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By GWILLIM.

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By MATTHEW BACON,
OF THE MIDDLE TEMPLE, ESQ.

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By HENRY GWILLIM,
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VOL. II.

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Corporations.

(A) Of the Nature and different Kinds of Corporations.

(B) By whom, and in what Manner created.

(C) Of the Names of Corporations.

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2. How far it may be varied from in Grants by or to a Corporation.
3. How far it may be varied from in Pleading and Judicial Proceedings.

(D) What Things are incident to a Corporation.

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(G) Of the Diſſolution of Corporations.

(A) Of the Nature and different Kinds of Corporations.

CORPORATIONS are of ſeveral natures, all of them inſtituted for the better government of a people combined together, and living under a regular ſyſtem of laws.

10 Co. 29. b. 31. b. 1 Roll. Abr. 512.

Of corporations ſome are ſole (*a*), and ſome are aggregate: a ſole corporation conſiſts of one perſon only, as the king (*b*): ſo, a clergyman by being made a biſhop (*c*), prebendary, parſon (*d*), or vicar, is ſaid to be a ſole corporation.

[(*a*) The uſe of the inſtitution of a ſole corporation is pointed out by Sir W. Blackſtone, in 1 Comm. 469, 470. But his ſucceſſor in the Vinerian chair thinks, "that it might have been better to have given ſole corporations ſome other name. For, except the incapacity of purchaſing in mortmain, very few points of corporation law are applicable to them. The power of making valid bye-laws, the right of electing new, and of removing old members, and the neceſſity of a common ſeal, as well as other matters, have little or no relation, except to corporations aggregate." 1 Wooddeſ. Syſt. 471, 2.] (*b*) Who is a corporation ſole by the common law, and has thereby ſeveral privileges and prerogatives diſtinct from a common perſon, for which *vide* tit. *Prerogative*. (*c*) Theſe are founded by the king, and are under eccleſiaſtical government; yet the common law takes notice of them, though not originally. (*d*) If he holds his poſſeſſions ſingly, he is a coporation ſole; but if with others he makes a chapter, he is thereby member of a corporation aggregate; ſo, the ſame perſon by being incumbent of the ſame preferment may be both a corporation ſole, and a member of a corporation aggregate. Comp. Incumb. 372.

4 Mod. 54. Carth. 217. Show. 280.

A corporation aggregate is an (*e*) artificial body of men, compoſed of divers conſtituent members *ad inſtar corporis humani*, the ligaments of which body politick or artificial body are the franchiſes and liberties thereof, which bind and unite all its members together; and in which the whole frame and eſſence of the corporation conſiſt.

(*e*) And is ſaid to be inviſible and immortal, and can only be created by act of parliament, or the king's charter; for though ſome corporations are ſaid to be by preſcription, yet ſuch preſcription always ſuppoſes an original grant from the crown, which being loſt, or worn out by time, yet having run out into a preſcription, ſtill continues to unite them. 45 E. 3. 2, 3. Co. Lit. 130. 2 Bulſ. 233. *Vide* in the argument of *quo warranto* againſt the city of *London*, 115. Kelw. 138.

Co. Lit. 250. a. 3 Inſt. 202.

Alſo corporations are ſaid to be eccleſiaſtical or lay; of eccleſiaſtical corporations ſome were called (*f*) *regular*, as abbots, priors, *&c.* others *ſecular*, as biſhops, deans, *&c.*

(*f*) Thoſe lived under certain rules, and had vowed true obedience, wilful poverty, and perpetual chaſtity; but are now diſſolved. Co. Lit. 93.

(*g*) Which by the civil law are called colleges or univerſities, yet are conſidered as lay corporations.

Of lay corporations ſome are ſaid to be for general government; as thoſe of mayor and commonalty, *&c.*; ſome for a particular purpoſe, as for the advancement of (*g*) learning, (*h*) charity, or ſome (*i*) particular trade or branch of buſineſs: theſe receive their ſanction from the crown, and muſt be by the king's licence; though a private perſon may be founder, and may give them laws to which they muſt ſquare themſelves in their future conduct.

Carth. 92. [The corporations of the univerſities of this country are lay corporations. 3 Burr. 1647. 1 Bl. Rep. 547.] (*h*) Such are hoſpitals. (*i*) As *Trinity-houſe* for regulating navigation, *South-Sea* Company, &c. *Vide* tit. *Mandamus*.

(B) By whom, and in what Manner created.

THE king, by virtue of his prerogative, is the (*a*) only perſon that can erect either an (*b*) eccleſiaſtical or (*c*) lay corporation. [1 Bl. Com. 472, 3.]

(*a*) The pope could not have founded or incorporated a college, &c. here; but it ought to have been done by the king himſelf. 4 Co. 107. b. (*b*) 5 Co. 26. a. Cawdry's caſe. (*c*) 49 E. 3. 4. 49 Aſſ. 9. Bro. Preſcription, 12. 10 Co. 33. b.

Yet the king may give power to a common perſon to name the corporation, and the perſons it is to conſiſt of; but when he hath ſo done, this corporation does not take its eſſence from the common perſon, but from the king. 10 Co. 33. b.

Alſo by the 39 *Eliz. cap.* 5. every perſon ſeiſed of an eſtate in fee-ſimple, may by deed enrolled in the high court of Chancery erect an hoſpital or houſe of correction, which ſhall be incorporated, and have perpetual ſucceſſion, and ſhall be viſited by ſuch perſons as ſhall be nominated by the (*d*) founders thereof, *&c.* *Vide* 2 Inſt. 720., this ſtatute expounded.

(*d*) By the common law, he that gives the firſt poſſeſſion to the corporation, is the founder. 38 Aſſ. 22. 50 Aſſ. 6. Bro. Corody, 12. 1 Co. 33. b. ——— But if the king and a common perſon give poſſeſſions to a corporation at one and the ſame time, the king only ſhall be the founder by his prerogative. 5 Aſſ. 6.

In the creating of a corporation, the law does not ſeem to require any ſet form of words to be made uſe of, as *incorporo*, *fundo*, *erigo*, *&c.* but any words (*e*) equivalent will be ſufficient. 10 Co. 30. Style, 198.

(*e*) As *conſtituimus* the men of ſuch a town a corporation, viz. mayor, &c. 2 Roll. Abr. 197.

The king may grant to the commonalty of *D.* that they ſhall be incorporate by the name of mayor, *&c.* and that they may chooſe a mayor, *&c.* and this is a good corporation, though the election of a mayor is *in* (*f*) *futuro*; for there is a diverſity between a power, liberty, franchiſe, or other thing newly created, which may take effect *in futuro*, and an eſtate or intereſt which none can take without a preſent capacity.

(*f*) By a ſpecial act of parliament it was enacted, that there may be built one meet-houſe, &c. that the ſame may be called, &c., and the lord, &c. may be governors, &c., and the ſaid governors, &c., ſhall for ever hereafter be incorporated, &c., it was reſolved, that no hoſpital was incorporated by this act, becauſe all the words are *de futuro*. 10 Co. 24. 5.

A patent procured by ſome few perſons only, ſhall not (*g*) bind the reſt; nor (*h*) can the inhabitants of a town be incorporated without the aſſent of the major part of them.

(*g*) Roll. Rep. 226. (*h*) 2 Brownl. 100.

As it is the king's charter that creates corporations, ſo ſuch charter (*i*) may mould and frame them as it ſhall think fit. 3 Mod. 13.

(*i*) Of ancient time, the inhabitants of a town were incorporated when the king granted to them to have *guildham mercatoriam*. Reg. 219. 10 Co. 30.

If the king grants lands to the men or inhabitants of *D.*, *hæredibus & ſucceſſoribus ſuis*, rendering (*k*) rent; (*l*) for any thing touching (*m*) theſe lands, (*n*) this is a corporation, but not to other purpoſes. 21 E. 4. 56. 7 E. 4. 3. 2 H. 7. 13.

(*k*) If the king grants *hominibus de Iſlington* to be diſcharged of toll, this is a good corporation to this intent, but not to purchaſe. 21 E. 4.

21 E. 4. 59.——Where the king, in giving lands to the inhabitants of a town, on a ſuppoſition that they were incorporated, ſhall be ſaid to be deceived in his grant, and the grant void. 1 Roll. Abr. 513. Co. Litt. 3. a. Lane, 21.——By the foreſt law, a grant of a privilege within a foreſt, to all the inhabitants, being freeholders within this foreſt, is good. 4 Inſt. 297. (*l*) By this they have capacity to take, but not to grant the lands to another. Cro. Eliz. 35. (*m*) Where a charter made to aliens may incorporate them *quoad* the king, and not *quoad* others. Roll. Rep. 148. 256. (*n*) But if the king releaſes the rent, the corporation is *ipſo facto diſſolved*. Dyer, 100. pl. 70.

10 Co. 31.
49 E. 3. 4.
49 Aſſ. 8.
Moor, 584.
Sid. 291.
2 Keb. 52. 63. 88.

One corporation may be made out of another; but it muſt be by the king's charter; therefore where the mayor and commonalty of *London* preſcribed to make another corporation in the city, though their cuſtoms are confirmed, yet it was holden not to be good, without the king's charter.

Salk. 192. pl. 5. [But the city of *London* may make a fraternity or fellowſhip, the members of which may aſſert their claim of privileges under the preſcriptive right of the mayor and commonalty to erect ſuch a company. Fazakerley v. Wiltſhire, 1 Str. 462.]

(C) Of the Names of Corporations: And herein,

1. Of the Name in its Creation.

5 E. 4. 201.
Leon. 307.
Dyer, 106.
11 Co. 21.
Perk. 8.
27 H. 6. 3.
Hob. 32.
Lit. 201.

THE names of corporations are given of neceſſity; for the name is, as it were, the very being of the conſtitution; for though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts; for it is no body to plead and be empleaded, to take and give, until it hath (*a*) gotten a name.

11 Co. 20. Owen, 35. Dalſ. 78. (*a*) 2 Bendl. 2. 10 Co. 28. 2 Inſt. 666., that the name of a corporation is as the name of baptiſm.

The names of corporations are uſually taken, firſt, from the perſons of which they conſiſt; ſecondly, from the uſe and deſign of their being; thirdly, from the names of the patrons that firſt procured their inſtitution; fourthly, from the place where they reſide; fifthly, from the names of ſaints.

Salk. 191. pl. 3. Per Holt, Ch. Juſt.

But though a corporation muſt have a name, yet that muſt be underſtood to be either expreſſed in the patent, or implied in the nature of the thing; as, if the king ſhould incorporate the inhabitants of *Dale* with power to chooſe a mayor annually; though no name be given, yet it is a good corporation, by the name of mayor and commonalty. So, the city of *Norwich* is incorporated to be a mayor and ſheriffs, by the charter of *Henry* the Fourth, and are called mayor, ſheriff and commonalty.

21 E. 4. 59. Fitz. Grant, 30. S. C. [See *ac.* Knight v. Mayor, &c. of Wells, 1 Ld. Raym. 80. 1 Lutw. 508. S. C.

Alſo, the king may incorporate a town by one name, and after by another name, and then they ſhall uſe their name according to their ſecond corporation; and (*b*) yet they ſhall continue their (*c*) poſſeſſions they had before by the other name.

—But with reſpect to the extinction of the old name by a new charter, Holt, C. J. took this diſtinction; where the new charter alters the conſtitution of the corporation, and new models it, there they ſhall loſe their old name; but if the conſtitution as to all its integral parts remains the ſame, though the new charter give them a new name, the old one remains. As, if a mayor be added, or a mayor and maſters be made mayor and aldermen, or an abbot and convent a dean and chapter; there they loſe their old name, becauſe new integral parts of the corporation are added.

added. But if the bailiffs and burgeſſes *villæ de Gippo*, accept a charter conſtituting them bailiffs and burgeſſes *villæ Gipwici*, and giving them farther privileges, this is a new name only, for the old corporation remains in its integral parts. Regina v. Bailiffs, &c. of Ipſwich, 2 Ld. Raym. 1237. 2 Salk. 433. S. C.] (*b*) So, a debt to the corporation remains, though their name is changed by a new charter. 3 Lev. 238. (*c*) And all other franchiſes and privileges. 4 Co. 87. b.

So, a corporation may be incorporated by one name, and power given them to ſue and purchaſe lands by another name. Jones, 261. College of Phyſicians and Butler. Lit. Rep. 168. 212. 350. Cro. Car. 256. S. C.

The college of phyſicians were incorporated by the name of the preſident, college or commonalty of the faculty of phyſick; and afterwards in the patent it was granted that the preſident of the college ſhould ſue and be ſued in behalf of the college. The college brought an action againſt Dr. *Salmon*, upon the ſtatute for practiſing without licence, under the ſeal of the college, and declared by the name of the preſident and college, or commonalty; and the court allowed to ſue by either; and ſo, were the precedents; for though it was a rare inſtance that the corporation ſhould be incorporated by one name, and have leave to ſue by another name; yet when it is ſo, it is proper. 5 Mod. 327. College of Phyſicians v. Dr. Salmon, 2 Salk. 451. S. C. pl. 2. Ld. Raym. 680. S. C.

2. How far the Name may be varied from, in Grants by or to a Corporation.

Although the names of corporations are not merely arbitrary ſounds, yet if there be enough ſaid to ſhew that there is ſuch an artificial being, and to diſtinguiſh it from all others, the body politick is well named, though the words and ſyllables are varied from; and this the rather in grants, which are to have a favourable conſtruction. 10 Co. 125. Gouldſ. 122.

So, if the name be expreſſed by words (*a*) ſynonimous, it is ſufficient; as if a college be inſtituted by the name of *guardianus & ſcholares domûs ſive collegii ſcholariuum de Merton*, and they make a leaſe by the name of *cuſtos & ſcholares*, it is good. 10 Co. 125. (*a*) So, if the grant be made by *præpoſitus & ſocii*, where it ſhould be *ſcholares*, it is good. 11 Co. 20. ——So, if *J. S.* abbot of *B.*, makes a leaſe, by the name of *J. S. clericus de B.* 11 Co. 21.

If there be a corporation founded by the name of *mayor and burgenſes burgi dom. regis de Lynn Regis*, and an obligation is made to them by the name of *mayor and burgenſes de Lynn Regis*, without ſaying *burgi dom. regis*, it is well enough; for the parties are ſufficiently expreſſed; and all boroughs are founded by the king. 10 Co. 125. The caſe of the Mayor and Burgeſſes of Lynn Regis.

If a houſe be founded by the name of *miniſter dei pauperis domus*, and a leaſe be made by the name of *miniſter pauperis domus dei*, this is well enough; for the ſame deſign is ſpecified by both names. Hob. 124.

But if a houſe be founded by the name of *guardianus & ſcholares domûs ſive collegii ſcholarium de Merton*; and a leaſe be made by them, by the name of *guardianus & ſcholaris domûs ſive collegii de Merton*, it is a material variance of the name, ſince they have not expreſſed the deſign of the houſe, which is a ſubſtantial part of the name. 10 Co. 125.

11 Co. 20. Arras's caſe.

But if a college be inſtituted by the name of *aula ſcholarium reginæ*, to be governed by a provoſt, and they are confirmed by the king, by the name of *præpoſitus & ſcholares aulæ reginæ*, and they make a grant of an advowſon by that name, this is good; for that college would never have a name according to the words of the firſt charter, for then it would be a ſole corporation, which is contrary to the general convenience of ſuch a body, for the name would be *præpoſitus ſcholarium aulæ reginæ*, which cannot be intended, and the word *ſcholares* is not required as in the former caſe; and the placing it where it is confirms the eſtabliſhment; and this confirmation of the king, and common appellation, are good interpreters of the original intent of the name.

Co. 124.

Edward the Fourth incorporated the dean and canons of *Windſor*, by the name of *The King's Free Chapel of St. George the Martyr*; and in the time of *Philip* and *Mary* they made a leaſe, by the name of *The Dean and Canons of the King's and Queen's Free Chapel*, &c. this was holden a material miſtake of the name; for it takes its name from the founder, that is here miſtaken, and the name of a different perſon ſubſtituted in his room.

Poph. 57. (*a*) A corporation muſt be named of ſuch a place as will diſtinguiſh its ſituation from others.

If a corporation be founded by the name of the dean and chapter of the cathedral church in *Oxford*, and they make a leaſe by the name of the dean and chapter of the cathedral church in the univerſity of *Oxford*, this is well enough; for the (*a*) place of the ſituation is well and ſufficiently ſhewn.

Vide 10 Co. 29. b. 32. b. 2 Brownl. 244. And. 196. Roll. Abr. 513.

10 Co. 124. (*b*) So, if a corporation be inſtituted in honour of *St. George the Martyr*, and in the leaſe they omit the word *martyr*, it is well enough; for the name of dedication is but an empty ſound, and no otherwiſe requiſite than to diſtinguiſh the corporation from all others. Poph. 59.

If the prior of *St. Michael of Coventry* makes a leaſe by the name of *The Dean of Coventry*, this is good; ſo (*b*) if the convent grant an annuity or corody, and the name of the ſaint be omitted.

Cro. Eliz. 816.

If there be an immaterial addition, this does not hurt; as if *the preſident and ſcholars of Corpus Chriſti college in Oxford* make a leaſe by the name of *preſident and ſcholars of Corpus Chriſti college in Oxon, com. Oxon*, this is good; for *utile per inutile non vitiatur*.

Maſter, &c. of Suſſex and Sidney College v. Davenport, 1 Wilſ. 184.

[If a bond be given to *A. B.* (maſter) and the fellows and ſcholars of Suſſex and Sidney college, to be paid, &c., to the maſter, fellows and ſcholars; this is a bond to the maſter, &c., in their corporate capacity, and not to the maſter, whoſe name is mentioned in the beginning of the bond, in his natural capacity.]

Leon. 307. Dyer, 106. 11 Co. 21. Perk. 8. Owen, 35. Daliſ. 78.

In deviſes, if the name of the corporation be miſtaken, yet if there be words ſufficient to ſhew that the teſtator could only mean and intend ſuch an one, it will be ſufficient; as a deviſe to *George Biſhop of Norwich*, when his name is *John*, &c.

Hob. 33. 19 H. 8. 8.

But if a deviſe be to the abbot of *St. Peter*, where it is really the abbot of *St. Paul*, the deviſe is void; for here the ſaint's name is the only ſpecification of the party in the deviſe, which is miſtaken.

3. How far it may be varied from in Pleading and Judicial Proceedings.

There is a difference between writs, declarations, *&c.*, and obligations and leaſes, *&c.*, for if the name of a corporation be miſtaken in a writ, a new writ may be purchaſed of common right; but if it were fatal if miſtaken in obligations and leaſes, the benefit of them would be wholly loſt; and therefore one ought to be ſupported, though not the other; as (*a*) where *John Abbot of N.* granted common of paſture to *J. S.* by the name of *William Abbot of N.* this was holden good; but if this name had been thus miſtaken in a writ, it had been fatal. 6 Co. 65.

(*a*) A corporation was inſtituted by the name of *præfecti & guardianorum naupegor. de Rederiffe*, and an action brought by the name of *præfati guardiani & ſocii*, and held ill. 2 Bulſt. 233. Tipling and Pexal, and 11 Co. 21. —In pleading a leaſe by a dean and chapter, the name of the dean muſt be ſhewn. Co. Lit. 3. a. [But ſee 1 Leon. 307. Dy. 86. a. in marg. and *infra*.]

There is alſo a difference between an ancient corporation and a corporation newly erected; for an ancient corporation, by uſe, may have a ſpecial name differing in ſubſtance, but otherwiſe of a corporation created within memory; for this regularly can only have the name by which it is inſtituted. Hob. 211. Noy, 54. 2 Brownl. 292. Latch. 229. 11 Co. 94. Dyer, 279. 3 Mod. 6. Cro. El. 351.

If the advowſon of popiſh recuſants convict be given to the chancellor and ſcholars of the univerſity of *Oxford*, and they bring their action by the name of the chancellor, maſters and ſcholars of the univerſity of Oxford, this is well brought; for a corporation by act of parliament may take by another name than that by which it was inſtituted; for in acts of parliament, the ſubject and deſign of the legiſlature muſt be reſpected; and thoſe that have the power wholly to change the name, have certainly power to alter it in any act of theirs; and all inferior juriſdictions are bound to ſupport the ſenſe of the law. 10 Co. 87. Chancellor of Oxford's caſe.

A parſon muſt be empleaded by chriſtian and ſurname, and not *John*, parſon of *D. &c.* but in other ſole corporations, the chriſtian name only is ſufficient; as *John*, Biſhop of *Canterbury*; *Thomas*, Abbot of *D.*, *&c.* 2 Inſt. 666. Yelv. 34. 49.

But where the corporation is aggregate of many capable perſons, as mayor and commonalty, dean and chapter, *&c.* none of them in pleading are named by their proper chriſtian and ſurnames; and the reaſon is, becauſe, in the firſt place, the death of the individual is a good plea in abatement, for a new ſucceſſor comes in his place, that was not party to the former writ; but bodies aggregate are immortal and invariable; and therefore the parties to the firſt writ are always the ſame. 2 Inſt. 666. Skin. 2. pl. 2.

If a writ is brought by the (*b*) warden and college of *All Souls*, for lands, *&c.*, *quod clamant eſſe jus & hæreditatem ſuam*, this is well enough, though it is not ſaid *jure collegii*; for they have no other capacity. Cro. Eliz. 232. Leon. 153. And. 272. S. C.

(*b*) If a parſon pleads he was ſeiſed, he muſt ſay *jure eccleſiæ*, for that he hath two capacities; *ſecùs* of an abbot, dean, and chapter, &c. Leon. 153. *per* Anderſon.—So, in caſe of a biſhop, it muſt be ſhewn *quo jure*. 2 Lev. 68. Vent. 223.—Where it cannot be alleged that a man was ſeiſed *jure preſbyteratus*, but

but ought to be *jure cantariæ*, *vide* Cro. Car. 215.——If a dean and chapter, being parſons *impariſonee* of the church of *D.*, demand the whole church, &c., they ſhall ſay they were ſeiſed *jure eccleſiæ &c* D. Plow. 503.

Cro. Car. 574. Healing and the Mayor of London.

Where the corporation were named by their name, which was afterwards miſtaken; as where judgment was given in an action of debt, that the mayor or commonalty and citizens ſhould recover the debt and 6*l.* coſts *eiſdem major. communitati* adjudged (omitting *civibus*); it was holden to be error: but afterwards upon motion in *C. B.* and upon examination of the doggett-roll (where it was well entered) it was awarded to be amended.

Turvill v. Aynſworth, 2 Str. 787. 2 Ld. Raym. 1515. Rex v. Croke, Cowp. 26.

[However, in legal proceedings, any variation from the true name of a corporation is fatal, even though the corporation be not a party to the proceedings. As where in an action on a South-ſea contract, the plaintiff declared it was for ſtock in the company trading *ad maria Auſtrialia, Anglicè vocat.* the South-ſea company. Again, an act of parliament gave power to the juſtices of the county of Surry, at their quarter ſeſſions, on the application of "the mayor, aldermen, and commons of the city of London "in common council aſſembled," to iſſue a precept to the ſheriff to ſummon a jury to inquire into the value of certain eſtates: an order was made by the juſtices at their quarter ſeſſions, ſtating, that on the application of "the mayor, and commonalty, and "citizens," they iſſued a precept, *&c.*: this order being removed by *certiorari* into the King's Bench, it was objected, that it ſtated the application to have been made by *the mayor, commonalty, and citizens*, inſtead of the *mayor, aldermen, and commons*, according to the directions of the act. The court allowed the objection, for that the bodies deſcribed in theſe different terms were diſtinct, the one being a ſelect body, the other the corporation at large, and that they could not go into the examination of any fact tending to reconcile ſuch diſtinction, or to ſhew that in truth the former were the proper perſons.]

(D) What Things are incident to a Corporation.

3 Mod. 13. Roll. Abr. 513. (*a*) That when a corporation is duly created, all other incidents are tacitly annexed. 10 Co. 30. b., that it is incident to ſue and be ſued, to purchaſe and ſell; but *vide* tit. *Mortmain*, and 10 Co. 30. Roll. Abr. 515. Hob. 211.

A Corporation is a creature of the charter that conſtitutes and gives it being, and preſcribes bounds and limits to its operations, beyond which it cannot regularly proceed: yet there are ſome things (*a*) incident to a corporation, which it may do without any expreſs proviſion in the act of incorporating.

10 Co. 31. Hob. 211. Moor, 584. 5 Mod. 439. (*b*) That every by-law, by which the benefit of the corporation is advanced, is a good by-law, for that very reaſon, that being the true touch-ſtone of all by-laws. Carth. 482. *per* Holt, *vide* tit. *By-Laws*.

As if the king creates a corporation, and does not give any expreſs power in the letters patent to make laws, yet this power is incident to the corporation, and included in their incorporation; for a body politick cannot be governed without laws; but theſe by-laws (*b*) ought always to be ſubject to the laws of the realm, as ſubordinate thereto.

Ancient

Ancient corporations have, as incident to them, a power of (*a*) electing members; but in newly erected corporations, the charter that gives them being, muſt provide for their continuance and ſucceſſion.

12 Co. 120. 3 Mod. 14.

(*a*) If the king creates a corporation of a mayor and eight aldermen, with a clauſe in the patent, *quod ſuper mortem vel remotionem alicujus aldermanni liceat majori & cæteris aldermannis infra octo dies proximo poſt mortem vel remotionem*, &c. to elect another alderman into his place, though no election be within eight days after the death of an alderman, yet they may elect an alderman at any time after. Roll. Abr. 513, 514.

[So, corporations have as incident to them a common ſeal. For a corporation, being an inviſible body, cannot manifeſt its intention by any perſonal act or oral diſcourſe: it therefore acts and ſpeaks only by its common ſeal. For though the particular members may expreſs their private conſents to any act by words, or ſigning their names, yet this does not bind the corporation; it is the fixing of the ſeal, and that only, (*b*) which unites the ſeveral aſſents of the individuals, who compoſe the community, and makes one joint aſſent of the whole.]

1 Bl. Com. 475. Dav. 44. 48.

(*b*) The agreement of the major part of a corporation being entered in the corporation-books, though not under the corporate ſeal, will be decreed in equity. Maxwell v. Dulwich College, 24th July 1783, cited in Fonbl. Eq. Tr. 296. But ſee *contr.* Taylor v. Dulwich College, 1 P. Wms. 655.

If a corporation be created of a mayor and eight aldermen, with a clauſe in the patent, that if any of the aldermen die, or be removed, that it ſhall be lawful for the mayor, and the reſt of the aldermen, within eight days after the death or removal, to elect another in his place, though it is not limited that they, or the greater number of them, may elect, yet the greater number may elect.

Roll. Abr. 515. Godb. 439. & *vide* the ſtatute 33 H. 8. c. 27.

And if in the above caſe the mayor, at the time of the death of an alderman, be abſent from *London* till after the eight days, and the aldermen, within eight days, come to the deputy, and require him to make an aſſembly of them to elect another within the eight days, and he refuſe, and thereupon the greater part of the aldermen aſſemble themſelves without the mayor or his deputy, and elect an alderman; this is a void election, for the mayor (*c*) ought to be preſent at it, by the words of the grant.

Roll. Abr. 515.

(*c*) But for this *vide* 3 Mod. 15., and how it is now remedied where the mayor, or other officer, who ought to preſide, wilfully or accidentally abſents himſelf, by the 11 Geo. 1. c. 4. *Vide Mandamus*, D.

Alſo where a charter impowers a corporation to chooſe officers, it impliedly obliges the perſons choſen to undergo and to ſtand to the nomination; for by accepting any letters patent, there is an obligation on the parties accepting to perform all things thereby required, as to undergo all charges, offices, &c.

5 Mod. 440.

Corporations have alſo divers franchiſes, &c., as felons goods, waifs, eſtrays, treaſure-trove, deodands, courts and cogniſance of pleas, return of writs, fairs, markets, exemptions from ſerving in offices or on a jury, exemptions from payment of toll, the aſſiſe of bread and beer, a pillory and tumbrel, the office of a juſtice of peace, coroner, clerk of the market, &c. but theſe muſt be mentioned in the charter, and granted by expreſs words.

14 H. 8. 5. 19 H. 6. 52. 39 E. 3. 35. Lev. 159. Keb. 840. Raym. 113.

5 Mod. 440. 6 Mod. 52. (a) But a corporation of a town cannot prescribe for the freeholders of the town. 2 Keb. 25.

And if there be letters patent, which grant to the body politick an exemption from tolls or privileges of fairs, (a) commons, &c. all the particular members shall take advantage of these grants.

(E) How Corporations differ from natural Persons: And herein,

1. Of Grants made by and to them.

[Here it may be observed, that corporations, in the character of *owners* or *occupiers* of houses or lands, are subject to the same burthens, to which individuals are subject in the same character. They are *inhabitants* within the purview of the statute of 22 H. 8. c. 5. for the repair of bridges. 2 Inst. 703. They are liable to be rated to the poor within the 43 El. c. 2. in respect of lands whereof they are seised in fee for their own profit. Rex v. Gardner, Cowp. 79. They are rateable to the repairs of a church in respect of their corporate lands. Thursfield v. Jones, Sir T. Jones, 187. So, they may be bound exclusively to the repair of a highway, or of a bridge, or creek, by reason of the tenure of certain lands: so, they may be compelled to do so by force of a general prescription, that they ought and have been used to do so from time immemorial, without an allegation that they used to do so, in respect of the tenure of certain lands, or for any other consideration; because a corporation aggregate, in judgment of law, never die, and therefore if they were ever bound to such a duty, they must continue to be always so; neither is it any plea that they have always done it out of charity; for what they have always done, they shall be presumed to have been always bound to do. 2 Inst. 700. 1 Hawk. P. C. c. 76. § 8. Mayor of Lynn v. Turner, Cowp. 87.] 45 E. 3. 2. 3. (b) Such corporations are not capable of a protection *protectur.* or *moratur.*, because the corporation itself is invisible, and resteth only in consideration of law. Co. Lit. 130. 2 Bulst. 233.——It hath not been known that a corporation hath been bound in a recognisance or statute-merchant. Moor, 68. pl. 182.——They cannot do homage or fealty, because these must be done in person. Co. Lit. 66. b. 4 Co. 11. a. 10 Co. 32. b. (c) But they cannot retain, without a due licence in *mortmain*. Co. Lit. 99. *vide* tit. *Mortmain*.

Ja 30. 6. 10. C. in case of Sutton's hospital.

The title is ~~Charity & Mortmain~~ Charitable Uses & Mortmain.

21 E. 4. 12. Moor, 51. [So, *e converso*, a bond or contract entered into by the body in the absence of the head, will not bind; and upon this principle, if a bond be extorted from a mayor and commonalty by the imprisonment of the mayor, the corporation may plead that imprisonment in avoidance of the bond, for during the imprisonment, the corporation may be considered as without a head. 21 E. 4. 12. Cowp. 224. 226.]

But a dean without the chapter, a mayor without his commonalty, the master of a college or hospital without his fellows, cannot purchase or grant, or make any contract that will bind the corporation.

Vide tit. *Remainder and Reversion.*

If a remainder be limited to such a corporation as the king shall next erect, this is no good remainder, though a corporation be erected before the particular estate determine; for though a remainder limited to the eldest son of J. S. in such a manner be good, yet this body of men is only capable of taking when they are *in esse*.

Co. Lit. 9. (d) So, if lands are given to the king by deed enrolled, without the word *successors* or *heirs*, a fee-simple passeth, Co. Lit. 9.

If a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many persons capable to purchase, they have a fee-simple without the word *successors*, (d) because in judgment of law they never die.

If

If a leaſe be made to a corporation aggregate for the life of the leſſor, this is a good eſtate for life, becauſe the life of the leſſor, which is wearing and will determine, is the meaſure of its continuance; but if a leaſe be made to a corporation aggregate for their own lives, this is no eſtate for life, but a fee-ſimple; for the leaſe being made to them as a body politick, which hath a continued ſucceſſion, and never dies, a leaſe made to them during their lives, is equal to a grant made to them while they continue a body politick, which, by reaſon of the perpetual ſucceſſion of its members, is in law looked upon to be for ever. 21 E. 4. 76. Roll. Abr. 843.

A corporation cannot be ſeiſed to the (*a*) uſe of another; and therefore it is ſaid, that if one by licence, without a valuable conſideration, make a feoffment, levy a fine, or ſuffer a recovery, or the like, to a corporation, to the uſe of *J. S.*, the corporation ſhall have it to their own uſe. Co. 122. 126. [(*a*) Gilb. Uſes and Truſts, 5. 170. Jenk. 195.

Pl. Com. 102. 538. (*b*) That is, by the ſtrict rules of the common law; for corporations are in point of fact frequently made truſtees for charitable uſes, and are compelled in equity to perform the truſts. But the doctrine in the text ſtill holds with reſpect to the king. Gilb. *ubi ſupra.*]

If *A.* grants to the mayor and burgeſſes of *D.*, the moiety of a yard-land, in the waſte of ———, without deſcribing in what part it ſhould be, or how it is bounded, the corporation cannot make their election by attorney; but are firſt to reſolve on having the land, and then they make a ſpecial warrant of attorney, reciting the grant to them, and in which part of the ſaid waſte their grant ſhould take effect; and according to ſuch direction the attorney is to enter. Leon. 30.

2. How they are to ſue and be ſued.

Corporations aggregate muſt ſue and defend by (*c*) attorney; and therefore the (*d*) proper proceſs againſt them is a *diſtringas*. Co. Lit. 66. (*c*) They cannot be

eſſoined. Dalſ. 121. pl. 154. Ld. Raym. 79. Argent v. Dean and Chapter of St. Paul's, B. R. E. 23 G. 3. cited in 2 Term Rep. 16.—cannot be outlawed. 10 Co. 32. b.—No attachment lies againſt a corporation. Raym. 152.——[1 H. Bl. 209. If they have neither lands nor goods, there is no way to make them appear, either in a court of law or equity; for it is a rule, that for a publick concern, the ſheriff cannot diſtrain any individual member of a corporation. Thursfield v. Jones, Skin. 27. 1 Ventr. 351. Style, 367. *contr.* all cited Cowp. 85. But in an extraordinary caſe, where they have no property, and will not appear, and where, conſequently, a court of equity can give no relief, the plaintiff may apply to the Houſe of Lords, who will make a ſpecifick order for relief. 1 Ch. Ca. 204. 2 Vern. 396. S. C. cited.] (*d*) Where on ſuch proceſs the court will order the ſheriff to return good iſſues. Salk. 191. pl. 2.

After ſervice of a writ of execution of a decree againſt a corporation, the next proceſs is a *diſtringas*, and after that a *ſequeſtration*, which being once awarded, they can never after come and pray to enter their appearance, as they might have done on the *diſtringas*, which iſſues for that very purpoſe to compel them to appear; but the appearing being paſt, the proceſs muſt go, becauſe the appearance being only in favour of liberty, can be of no ſervice to a corporation, which cannot be committed. 2 Vern. 396. Preced. Chan. 128.

A corporation aggregate cannot diſtrain in their own perſons, but by their bailiff, and therefore no (*e*) replevin lies againſt them by the name of their corporations. Brownl. 175. (*e*) Cannot be declared againſt, as

in cuſtodia mareſchalli. 6 Mod. 183. [Cannot ſue as a common informer. 2 Stra. 1241. marg.

The

The ſummons to appear muſt be ſerved on the mayor, or other chief officer, and that is ſufficient. Pr. Ch. 131. 1 Ch. Ca. 206.]

10 Co. 32. a. Skin. 27.

[It is holden that a corporation aggregate cannot be ſummoned into the eccleſiaſtical courts: they may, however, be made ameſnable to thoſe courts: for in the court Chriſtian they are cited by their proper names, though in their *politick* capacity; and if they ſtand out, they muſt lie by the heels in their *natural* capacity.

22 Aſſ. p. 67. Bro. Corpor. p. 43.

A corporation which has a head cannot ſue or be ſued without it, becauſe without it the corporation is incomplete.

(*a*) Plowd. 102, 3. Dy. 102. 2 Lev. 68.

A ſole corporation, having two capacities, a natural and a corporate, muſt always ſhew in what right he ſues (*a*): but an aggregate corporation having only a corporate capacity, a ſuit in their corporate name can be only in that capacity; and therefore, it is not neceſſary that a mayor and commonalty ſhould allege ſeiſin in right of the corporation (*b*), or a warden and ſcholars, ſeiſin in right of their college (*c*).

(*b*) 1 Leon. 353. (*c*) Cro. El. 232. 1 Anderſ. 272.

Hob. 211. 2 Ld. Raym. 1535.

In an action of whatſoever kind, brought by a corporation, it is unneceſſary to ſhew how they were incorporated; but on the general iſſue pleaded by the defendant, it is ſaid, they muſt prove that they are a corporation.

Dutch Weſt India Company v. Henriques Van Moyſes. 2 Ld. Raym. 1535. 1 Str. 612.

An action may be ſupported in this country by a foreign corporation, in their corporate name and capacity; and in pleading it is not neceſſary they ſhould ſet forth the proper names of the perſons who compoſe the corporation, or ſhew how they were incorporated; though on the general iſſue being pleaded, they muſt prove that by the law of the foreign country they were effectually created a corporation.

Pitts v. Gainee, 1 Ld. Raym. 558. 3 Salk. 10.

But in juſtifying a treſpaſs committed in the aſſertion of a franchiſe or privilege of a corporation, it is frequently neceſſary to ſhew not only the exiſtence of a corporation, but the manner in which it claims to be ſo, whether by charter, preſcription, or act of parliament.

In equity, corporations aggregate anſwer under their common ſeal, and not upon oath: as therefore it is not very likely that they will diſcover any thing to their prejudice, it is uſual for plaintiffs to make the clerk or treaſurer, or ſome of the principal members in their natural capacity, co-defendants with the corporation. This practice appears to have commenced in the time of *Charles* the Second, and was afterwards expreſsly recogniſed by Lord *Talbot*.

Anon. 1 Vern. 117. Wych v. Meal, 3 P. Wms. 310.

Moodamay v. Morton, 1 Br. Ch. Rep. 471.

When a perſon has reaſon to ſuſpect that he has ſuſtained an injury by perſons acting under the authority of a corporation, but cannot aſcertain how far they are concerned, he may file a bill againſt them and their ſecretary, or other officer, for a diſcovery, before he brings an action at law, ſuggeſting that he intends to bring one, but cannot do it, without the diſcovery prayed; becauſe as the ſuit againſt a corporation is by original, the diſcovery may be neceſſary before he can ſue out his writ. But if the diſcovery of any of the matters called for would be prejudicial to the corporation,

ration, and not be neceſſary to the plaintiff's caſe, the officer needs not diſcover thoſe parts.

If the majority of the members of a corporation are ready to put in their anſwer, and the head who has the cuſtody of the common ſeal, refuſes to affix it, a court of equity will ſtay the proceſs againſt the corporation, 'till an application can be made to the court of King's Bench for a mandamus to compel him, which that court will grant.] R. v. Dr. Wyndham, Cowp. 377.

3. What they may do without Deed.

Aggregate corporations, conſiſting of a conſtant ſucceſſion of various perſons, can regularly do no act without writing; therefore gifts (*a*) by and (*b*) to them, (*c*) muſt be by deed. Co. Lit. 94. b. 6 Co. 38. b. Cro. Car. 170. 2 Sand. 305. Raym. 194. (*a*) They cannot attorn without deed. 6 Co. 38. b. (*b*) A gift to a dean and chapter, or other corporation aggregate, muſt be by deed. Co. Lit. 94. b.——But an abbot, biſhop, parſon, &c., or other ſole body politick, might have been infeoffed without deed. Co. Lit. 94. b.—(*c*) Where if pleaded, the thing is done, it muſt be intended by deed. Cro. Jac. 411. 2 Saund. 305.

A corporation aggregate cannot, without deed, command their bailiff to enter into certain lands of their leſſee for years, for a condition broken. Roll. Abr. 514. Cro. Eliz. 815. 2 Roll. Abr. 699. S. C. Cro. Jac. 411. Cro. Car. 269.

[Neither can they, without deed, appoint one to ſeiſe goods as forfeited to the uſe of the corporation. Horne v. Joy, 1 Ventr. 47. 1 Mod. 18. 2 Keb. 567. cited 3 P. Wms. 424.

Nor can they, without deed, preſent a clerk to a living.] 13 H. 8. 12. Bro. Corp. 83.

But a corporation may employ one in ordinary ſervices without deed, as a butler, cook, &c. but not to appear for them in an aſſiſe, or any other act which concerns their intereſt or title. Vent. 47. Mod. 18.

So, a man may avow the taking cattle damage-feaſant, as bailiff to a corporation, without having any precept in writing. 3 Lev. 107.

Alſo, a corporation aggregate may appoint a bailiff to diſtrain without deed or warrant, as well as a cook or butler; for it neither veſts nor deveſts any ſort of intereſt in or out of the corporation. Salk. 191, pl. 3.

So if the ſheriff makes a warrant to a corporation that hath return of writs to arreſt a man, they may by parol make a bailiff to execute it. Moor, 552.

[The bank of *England*, or any ſimilar corporation, may without deed, empower their ſervant to make promiſſory notes, or bills of exchange, in their name: and this is the uſual practice with the bank.] Rex v. Bigg, 3 P. Wms. 419.

If a leaſe for years be made to a corporation aggregate of many, they cannot make an (*d*) actual ſurrender thereof, but by deed under their ſeal. 10 Co. 68. (*d*) But if they accept a new leaſe thereof, this is a ſurrender in law of their firſt leaſe. 10 Co. 68. b.

If the churchwardens of *S.* are incorporated, &c., and the king leaſes, &c., to them for twenty-one years, and, in conſideration of a ſurrender thereof, leaſes to them for fifty years, they may with their 10 Co. 68.

their own hands, and without writing, (*a*) deliver the firſt letters patent into Chancery to be cancelled.

(*a*) A dean and chapter in their chapterhouſe acknowledged a deed of grant of their lands to the king, without making an attorney. Moor, 676. held clearly by Egerton, Lord Keeper, that it might be done, as well as to put their common ſeal to a deed without attorney; but *vide* Leon. 184. Roll. Rep. 82.

Carth. 390. Patrick v. Balls.

In *ejectment*, the plaintiff declared upon a demiſe made to him by the aldermen and burgeſſes of ———, without ſetting forth that it was by deed, or under the ſeal of the corporation, and on a writ of *error*, it was holden well enough; and that this being a fictitious action to try the title, the demiſe need not now be ſet out to have been by deed.

Salk. 192. pl. 4. & *vide* Skin. 154. pl. 2. Seal of a corporation, put to a deed by a perſon who is not mayor, does not make it the deed of the corporation. 12 Mod. 423.

If a *mandamus* be directed to the mayor and commonalty of *T.*, the return may be made in the name of the corporation, without the common ſeal, or the hand of the mayor ſet to it; for though a corporation cannot do an act *in pais* without their common ſeal, yet they may do an act upon record, by which they are eſtopped to ſay it is not their act.

4. What Things they may take in Succeſſion.

Co. Lit. 46. b. Roll. Abr. 515.

A corporation aggregate may take any chattel, as bonds, leaſes, &c. in its political capacity, which ſhall go in ſucceſſion, becauſe it is always in being.

Co. Lit. 46. b. Hob. 64.

But (*b*) regularly, no chattel ſhall go in ſucceſſion, in caſe of a ſole corporation.

Dyer, 48. Co. Lit. 9. a. (*b*) But a ſole corporation by cuſtom may be enabled by the ſame cuſtom to take a chattel in ſucceſſion, as the chamberlain of *London*, whoſe ſucceſſor by cuſtom may have execution of a bond or recognizance acknowledged to his predeceſſor for orphanage money. 4 Co. 65. Cro. Eliz. 464. 682.

Co. Lit. 46. b. (*c*) The ornaments of the chapel of the predeceſſor belong to the ſucceeding biſhop, and are merely in ſucceſſion, though other chattels, in caſe of a ſole corporation, belong to the executors of the deceaſed, and go not in ſucceſſion. 12 Co. 105.———So, the ancient jewels of the crown ſhall go to the ſucceſſor, and are not deviſable by teſtament. Co. Lit. 18. b. But they may be diſpoſed of by patent, *per* Berkley and Jones. Cro. Car. 344.

Therefore if (*c*) a leaſe for years be made to a biſhop and his ſucceſſors, and the biſhop die, this ſhall not go to his ſucceſſors, but to his executors.

(*d*) 19 H. 6. 44. Roll. Abr. 515. where the ſucceſſor of an abbot ſhall recover damages in a writ of entry, though it is otherwiſe in caſe of a biſhop, and other ſole ſecular bodies politick. 2 Inſt. 286.

If a (*d*) maſter of an houſe, that hath a covent and common ſeal, recovers in an annuity, and after arrearages incur, and after he dies, the ſucceeding maſter ſhall have the arrearages, and not the executor of the predeceſſor, becauſe the executor could not make a teſtament.

19 H. 6. 44. Roll. Abr. 515.

But if a parſon recovers an annuity, and after arrearages incur, and after the parſon dies, the executor of the parſon ſhall have the arrearages, and not the ſucceſſor, becauſe he could make a teſtament.

Roll. Abr. 515. Atkins and

By the charter granted to the college of phyſicians, and confirmed in parliament, the offenders in practiſing phyſick in *London*, without

without admiſſion by the college of phyſicians, ſhall forfeit 5*l.* for every month, *unum dimidium regi & alterum dimidium dicto preſidenti & collegio:* on this charter it was holden, that if the preſident of the college recovers in debt againſt an offender, and dies, the ſucceſſor ſhall have a *ſcire facias* to execute it, and not the executor; for the predeceſſor recovered it as due to him and the college. Gardner, Cro. Jac. 159. Noy, 121. Brownl. 93. S. C.

5. Where they ſhall be liable in their natural Capacities.

If a corporation aggregate diſſeiſe to the uſe of another, they are diſſeiſors in their natural capacity, and the perſons who committed the wrong ſhall be charged therewith, and not the corporation, which conſiſting of a conſtant ſucceſſion of various perſons, and as a corporation, can regularly do no act without writing. *Vide* tit. *Diſſeiſin.*

If a mayor, or any other member of a corporation, procure a falſe return to be made to a *mandamus*, they may be proceeded againſt in their private capacities. Salk. 192. pl. 4.

If the maſter and wardens of the company of woodmongers enter into bond thus, *viz. noverint, &c. magiſtrum & guardianos, &c., teneri, &c.*, and the common ſeal is put thereto, and it is ſigned as uſual, by the principal of the company, and indorſed *Sigillat. & deliberat. in præſentiâ, &c.* and the corporation is diſſolved after, yet they ſhall not be (*a*) charged in their natural capacity. Lev. 237. —Where a corporation granted an annuity, and was afterwards diſſolved.

Vide Owen, 73. 2 And. 107. (*a*) Where in equity, the private members of a company were made liable to the company's debts, where the company had no goods. 2 Vern. 396.

[6. Of the Qualifications requiſite for Members or Officers of Corporations.

A quaker, who has ſerved an apprenticeſhip of ſeven years, is entitled to be admitted to the freedom of a corporation as well as any other perſon, and his ſolemn affirmation, by virtue of 7 & 8 *W.* 3. *c.* 34. is equivalent to taking the uſual oaths; for that clauſe of the ſtatute which provides that no quaker, by virtue of that act, ſhall have any office or place of profit in the government, does not extend to the freedom of a corporation. Rex v. Morris, Carth. 448. 1 Ld. Raym. 337. 5 Mod. 402.

Though it be true that where an infant is *actually* mayor, or other chief officer of the corporation, this ſhall not avoid the acts of the corporation with reſpect to ſtrangers; becauſe theſe acts are not the acts of the particular perſons, but of the body corporate; yet it ſeems that where neither the proviſions of the charter, nor the uſage of the corporation, *expreſsly* authoriſe the election of an infant into a corporate office, he is not capable of being elected. 5 Co. 27. Rex v. Carter, Cowp. 220. Rex v. White, Ca. temp. Hardw. 8.

Reſidence within a corporate town is not neceſſarily a previous qualification for the freedom of the corporation, and the freedom, when once obtained, is not forfeited by non-reſidence: but by the conſtitution of the corporation, whether by preſcription, or the *expreſs* words of the charter, reſidence *may* be requiſite as a previous qualification (*b*): and, where that is the caſe, the court of King's Bench will grant leave to file an information, in the nature of *quo warranto*, (*b*) 1 Barnardiſt. 138. 1 Salk. 374.

1 Ld. Raym. 426. Carth. 503. *warranto*, againſt the governing part of the corporation, for admitting perſons non-reſident.

Where a man is already a member of a corporation, reſidence is not a precedent qualification to his being choſen to a corporate office, unleſs expreſsly required by the conſtitution of the borough; but though reſidence be not required at the time of the election, an abſent perſon muſt not be choſen colluſively for any ſiniſter purpoſe, and if he be, the election will be abſolutely void. The corporation of *Cambridge*, on the charter-day for the election of a mayor, elected a perſon who was an officer in the army juſt gone to *North America*, and without the leaſt probability of his returning till long after the year would be expired: the electors were ſufficiently appriſed of the fact, at the time of the election, and ſoon afterwards had expreſs notice given them of it, but refuſed to proceed to a new election; and it appeared they had elected this abſentee for the purpoſe that the preceding mayor might hold over, which it was pretended he might do by ancient uſage, and by virtue of a charter of *Charles* the Second. The court of King's Bench held that this was merely a colour to avoid any election at all: that the electors had choſen this perſon becauſe they knew it was impoſſible for him to execute the office, and that the election was abſolutely void.

Cowp. 539.

Rex v. Mayor, &c. of Cambridge, 4 Burr. 2008.

Rex v. Heath, 1 Barnardiſt. 416. By the proviſions of a charter, reſidence may be required as a previous qualification for ſome offices and not for others.

See further on this head, tit. "*Offices and Officers*" (E) (K).

7. Of the Concurrence required in corporate Acts.

1 Kyd on Corp. 402. (*a*) 10 Mod. 75. 12 Mod. 232. (*b*) Cowp. 249. Where no ſpecial proviſion is made by the conſtitution of a corporation, the whole are bound by the acts, not only of the major part (*a*), but of the major part of thoſe who are preſent at a regular corporate meeting, whether the number preſent be a majority of the whole body or not (*b*). So, though a particular conſtitution require the *preſence* of a majority of the *whole* number, yet the *concurrence* and *conſent* of a majority of the whole is not neceſſary; it is ſufficient that a majority of the number *preſent* concur (*c*). So, where a number leſs than the majority of the whole, are by a particular conſtitution competent to do a corporate act, the act of a majority of that ſmaller number is equivalent to the act of the majority of the whole: thus, by the conſtitution of the city of *London*, forty are ſufficient to form a court of common council, though the number of common councilmen greatly exceeds the double of that number, and a *majority* of the forty, if no more be preſent, bind the whole corporation. So, where it appeared that king *Edward* the Sixth, by charter, incorporated twelve perſons by name, to elect a chaplain for the church of *Kirton*, in *Lincolnſhire*; and by a diſtinct clauſe, *three* of the twelve were to chooſe a chaplain to officiate in the church of *Sandford*, within the pariſh of *Kirton*, with the conſent and approbation of the major part of the inhabitants

(*c*) 2 Burr. 1019.

Attorney-General v. Day, 2 Atk. 212.

inhabitants of *Sandford*; on a vacancy, two of the three chose a chaplain, with the consent of the major part of the inhabitants of *Sandford*; the third dissented: the question, whether this was a valid election, coming before Lord Chancellor *Hardwicke*, he is reported to have expressed himself thus:—"It cannot be disputed, that wherever a certain number are incorporated, a major part of them may do any corporate act; so, if all be summoned, and *part* appear, a major part of those that *appear* may do a corporate act, though nothing be mentioned in the charter of the major part. This is the common construction of charters, and I am of opinion, that the three are a corporation for the purpose for which they are appointed, and that the major part of them may do any corporate act: this was a corporate act, and the choice too was confined, and consequently, it was not necessary that all the three should join."

Where a charter requires an act to be done by the *major* part of a *definite* body, no corporate assembly can be composed of less than a majority of such definite body, when complete; and consequently, when the number is reduced *below* that majority, the power of acting is at an end. But in such case, if the number be indefinite, the words *major part* have no operation, and any number of the body, duly assembled, however small, is sufficient to form a corporate assembly. Rex v. Newsham, Say. Rep. 211. Rex v. Grimes, 5 Burr. 2598. Rex v. Varlo, Cowp. 248. Rex v. Monday, *id.* 530. Rex v. Bellringer, 4 Term Rep. 810. Rex v. Miller, 6 Term Rep. 268.

With respect to the head of the corporation, there was this difference between a corporation aggregate of one person capable and many incapable, and a corporation aggregate of many persons capable, that in the former, as in the case of abbot and convent, there must have been the concurrence of the major part, and of the head besides, because the abbot only acted with the consent of the major part of the rest; but in the latter, as in the case of master and fellows, or mayor and commonalty, the head is but a member of the acting part, in the same manner as any other individual; and therefore, without a particular usage, or the express provision of a charter, he has no casting voice. Rex v. Blythe, 5 Mod. 404. 421. Reg. v. Sutton, 10 Mod. 74. Cotton v. Davies, 1 Str. 53.

Where it appeared that an officer was removable by bailiffs and burgesses, or the greater part of them, "of whom the bailiffs to be two," and it was said in the return to a mandamus, that he was removed by the bailiffs and burgesses, the bailiffs being then present, the court held, that if the actual consent of the bailiffs had been required in this case, their consent should be intended, either as actually given, or as included in that of the major part: but they held that it was not required; for that, as in all corporate acts, the act of the majority is the act of the whole, so the bailiffs being the head of the corporation, nothing could be done without their *presence*, though it had not been expressly required, and its being so required did not render their concurrence necessary. 2 Ld. Raym. 1236. 2 Salk. 434.

Where the head office of a corporation is vested in more than one person, as in the case of two bailiffs, the *presence* of both is absolutely necessary, because both fill but one office. 1 Kyd on Corp. 428.

Where the provisions of a charter direct that the new mayor shall be sworn *before* his predecessor, the *presence* only of the latter is Rex v. Ellis, 2 Str. 994.

is not ſufficient: there muſt alſo be his *aſſent*; at leaſt nothing muſt appear from which his *diſſent* is manifeſt.

8. Of the Regularity of their Proceedings.

Ca. temp. Hardw. 151.

Where corporate acts are to be done, not on a charter day, and by a ſelect body, there muſt be a ſummons of every member, except ſuch as have abſolutely deſerted the town.

And where there are different aſſemblies in a corporation with diſtinct powers, and all the members of the ſmaller aſſembly are members of the more numerous; if the more numerous aſſembly be ſummoned to meet to exerciſe the powers lodged in them, thoſe who are members of the ſmaller aſſembly cannot ſeparate from the reſt, and exerciſe their diſtinct powers: but there muſt be a ſummons for that purpoſe of the ſmaller aſſembly by itſelf.

Rex v. Mayor of Carliſle, 1 Str. 385. Machell v. Nevinſon, 2 Ld. Raym. 1355. S. P.

The corporation of the city of Carliſle conſiſted of a mayor, aldermen, bailiffs, and capital citizens, who together formed the common council, and had the power of electing capital citizens; the power of amotion was in the mayor and aldermen only, or the major part of them. The common council met for the purpoſe of tranſacting the buſineſs of that aſſembly; and the mayor and aldermen made an order for the amotion of one Poulter, a capital burgeſs, for a cauſe which was allowed to be legal. The court held, that the removal in this caſe was not regular, and that there ought to have been a ſummons for the mayor and aldermen to meet in their diſtinct capacity.

Per Lord Parker, in Rex v. Strangeways, Hil. 1 Geo. 1. cited by Ld. Hardwicke, 2 Ld. Raym. 1358.

It hath been ſaid in ſome books, that if all the members of the corporation be preſent by accident, or in conſequence of a ſummons to attend on *one* particular buſineſs, acts relating to *any* buſineſs done by unanimous conſent will be good. But this is a point which hath never been ſolemnly adjudged.

Ca. temp. Hardw. 151. 1 Barnard. 80. Muſgrave v. Mayor of Appleby, 1 Str. 584. See Kyd Corp. 434., &c.

Rex v. Mayor, &c. of Shrewſbury, Ca. temp. Hardw. 147.

Where a ſummons is neceſſary, it is not ſufficient that the uſual and general orders be given to the ſummoning officer; the latter muſt actually do every thing he poſſibly can to ſummon all the members of the ſelect body.

Per Eyre, J. 1 Str. 386.

It has been ſaid, that though the aſſembly of a ſelect number held *not* on a charter-day, be irregular, unleſs every member within reach of ſummons, be actually ſummoned, yet that in the ſummons it is not neceſſary to ſpecify any particular act. However well-founded this may be, as applied to the ordinary buſineſs of the corporation, it ſeems that, in the caſe of an amotion of a corporator, a *general* ſummons to every member is not ſufficient; but that it is neceſſary to mention, that it is intended to conſider the queſtion of removing the particular perſon; perhaps even that will not be ſufficient, but it may be neceſſary to ſtate the *cauſe* of his intended amotion. This, however, does not appear to be fully ſettled, for in the caſes where the amotion of members has been held irregular for want of *proper* ſummons, the determination

Rex v. Mayor, &c. of Liverpool, 2 Burr. 723. Rex v. Mayor, &c. of Doncaſter, *id.* 758.

tion has generally proceeded on the circumſtance of there having been no ſummons at all.

But no ſummons is neceſſary where a member is not reſident within the town. 5 Burr. 2601.

It is laid down as a general rule, that where there is a *uſual* method of notice, that cannot be diſpenſed with, though there be an actual ſummons of all the members, unleſs indeed every ſingle member be preſent at the meeting, and conſent to wave it. Rex v. Mayor, &c. and Rex v. Little, &c. Freemen of Saltaſh, 5 Burr. 2682.

Where it is intended to remove any one of the members or officers of a corporation, it is, in general, abſolutely neceſſary, not only that he ſhould be ſummoned generally to attend; but he muſt have a particular ſummons to attend and anſwer the particular charge alleged againſt him; for it would be highly unjuſt, upon a general ſummons, to remove a man for particular offences, which he may have had no opportunity of preparing to anſwer. James Bagg's caſe, 11 Co. 99. a. Glyde's caſe, 4 Mod. 33. 37.

But there may be particular circumſtances, under which the ſummons may be diſpenſed with. Thus, ſays *Holt*, C. J. "a man ought not to be disfranchiſed until he has been heard in his defence, on notice and preparation, and notice is only neceſſary for that purpoſe. Therefore, if a man be charged *in plenis comitiis*, and ordered to prepare by ſuch a time, this will be good, though there be no actual ſummons, becauſe if the party be heard it is ſufficient." Rex v. Chalke, 1 Ld. Raym. 225. 1 Salk. 42.

If a party be charged with a particular offence in one aſſembly, and ordered to prepare for his defence, he certainly cannot complain of want of notice; but it ſeems very doubtful whether his being charged and anſwering in the *ſame* aſſembly will cure the want of notice. Serjeant Whitaker's caſe, 2 Ld. Raym. 1240. 2 Salk. 435. See 1 Kyd. Corp. 445, 6, 7, 8, 9.

Where a perſon is removable for non-reſidence, there is no neceſſity to ſummon him before he is removed, becauſe he has abdicated the town, and is out of the reach of ſummons (*a*). But if he be removable for non-attendance at the corporate aſſemblies, he muſt have had perſonal notice to attend, and that his preſence was neceſſary; for the *uſual* notice of the intended meeting will not be ſufficient, unleſs that *uſual* notice be perſonal (*b*). (*a*) Comb. 198. 270. 1 Show. 259. 364. Reg. v. Trubody, 2 Ld. Raym. 1275. cited in Dougl. 152. 157. *Vid.* Sty. 151. 446. Palm. 451. 1 Sid. 14. 2 Sid. 97. Forteſc. 205. (*b*) Rex v. Richardſon, 1 Burr. 517. 520. 540.

A man *may* be conſtituted a burgeſs, or appointed to an office, by deed under the common ſeal, and *then* he ought to be diſcharged in the ſame manner: but where the party is conſtituted or appointed by election, nothing more is required than an entry in the books of the corporation; and he may be diſcharged by an order entered in the ſame manner. 1 Ld. Raym. 226. 1 Kyd. Corp. 450.

So, where an office is granted by deed, the *reſignation* or *ſurrender* ought alſo to be by deed; but where an officer is appointed by election, the corporation may accept his reſignation or ſurrender by parol before them: "if, indeed," ſays *Holt*, "a man ſpeak at large, and ſay he will be no longer alderman, *&c.* that ſignifies nothing: but if he come in an open aſſembly of the 1 Ld. Raym. 563. 2 Salk. 423.

corporation, and there reſign his office, declaring that he will not continue in it any longer, and deſire them to accept his reſignation, and they accept it and elect another in his room, this is a good reſignation."

With reſpect to the preſiding officer, it is to be obſerved, that, where ſtrangers are not intereſted, all *voluntary* acts not *neceſſary* to carry on the buſineſs of the corporation, done by an uſurper or a mayor *de facto*, or under the authority of either, ſeem to be void: and that ſome *neceſſary* acts are void in both caſes. For though in the caſe of *The King* v. *Liſle*, the court dwelt upon the circumſtance of the election of the defendant, not being a *neceſſary* act, yet it appears from ſubſequent caſes, that the circumſtance of the act being *neceſſary* is not alone ſufficient to make it good.

2 Str. 1090. Andr. 163.

1 Kyd Corp. 454.

In the *King* and *Hebden*, the defendant made a title to the office of bailiff of *Scarborough*, from an election under the bailiff-ſhip of *Batty* and *Armſtrong*, and on iſſue joined whether theſe were bailiffs or not, a record of a judgment of ouſter againſt them was read in evidence; and on a motion for a new trial, it was holden, that it was properly admitted; and the ſame evidence was ſaid to have been lately admitted in a trial at bar, in a caſe relating to the corporation of Orford.

2 Str. 1109. Andr. 388.

In the caſe of the *King* and *Grimes*, a queſtion having been made, whether the *ſpecial verdict* found on the information againſt *John Leigh*, for uſurping the office of mayor, and the judgment given thereupon againſt him, were evidence in the preſent caſe againſt *Grimes* for uſurping the office of capital burgeſs; and to what degree it ought to be allowed; the court held it to be admiſſible, but not concluſive, and, in fact, gave judgment againſt him, on the ground that *Leigh*, who had preſided at his election, was not a rightful mayor. In the firſt of theſe caſes, if not in both, the election was an act *neceſſary* to the preſervation of the corporation.

5 Burr. 2603.

Where the mayor's preſence is neceſſary at a corporate aſſembly, his departure before a buſineſs, regularly begun, be concluded, will not invalidate that particular buſineſs, but the aſſembly cannot proceed to any thing elſe.

1 Barnard. 385.

9. Of the Election and Amotion of their Members.

There cannot properly be any election to an office which is not actually vacant, for though it may be a practice in ſome caſes to chooſe a perſon before-hand, which may be called an inceptive election, and on the death of the predeceſſor, to admit the perſon before nominated, which completes the election; yet ſuch an inceptive election is not binding on the electors; and when the vacancy really happens, they may elect another.

Skin. 45. 2 Kyd Corp. 5.

If the election of a particular officer be, by ancient charter, veſted in one body, a ſubſequent one cannot of itſelf alter the mode of election; but if the ſubſequent charter be accepted by the corporation at large, or if they acquieſce under it, and act in conformity

2 Kyd Corp. 6.

conformity to it, which is evidence of acceptance, the latter mode of election is valid.

By a charter of Henry 4, it was granted, that the mayor, aldermen, and citizens of *Norwich*, might elect two to be sheriffs of that city: *Charles* the Second, in the 18th year of his reign, by his charter granted, that the mayor and aldermen might elect one sheriff, and the citizens the other.—The subsequent elections were made according to the provisions of the latter charter, and were held good by the opinion of two justices against one. Skin. 574.

The privilege of election may be in one body, and the privilege of approbation in another: thus, the privilege of election to the office of alderman in *London* and in *Norwich* is in the ward, and that of approbation in the mayor and aldermen; but if the mayor and aldermen reject, without reason, one chosen by the ward, a peremptory *mandamus* will be granted to admit him. 2 Salk. 436.

Where the person elected is unqualified, and the electors at the time have notice of the want of qualification, their votes to him are thrown away, and the person who has the next greater number to the qualified person, is to be considered as duly elected. Reg v. Boscawen, P. 13. Ann. B. R. Rex v. Withers, P. 8. G. 2. B. R. cited in 2 Burr. 1020. Cowp. 537. Taylor v. the Mayor of Bath, M. 15 G. 2. B. R. cited in Cowp. 537.

Where a candidate is proposed in a corporate meeting duly assembled, and a majority of the persons assembled protest against any election, and do not propose any other candidate, the minority may elect the candidate proposed. Oldknow v. Wainwright, 2 Burr. 1017. See the case of the King v. Monday, Cowp. 530., and 2 Kyd Corp. 17., &c.

Where the time and manner of election are not fixed by charter or prescription, it is competent to a corporation to make regulations respecting them. Machell v. Nevinson, 2 Ld. Raym. 1355. Newling v. Francis, 3 Term Rep. 189.

It seems now to be acknowledged, notwithstanding the opinion of Lord *Coke* (*a*) and others, that every corporation aggregate hath, as incident to it, a power of removing its members for reasonable cause. Tidderley's case, 1 Sid. 14. Lord Bruce's case, 2 Str. 819. Rex v. Richardson, 1 Burr. 517. (*a*) James Bagg's case, 11 Co. 99. a. Yates's case, Sty. 477. Rex v. Mayor of Coventry, 1 Ld. Raym. 392. Rex v. Mayor, &c. of Doncaster, 2 Ld. Raym. 1566.

But this power, like every other incidental power, is incident to the corporation at large, and cannot be exercised by any select body, unless given it by charter, or claimed by prescription, or in consequence of a by-law made by the body at large. And it is laid down as a general principle, that where by custom a particular body has acquired that power, and a subsequent charter in some respects new models the constitution of the corporation, but retains the particular body, without restraining its customary power of disfranchisement, the power still continues in the particular body. 2 Kyd Corp. 56. Dougl. 149. Haddock's case, Sir Thomas Raym. 435.

This power, whether possessed as incident to the corporation at large, or vested in a particular body, must appear to be exercised at 2 Kyd Corp. 57. Rex v. Taylor, 3 Salk. 231

at a regular meeting holden in a corporate character, or at leaſt holden in the character, by virtue of which they are empowered to amove: thus, where it appeared by the return to a *mandamus* that the common council had the power of amotion, and it was alleged as a fact, that the party complaining was removed by thirty of the common councilmen, in the council chamber aſſembled, the court held this to be inſufficient; becauſe it did not appear "that the thirty common councilmen were *then and there* aſſembled as a common council, as they might be there to feaſt, or for other purpoſes not connected with their corporate character."

Braithwaite's caſe, 1 Ventr. 19.

A *mandamus* having been directed to the mayor, bailiffs, and burgeſſes of the town of *Northampton*, commanding them to reſtore one *Braithwaite* to the place of common councilman; they returned, that by letters patent of incorporation, power was given them of holding a common council, conſiſting of a mayor, two bailiffs, and forty-eight burgeſſes; that the power of removing any common councilman from his place upon juſt cauſe, was given to the mayor, bailiffs, and *ſuch* burgeſſes as had been mayors; that *Braithwaite* had been a common councilman, and committed ſeveral offences, which were particularly expreſſed; and that the *common council* aſſembled together and procured *Braithwaite* to be ſummoned, but that he did not appear to anſwer; on which he was removed from his office and place in the common council, "*by the mayor and burgeſſes*, by the authority, and according to the charter aforeſaid."

It was objected, that this amotion was not according to the authority given by the charter; for that it was ſaid to be by the mayor and burgeſſes, ſo that it might have been by the mayor and *all* the burgeſſes, many of whom might not have been mayors, whereas the charter confined the power to the mayor and *ſuch* of the burgeſſes as *had* been mayors: but the objection was overruled, on the ground, that it muſt be intended that *all* the burgeſſes were preſent, and agreed to the amotion; and that as it was alleged to be by the mayor and burgeſſes *according* to the charter, the diſſent of the burgeſſes who were qualified, was not to be preſumed.

2 Kyd Corp. 58. Dy. 332. in marg.

This power of amotion, when poſſeſſed as incident to the corporation at large, cannot be exerciſed without reaſonable cauſe; nor can it be *ſo* exerciſed either by the corporation at large, or by a ſelect body, whether given by charter or claimed by preſcription, if it be given or claimed only in general terms: but if a charter, by expreſs words, empower either the corporation at large, or a ſelect body, to remove an officer at pleaſure, or empower them to chooſe him *during* pleaſure, they may in either caſe remove him without cauſe. So, a corporation by preſcription may, by cuſtom, have the power of removing an officer at pleaſure: but, in the return to a *mandamus*, commanding them to reſtore an officer ſo removed, it will not be ſufficient to ſtate "that they are a corporation by preſcription, and that the king, by letters patent, reciting that they had a cuſtom to remove at pleaſure, confirmed *that* with other cuſtoms;" they muſt allege the

Sir T. Jones, 52. Sir T. Raym. 188. 1 Ventr. 77. 82.

Rex v. Mayor, &c. of Coventry, 1 Ld. Raym. 391.

the cuſtom in poſitive terms, and not ſimply by way of recital in the letters patent.

So, if an officer, either by the proviſion of a charter, or by cuſtom, be eligible in the alternative for life, or during pleaſure, and he be choſen to continue during pleaſure, he may, at any time, be removed without cauſe: and where an officer is removable at pleaſure, or choſen to continue *during* pleaſure, the election of another is a determination of his office, without any formal removal, or notice of the intention to remove him. So, if the mayor for the time being have power to elect a town-clerk, it follows of courſe, that he may remove the former town-clerk at his pleaſure.

Pepis's caſe, 2 Show. 69. 1 Ventr. 342. Rex v. Mayor, &c. of Canterbury, 1 Str. 674. 2 Keb. 641. 1 Sid. 15.

But where an officer is removeable at pleaſure, the corporation, in their return to a *mandamus*, commanding them to reſtore him, ought to rely ſolely on that circumſtance; for they cannot take advantage of it, if they return a cauſe, and that cauſe be not ſufficient; becauſe it will then appear, that, at the time they removed him, they did not mean to proceed on their power to remove him at will.

2 Ld. Raym. 1240.

A common freeman cannot be deprived of his freedom at the *pleaſure* of the corporation at large, or of any ſelect body, whether that power be claimed by charter or preſcription.

Warren's caſe, Cro. Ja. 540.

The caſe of a common councilman is, in ſeveral books, diſtinguiſhed, in this reſpect, from that of an alderman; it being frequently holden that a power of removal is good as to the former, and void as to the latter.

Ibid. 2 Roll. Rep. 112. Sir T. Raym. 188. 1 Ventr. 77. 82. Rex v. Mayor, &c. of Coventry, 1 Ld. Raym. 391. Rex v. Burgum Andover, *id.* 710.

To the power of amotion, or disfranchiſement, the power of holding a corporate meeting for that purpoſe is neceſſarily incident, whether the former be in a ſelect body, or in the corporation at large; and therefore it is not neceſſary that the latter ſhould be expreſsly given by charter or claimed by cuſtom.

2 Kyd Corp. 62. Dougl. 153.

The cauſe for which a member of a corporation is disfranchiſed, or an officer removed, muſt be ſomething which has ariſen ſubſequently to the admiſſion of the one to the enjoyment of his franchiſe, or of the other to the exerciſe of his office: the power of disfranchiſement or amotion cannot be exerciſed for a defect of original qualification; that can only be queſtioned by a proſecution by information in the nature of *quo warranto*.

2 Kyd. *ubi ſupr.* Dougl. 80.

The offences for which a corporator may be disfranchiſed, or a corporate officer removed, have been diſtributed into three diſtinct claſſes.

Ca. temp. Hardw. 154. 1 Burr. 538.

Firſt, Such as relate merely to his corporate or official character, and amount to breaches of the condition tacitly or expreſsly annexed to his franchiſe or office.

Secondly, Such as have no immediate relation to his corporate or official character, but are in themſelves of ſo *infamous* a nature, as to render the offender unfit to enjoy *any* public franchiſe; ſuch as perjury, forgery, &c.

And, thirdly, offences of a *mixed* nature, being not only againſt his corporate or official duty, but alſo indictable at common law.

2 Kyd Corp. 63. 11 Co. 99. a. 1 Ld. Raym. 226.

To burn or deface the charters or evidences of the corporation; or to raſe or corrupt the books, are offences againſt the corporate duty of a corporator, for which he may be removed; but in the caſe of a raſure of the books, the party muſt appear to have acted maliciouſly, and to the detriment of the corporation, for it might happen that the entry, as it ſtood, was wrong, and that he only made it as it ought to be.

Sir Thomas Raym. 438. Ca. temp. Hard. 156. Sty. 477.

So, if he make a riot in diſturbance of an election of a mayor or other officer, or endeavour to hinder one of the aldermen from attending the common council, or hinder others who have a right to attend, from going thither to do the buſineſs of the corporation; ſo, if he continue in court and make orders, after the court is adjourned.

2 Kyd Corp. 64. Rex v. Taylor, 3 Salk. 231.

Circumſtances which have no immediate relation to the corporation, may be a ſufficient cauſe to remove a man from an office of magiſtracy, provided they be ſuch as render him incapable or unfit to execute the office; ſuch as habitual drunkenneſs in an alderman, though if a man were drunk by accident, that would not be ſufficient cauſe to remove him.

3 Salk. 229.

So, it has been holden to be a ſufficient cauſe to remove a man from the place of alderman, that he is poor and cannot pay the taxes, though ſuch a cauſe would certainly not be ſufficient to deprive a man of his freedom.

Clegg's caſe, 2 Burr. 732.

Bankruptcy, and not having obtained his certificate, is not alone ſufficient cauſe for removing a man from the office of common councilman, though ſome *one* or *more* of the *conſequences* of bankruptcy may eventually become ſo.

2 Roll. Rep. 11.

Old age is not a ſufficient cauſe to deprive an alderman of his office.

1 Burr. 540. See Dougl. 177.

Non-attendance at the courts of the corporation is not ſufficient cauſe of removal, when the preſence of the party is not *neceſſary*, and no particular buſineſs is obſtructed by his abſence, though his abſence be wilful, and notwithſtanding he may have due notice to attend.

2 Kyd Corp. 73. City of Exeter v. Glide, 4 Mod. 36.

Non-reſidence within a borough cannot be a ſufficient cauſe to diſfranchiſe a freeman; becauſe he has his freedom for his own benefit, and his reſidence is of little conſequence to the corporation at large.

Rex v. Truebody, 2 Ld. Raym. 275. Rex v. Lyme Regis, Dougl. 149.

But a *total* deſertion of the borough, by an alderman with his family, is a good cauſe to remove him from the office, becauſe he is thereby rendered incapable of doing his duty to the corporation: but it is not a cauſe to diſfranchiſe him, becauſe, though he ceaſe to be an alderman, he may ſtill continue a freeman. Nor is it every temporary abſence, that will be good cauſe for removing an alderman; he may have ſome reaſonable cauſe of abſence, as ſickneſs, or going to the Bath for the recovery of his health, or being employed in the ſervice of the king: he may leave a ſervant

vant in the houſe, which is a proof of his intention to return, and makes him virtually an inhabitant; and if he return before his actual amotion, that may cure the defect of his abſence, however long continued. It has been holden, that it was not a good cauſe to remove an alderman, that he had left the borough for four months *with his whole family*. The length of time which the party hath been reſident, ſeems to be immaterial, provided the reſidence hath been *bonâ fide*, and, in general, wherever non-reſidence is aſſigned as a cauſe for the removal of an alderman, or officer of ſimilar denomination, it muſt appear that reſidence is required by the conſtitution of the corporation, or that the buſineſs of the corporation has been obſtructed by the non-reſidence of the party removed.

Rex v. Mayor of Leiceſter, 4 Burr. 2087. Rex v. John Sargent, 5 Term Rep. 466. Dougl. 182. 174.

Wherever non-reſidence is a cauſe of amotion, it does not render the office *ipſo facto* void, but only voidable; and there muſt be an actual amotion before any proceedings can be had againſt the party for an uſurpation.

Vaughan v. Lewis, Carth. 227. Rex v. Ponſonby, Say. 245. 5 Br. P. C. 287. Rex v. Heaven, 2 Term Rep. 772.

It is no cauſe of removal, that a corporator has uſed opprobrious or indecent language to the mayor, or other principal magiſtrates of the corporation, as if he call the mayor a knave, or ſay, that he has done that in the execution of his office, which he cannot anſwer; though the words be in conſequence of an admonition from the mayor, for a malicious act to another burgeſs; as where a burgeſs being church-warden preſented one of the burgeſſes maliciouſly, without cauſe, for being abſent from the perambulation; for which being rebuked by the mayor, he ſaid contemptuouſly, *I care not for Mr. Mayor, nor for any of the burgeſſes:* nor does it ſeem a good cauſe of amotion that a man has written a libel on the mayor, or on another member of the corporation. It may, in ſome of theſe caſes, be proper to commit the offender till he find ſureties for his good behaviour; or ſome of the offences may be a foundation for an action at the ſuit of the party injured; but they can be no cauſe of disfranchiſement: ſo, neither can it be a good cauſe of disfranchiſement or amotion, that the conduct of the party is troubleſome or diſpleaſing to the body at large.

2 Kyd Corp. James Baggs's caſe, 11 Co. 96. Clerk's caſe, Cro. Ja. 506. *Per* Holt, C. J. Forteſc. 275. 11 Co. 94.

So, a *cuſtom* to disfranchiſe for contemptuous words is void, even in the city of *London*, whoſe cuſtoms are confirmed by act of parliament, for that confirmation cannot extend to unreaſonable cuſtoms, which this clearly is.

2 Salk. 426. 2 Ld. Raym. 777. Clark's caſe, 1 Ventr. 327. *Vid.* 1 Ventr. 302. a *dictum* of Twiſden, J. to the contrary. See further on this point, Sir Thomas Earle's caſe, Carth. 173.

Though the power of conferring degrees, and of degrading, in the univerſities, is in the vice-chancellor, maſters, and ſcholars, aſſembled in a body; yet they cannot degrade without reaſonable cauſe: and it was decided in the caſe of Dr. *Bentley*, that a contempt to the vice-chancellor, as a judge, was not a ſufficient cauſe to degrade.

1 Mod. 148. Forteſc. 202. 2 Ld. Raym. 1334. 1 Str. 557.

If

11 Co. 98. b.

If a man threaten, or endeavour either by himſelf or in combination with others, to do a thing againſt the truſt of his freedom, and to the prejudice of the publick good of the city or borough, but do not put it in execution; as if he threaten the ruin of their charter or privileges, or diſſuade the payment of cuſtoms due; this may be a good cauſe to puniſh him as before mentioned, but not to disfranchiſe him.

2 Ld. Raym. 1564. 4 Burr. 1999.

Miſconduct in *one* corporate office is not a cauſe to amove the offender from *another;* thus, if a capital burgeſs be appointed chamberlain of the corporation, and miſconduct himſelf in *that* office, this is not a good cauſe to deprive him of the office of capital burgeſs.

1 Ld. Raym. 226. (*a*) 1 Sid. 282. (*b*) Com. Dig. Franchiſe, F. 33. ſays Semb. *contr.* Raym. 446. (*c*) 2 Ld. Raym. 1566. 2 Kyd Corp. 88.

Though an offence may ſeem to have ſome relation to the corporation, or the corporate character of the offender, yet, if the corporation have another remedy, it is no cauſe of disfranchiſement: thus, the miſemployment or non-payment of money, belonging to the corporation, is no ſufficient cauſe, the corporation having a remedy by action; nor, a refuſal to pay his proportion of the expence of renewing the charter (*a*); nor a refuſal by a liveryman, to make the uſual payments for ſupport of the company (*b*); nor general diſobedience to the laws and orders of the corporation; nor, as it would ſeem, the breach of any particular bye-law (*c*).

Style, 479. Lane's caſe, 2 Ld. Raym. 1304. 11 Mod. 270. Forteſc. 275. Ca. temp. Hardw. 155. 1 Burr. 359.

For offences which have no immediate relation to the corporate office, but which the loſs of credit renders a ground of forfeiture, the corporation cannot disfranchiſe or remove, without a previous conviction at common law; for in ſuch caſes the corporation cannot try the truth or falſehood of the accuſation: it is for this reaſon, that it is no cauſe to remove or disfranchiſe a man, that he is *indicted* of felony, perjury, forgery, libelling, or other infamous crime, becauſe he may be acquitted of the charge.

Rex v. Yates, Style, 477. Rex v. Mayor, &c. of Derby, Ca. temp. Hardw. 153. and the caſes there cited. Rex v. Richardſon, 1 Burr. 538. Rex v. Corporation of Doncaſter, 2 Burr. 738.

With reſpect to thoſe offences which are of a mixed nature, as being not only againſt the oath and duty of the corporator, but alſo matters indictable at common law, it ſeems to be exceedingly doubtful whether for theſe the corporator can be removed without a previous conviction. The difficulty ariſeth from the poſſibility of a difference of determination by two different juriſdictions, as the party may be removed by the corporation for the ſame fact, of which he may afterwards be acquitted on a trial by jury. The queſtion hath been often diſcuſſed, but hath never received a final deciſion.

Sawyer's *arg. Quo Warranto*, 22. cited 1 Burr. 525. (*d*) 1 Burr. 530.

It hath been aſſerted, that, after conviction, the king might, by writ iſſuing out of the court where the conviction remains, or out of Chancery, command the corporation to diſcharge the party convicted; but this doctrine has been juſtly diſregarded (*d*).

Rex v. Amery, 2 Term Rep. 516.

In ſome inſtances, too, the crown has reſerved to itſelf the power of removing at pleaſure all or any of the principal officers of the

the corporation; but whatever may be ſaid as to the invalidity of ſuch a reſervation, as being repugnant to the purpoſe of the charter, ſuch a power cannot certainly be exerciſed to ſuch an extent as to deſtroy the whole body at once, and render the election of other officers impoſſible.

(F) How they are viſited.

SPiritual corporations are viſited in eccleſiaſtical matters (*a*) by the ordinary: eleemoſynary corporations are ſubject to the viſitation of the founder, his heirs, or aſſigns; and other civil corporations to that of the king in his court of King's Bench. In reſpect of ſchools endowed, where no ſpecial viſitor (*b*) is appointed by the founder, and (perhaps it may be added) where his heirs are unknown or do not chooſe to act, it is provided by the ſtatute of charitable uſes that they may be viſited by commiſſioners appointed under the great ſeal.

1 Bl. Com. 480.

(*a*) And the ordinary may in his general viſitation, by virtue of his general viſitatorial power, deprive a canon or prebendary for incontinency or other offences deſcribed in the ſtatutes; and this, of his own authority without obſerving all the preliminary forms the ſtatutes may appoint. The King v. Biſhop of Cheſter, 1 Wilſ. 206. 1 Bl. Rep. 22. But a biſhop, as viſitor of the dean and chapter, ſeems to have no juriſdiction to determine between the members on the ſubject of their corporate property. Rex v. Epiſc. Dunelm. 1 Burr. 567. It is clear, that he cannot by virtue of ſuch power fill up a vacancy in the ſtalls of the cathedral by lapſe. Biſhop of Chicheſter v. Harwood, 1 Term Rep. 650. And whether he can, as viſitor, decide in matters of election to ſuch ſtalls, is a queſtion which hath not yet received a general ſolution. *Id. ibid.* (*b*) 1 Wooddeſ. 474, 5.

It is only over eleemoſynary foundations that the viſitatorial power, properly ſo called, extends. For this power, as now underſtood, is final and concluſive, exerciſable voluntarily, in a ſummary mode, and without appeal. And as the court of King's Bench cannot interfere till called upon, and its judgments are liable to be reverſed by writs of error, it ſeems to want two of the eſſential marks of viſitorſhip.

1 Wooddeſ. 474.

1 Bl. Com. 481.

This kind of power appears to be of very early date, mention being made of it in the beginning of the reign of *Edward* the 3d. It was not introduced by any canons or eccleſiaſtical conſtitutions, but is an appointment of the law, and ariſeth from the property which the founder had in the lands appropriated for the ſupport of the charity. Hence, it is in the power of the founder to veſt it in any perſon and his heirs, or in a ſole corporation and his ſucceſſors; but if he appoint no one to exerciſe it, it will deſcend to his own heirs.

8 E. 3. 69, 70. 8 Aſſ. pl. 29. 31. 1 Vez. 472. 2 Term Rep. 352. If it be given to the Biſhop of E., not by his chriſtian name, the grant is to him in his politick capacity, and it is not neceſſary to mention his ſucceſſors. Bentley v. Biſhop of Ely, 2 Str. 913. Fitzg. 308.

If the founder dies without making any appointment of a viſitor, and without heirs, it will in that caſe devolve upon the king to be exerciſed by the great ſeal.

Rex v. Maſter, &c. of Catherine Hall, 4 Term Rep. 233.

Where the perſons, for whoſe benefit a charity is eſtabliſhed, are not themſelves incorporated, but truſtees or governors are appointed, as in the caſe of Sutton's hoſpital, the governors have a kind of viſitorial power with reſpect to the objects of the charity; but

2 Kyd, 187. 10 Co. 31. a. Eden v. Foſter, 2 P. Wms. 325.

Attorney-General v. Lock, 3 Atk. 164. Attorney-General v. Middleton, 2 Vez. 327.

but where no viſitor is expreſsly appointed, and the legal eſtate of the endowment is veſted in the governors, the latter, as to the management of the revenues, are ſubject to the juriſdiction of the court of Chancery.

2 Kyd, 195, 6. Fitzg. 108. 307. 3 Atk. 663. 1 Vez. 78. 2 Vez. 328. 1 Burr. 200.

As the power of appointing a viſitor is entirely in the founder, he may delegate it either generally or ſpecially; if he appoint a general viſitor, without any reſtraint, the perſon ſo appointed hath all incidental powers. But a perſon conſtituted viſitor in general terms, may be reſtrained in particular inſtances. So, the founder may appoint a *ſpecial* viſitor for a *particular* purpoſe, and no farther. So, he may make a *general* viſitor, and yet appoint an inferior *particular* power, to be executed by another perſon, who will then be a *ſpecial* viſitor. Thus, the viſitation of the corporation at large may be in one perſon; and that of one of the members, as of the head, may be in another: and if the founder of a college appoint a viſitor of the head ſpecially, the general power of viſitation remains in the founder and his heirs. The manner too in which the viſitatorial power ſhall be exerciſed, whether general or ſpecial, may be preſcribed by the founder.

Vid. ubi ſupr.

No technical or ſet form of words is neceſſary for the appointment of a viſitor. "*Viſitator ſit Epiſcopus Elienſis,*" is an appointment of a general and perpetual viſitor. But a perſon may be a general or ſpecial viſitor without any expreſs appointment, by conſtruction and implication from various branches of the ſtatutes.

Appleford's caſe, 1 Mod. 82. Carth. 92. 1 Lev. 23. 65. Raym. 56. 94. 100. 1 Sid. 94. 152. 346. Phillips v. Bury, Skin. 447. 2 Term Rep. 346. Rex v. Epiſc. Elienſ. 5 Term Rep. 475.

The ſentence of a viſitor, on ſubjects within his juriſdiction, is final and concluſive, and the king's courts cannot in any form of proceeding, review it.

3 Atk. 674.

Nor will the king's courts anticipate the judgment of a viſitor, or take away his juriſdiction, if the caſe in which they are called upon to interfere appears to be within the ſcope of the general viſitatorial power.

Rex v. Alſop, 2 Show. 170. Skin. 13.

In a return to a mandamus directed to a college, it is ſufficient to ſtate in general terms, that ſuch a perſon is viſitor; for as viſitor, he has power to determine all matters that come as grievances before him, unleſs he be particularly reſtrained by the ſtatutes, and ſuch reſtraint will not be preſumed. Nor is it material whether the grievance complained of happened in the time of the preſent viſitor, or in that of his predeceſſor, and therefore it is not neceſſary to ſhew that in the return.

Rex v. Whaley, 2 Str. 1139.

The queſtion, whether there be a viſitor or not, may be ſometimes decided on affidavits: but if a mandamus has been granted, commanding the party to whom it is directed to admit a perſon to a fellowſhip, on an affidavit of his election, the court will not ſuperſede the writ on affidavits that there is a viſitor, but will put the defendant to make a return; becauſe where the point is determined on affidavits againſt the party complaining, he has no opportunity to do himſelf juſtice by an action.

Ingrafted

Ingrafted fellowſhips in colleges, where the founders of them make no ſtatutes for their regulation, are ſubject to the general laws of the college, and, conſequently, to the viſitor's juriſdiction. Attorney-General v. Talbot, 1 Vez. 78. Green v. Rutherforth, *id.* 475. St. John's College v. Toddington, 1 Burr. 159.

As independent members of colleges are mere boarders, and have no corporate rights, it follows, that they are not ſubject to the viſitor's juriſdiction, and cannot obtain redreſs for any grievance by appealing to him. Neither indeed can they in matters of diſcipline obtain redreſs in a court of law. *Ex parte* Daviſon, cited in Cowp. 319. Rex v. Grundon, Cowp. 315.

It ſeems rather doubtful whether a perſon who is not yet actually a member of an eleemoſynary corporation, but who claims a right to become one, be a proper ſubject of viſitatorial juriſdiction. Rex et Reg. v. St. John's College, 4 Mod. 260. Comb. 238.

If it be queſtioned whether any viſitatorial power exiſts in the perſon applied to in that character, this muſt be ſettled by the court of King's Bench. 1 Burr. 158.

So, if a viſitor ſhould aſſume the power of making new ſtatutes, ſuch uſurpation would be reſtrained by the court of King's Bench. Green v. Rutherforth, 1 Burr. 201. 1 Vez. 472.

If the performrnce of a truſt is to be decreed, a court of equity muſt be reſorted to, for a viſitor is incompetent to do complete juſtice. So, if a college agree with a ſtranger to grant him a leaſe, and refuſe to perform the agreement, the remedy is by bill in equity for a ſpecifick performance, and not by appeal to the viſitor. 1 Vez. 473. Rex v. Windham, Cowp. 378.

If the ſtatutes of a college give to the ſame perſon who is viſitor the power of appointing to an office one out of two perſons returned to him by the college, he has that appointment not as viſitor, but by virtue of ſuch expreſs proviſion, and therefore muſt make choice of one of the perſons returned to him: if he aſſume the appointment of any other perſon, the court of King's Bench will interpoſe. Rex v. Epiſc. Eliens, 2 Term Rep. 290.

And the ſame common law judicature will interpoſe, if the viſitor be a party. Thus, where a mandamus was directed to the Biſhop of *Cheſter*, as warden of *Mancheſter* college, requiring him to admit a chaplain, and he made return, that he was viſitor of the ſociety; it was holden, that though a mandamus will not lie where there is a viſitor free from objection, yet here the two offices being in the ſame perſon, there is a temporary ſuſpenſion and the King's Bench muſt exert its authority. Rex v. Epiſc. Ceſtr. 2 Str. 797. In the year after this determination, an act was paſſed, to veſt in the crown the viſitatorial power over Mancheſter-college, whenever the wardenſhip ſhould be holden in *commendam* with the biſhoprick of Cheſter. St. 2 Geo. 2. c. 29. See too, 4 Term Rep. 244.

In the caſe of Dr. *Bentley*, maſter of *Trinity-college* in *Cambridge*, who was cited before the biſhop of *Ely*, as viſitor over the ſociety, to anſwer ſixty-four articles charged to be violations of the ſtatutes; the King's Bench granted a prohibition, becauſe the biſhop in his citation had not ſet forth his genuine authority. But the Houſe of Lords, on a writ of error, reverſed the former judgment, and went into the conſideration of the ſeveral articles, and, as to ſome, confirmed the prohibition, and, as to others, allowed the biſhop Bentley v. Biſhop of Ely, 2 Str. 912. Fitzg. 107. 305. 4 Br. P. C. 1 Wooddeſ. 481.

to

to proceed. It was indeed inſiſted, that the king was general viſitor (*a*) and the biſhop ſpecial viſitor only; but the King's Bench was of a different opinion; and, in this reſpect, their judgement ſeems unimpeached.

(*a*) Yet it ſeems as yet unſettled who is general viſitor of that ſeminary. 1 Wooddeſ. 481.

Rex et Reg. v. St. John's College, 4 Mod. 233.

Where the publick laws of the land are diſobeyed, the court of King's Bench will interfere, notwithſtanding there be a viſitor, for his province is confined to the private ſtatutes and domeſtick regulations.

Rex v. Epiſc. Lincoln. 2 Term Rep. 338. n. Rex v. Epiſc. Elienſ. 5 Term Rep. 475.

If a viſitor refuſe to receive and hear an appeal, the court of King's Bench will grant a mandamus to compel him.

Brideoak's caſe, H. 11 Ann. cited in 1 Wilſ. 209. 2 Bl. Rep. 25. 58.

But where the viſitor has actually executed a ſentence of expulſion, though he may appear to have exceeded his juriſdiction, a mandamus will not lie to reſtore the party expelled, for that would be to command the viſitor to reverſe his own ſentence.

(*b*) *Per* Lee, C. J. 1 Wilſ. 209. (*c*) 1 Vez. 470. 2 Kyd, 282.

The party, however, againſt whom the ſentence has been executed, may have a remedy by ejectment (*b*); or he may, it is ſaid, have an action for damages againſt the viſitor (*c*).

Dr. Walker's caſe, Ca. temp. Hardw. 212. Rex v. Epiſc. Elienſ. Andr. 176.

When the viſitor has pronounced a ſentence, which by the ſtatutes of the college a particular officer is to put in execution, the court of King's Bench will not compel that particular officer by mandamus, to do his duty; becauſe that would be to interfere with the privilege of the viſitor, who has power to compel the proper perſon to execute the ſentence: but it ſeems doubtful, whether, if the viſitor himſelf refuſe to compel the execution of the ſentence, the court will grant a mandamus directed to him for that purpoſe.]

(G) Of the Diſſolution of Corporations.

(*d*) Roll. Abr. 514. (*e*) 10 Co. 30. b. Roll. Abr. 514. S. P. —If any corporation aggregate, as mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver ſeiſin, this authority does not determine by the death of the mayor or dean, but the attorney may well execute the power after their death, becauſe the letter of attorney is an authority from the body aggregate, which ſubſiſts after the death of the mayor or dean; but if the dean or mayor be named by their own private name, and die before livery, or be removed, livery after ſeems not good. Co. Lit. 52. b. 2 Roll. Abr. 12. 14 H. 8. 3. 11 H. 7. 19. (*f*) The maſter of a college cannot deviſe lands to the houſe of which he is head. Daliſ. 31. 4 Leon. 223.

(*d*) IF all the members of an aggregate corporation die, the body politick is diſſolved; but if the king makes a corporation conſiſting of twelve men, to continue always in ſucceſſion, and when any of them die, the others may chooſe another in his place; (*e*) if three or four of them die, (*f*) yet all acts done by the reſt ſhall be ſufficient.

1 Roll. Abr. 514. Co. Lit. 264. Reg. v.

[But where a corporation conſiſts of ſeveral diſtinct integral parts, if one of theſe parts become extinct, whether by the death of the perſons of whom it is compoſed, or by any other means, the

whole corporation is diſſolved. This indeed was doubted in the caſe of *Colcheſter* v. *Seaker* (*a*); but a later adjudication (*b*) hath ſettled, "that when an integral part of a corporation is gone, and the corporation hath no power of reſtoring it, or of doing any corporate act, the corporation is ſo far diſſolved, that the crown may grant a new charter to a different ſet of men."

Ballivos de Ewdley, 1 P. Wms. 207. 10 Mod. 346.

(*a*) 3 Burr. 1866. In this caſe, which occurred in 1766, it appeared, that in 1740 there were judgments of ouſter againſt all the perſons then claiming in fact to be mayor and aldermen of the corporation: that thoſe perſons were all dead before the year 1763: that from 1740 to 1763 no perſon took upon himſelf to be, or claimed to be, mayor or alderman; and that in 1763 the charter under which they acted when the caſe occurred, was granted and accepted. The queſtion immediately before the court was, whether the preſent corporation could maintain an action on a bond given to the old corporation in the year 1735? which was determined in the affirmative; for that the charter of 1763 reſtored the corporation to all its former rights and franchiſes, and ſubjected it to all its former obligations. (*b*) Rex v. Paſmore, 3 Term Rep. 199.

Alſo, a corporation may be diſſolved by miſuſer or abuſer; for as all franchiſes flow from the bounty of the crown, ſo there is a tacit or implied condition annexed to ſuch grants, which, if broken, forfeits the whole franchiſe.

2 Inſt. 222. 20 E. 4. 5. But for this *vide* the arguments in the great caſe of the *quo warranto* againſt the city of *London*, which was brought againſt the whole corporation, 1. For that the common council had petitioned the king, upon a prorogation of parliament, that it might meet on the day on which it was prorogued, and had charged the prorogation as that which occaſioned a delay of juſtice. 2. That the corporation had impoſed new taxes on their wharfs and markets, which was an invaſion of the liberty of the ſubject, and contrary to law; and the judgment in that caſe was, that the franchiſe ſhould be ſeiſed into the king's hands; but *vide* 2 W. & M. § 1. c. 8., by which this judgment is declared to be void and illegal; and *vide* the caſe of Sir James Smith, Show. 280., 4 Mod. 52., 12 Mod. 17, 18., 10 Mod. 174., who being choſen an alderman of the city of *London*, after the ſame judgment (which was never recorded) the queſtion was, whether he was duly elected, ſo as to be obliged to take the oaths preſcribed by 1 W. & M. c. 8.? and it was reſolved, that though a corporation may be forfeited, yet that the proceedings and judgment in the *quo warranto* againſt the city, did not diſſolve the body politick, or make their ſubſequent acts void; and conſequently, that Sir James not taking the oaths purſuant to the 1 W. & M. c. 8., was a ſufficient cauſe to remove him from the place of alderman. See Skin. 310. Show. Rep. 280.

If the members of a corporation refuſe or neglect to chooſe ſuch officers, as they are obliged to chooſe by their charter, this is a forfeiture, and conſequently a diſſolution of the corporation (*c*).

Carth. 483. but *vide* 11 Geo. 1. c. 4.

[(*c*) In ſuch caſe the corporation is diſſolved without any legal proceeding: but for a forfeiture it is not diſſolved without a judgment in a court of law to enforce it. "A *ſcire facias* is proper," ſays Mr. Juſtice Aſhhurſt, "where there is a legal exiſting body capable of acting, but who have been guilty of an abuſe of the power entruſted to them; for as a delinquency is imputed to them, they ought not to be condemned unheard: but that does not apply to the caſe of a non-exiſting body. A *quo warranto* is neceſſary where there is a body corporate *de facto*, who take upon themſelves to act as a body corporate, but who, from ſome defect in their conſtitution, cannot legally exerciſe the powers they affect to uſe."—If, in a proſecution againſt a corporation, the judgment be for the defendants, the form of it is, "that the liberties be allowed," Co. Entr. 535. b.; if it be for the crown, and the parties have continued poſſeſſion of the franchiſe by wrong from the beginning, the judgment is, "that they be ouſted;" but if they once had title, and loſe it, the judgment is, "that the liberty be ſeiſed into the king's hands." Yelv. 192. Co. Entr. t. *quo warranto*. The prior judgment of ſeiſure is called a judgment "*quouſque*;" this judgment, it hath been thought, would diſſolve the corporation, if the parties did not come in and avoid it the ſame, or at the fartheſt, the next term, and that there was no uſe in a final judgment, but to ſhew that the king will take advantage of the forfeiture, which he may declare by the grant of a new charter. Rex v. Amery, 2 Term Rep. 515. But this opinion was over-ruled in the Houſe of Lords, where it was determined, that the effect of this judgment was merely to lay the king's hands on the franchiſe of being a corporation, ſo that the corporation could not uſe its liberties, and the action of its vital powers was ſuſpended; that in that ſituation the king might appoint a cuſtos; and might introduce a new corporation by charter, to whom he might commit the cuſtody; but that the old corporation were entitled to redeem their liberties, and remove the king's hands, upon which the power of the new corporation muſt neceſſarily ceaſe, and the letters-patent to them become void. *Vide* the judgment in Rex v. Amery in the Houſe of Lords, in the account of that caſe in two volumes quarto, and 2 Kyd, 496., &c.—With reſpect to the form of a final judgment, it was determined in Sir James Smith's caſe, that the corporation of *London* was not diſſolved by the judgment as recited in the act of 2 W. & M. ſt. 1. c. 8.,

c. 8., which was, "that the liberty, franchise, and privilege of the city of *London, being* a body politick, &c. should be seized." For the word *of* being omitted before the word *being*, the judgment was not against the corporate existence of the city, but against the franchises it enjoyed: and Holt said, "that a corporation might subsist after its franchises were taken away; for that these were not essential to it, but only a privilege appertaining to it; that the essence of a corporation was to make bye-laws, and govern their members, which a corporation might do, though their franchises were seized." 4 Mod. 52. Skin. 310. Carth. 217. 1 Show. 263.]

Salk. 191. 12 Mod. 247. A corporation may be dissolved by surrendering the charter, but a surrender of an old charter is void, for want of enrolment.

Co. Lit. 102. b. If a prior and convent, *concurrentibus iis quæ in jure requiruntur*, are translated to an abbot and convent, or to a dean and chapter, though the name is changed, yet the body is not dissolved.

3 Co. 75. b. (*a*) But there cannot be a guardian of a chapel, when the chapel and all the possessions thereof are aliened. 3 Co. 75. a. 10 Co. 32., for there cannot be a guardian of nothing. Though a dean and chapter have surrendered (*e*) all their possions to the king, yet their corporation continues, and they remain a chapter of the bishop to assist him in spiritual matters, *&c.* for all their possessions were from the bishop, and a prebendary, though he hath no possession, hath *stallum in choro & vocem in capitulo.*

Co. Lit. 13. b. Godb. 211. [Mo. 283. If lands are given to a corporation, which is (*b*) afterwards dissolved, the donor shall have the lands again; for the law annexes such a condition in every grant to a body politick.

acc. *Vide tamen* 20. Jac. C. B. Johnson v. Morris, that the lands shall escheat. Hall. MSS., which also cites 21 E. 4. 1., and 21 H. 7. 9. And the case of Johnson v. Norway in Winch. 37., which seems to be the same as that cited by Lord Hale, is against the donor, though it is not mentioned in Winch, that the judges finally decided the point. See also *contr.* Lord Coke, the case of Southwell v. Wade, in 1 Ro. Abr. 816. A. p. 1., and S. C. in Poph. 91.—Co. Lit. 13th ed. 13. b. n. 2.] Roll. Abr. 816. (*b*) A debt due to a corporation still remains, though their name is changed by a new charter. 3 Lev. 238.——If a corporation bind themselves in a bond, and are afterwards dissolved, they shall not be charged in their natural capacities. Lev. 237., and *vide* Owen, 73. 2 And. 107.

Costs.

(A) Of the first Introduction of, and giving the Plaintiff Costs *de incremento.*

(B) In what Cases the Plaintiff shall have no more Costs than Damages: And herein,

1. Of Actions of Trespass, where the Right of Freehold or Inheritance may come in Question, as also of wilful and malicious Trepasses.

2. Of

2. Of Actions of Slander.
3. Of Actions of Aſſault and Battery.

(C) Where the Coſts ſhall be doubled or trebled.

(D) Of awarding the Defendant his Coſts.

(E) What Perſons are entitled to or exempted from paying Coſts: And herein,

1. Of Executors and Adminiſtrators.
2. Of Officers and Miniſters of Juſtice.
3. Of Informers, and where the Proſecution may be ſaid to be carried on at the Suit of the King.
4. Of Paupers.

(F) Of Coſts in Replevin.

(G) Of Coſts in a Writ of Error.

[(H) Of Coſts in a feigned Iſſue.]

(I) Of Coſts in the ſeveral Steps and Proceedings of a Cauſe.

(K) Coſts how aſſeſſed or taxed.

(A) Of the firſt Introduction of, and giving the Plaintiff Coſts *de incremento*.

THERE were no coſts at common law (*a*); but if the plaintiff did not prevail he was amerced *pro falſo clamore*; if he did prevail, then the defendant was *in miſericordiâ*, for his unjuſt detention of the plaintiff's right, and therefore was not puniſhed with the *expenſa litis*, under that title.

2 Inſt. 288.

[(*a*) Altho' coſts were never given at common law, *eo nomine*, yet in reality they were always included in the quantum of damages, in thoſe actions where damages were given; and even now, coſts for the plaintiff are always entered on the roll as increaſe of damages by the court; the form of which entry may poſſibly have ariſen from the abovementioned practice. 3 Bl. Comm. 399. And it is ſaid by Lord Chief Baron Gilbert, that the juſtices in eyre were wont at their *iters*, before the ſtatute of Glouceſter, to aſſeſs the coſts of the plaintiff, where he prevailed, at a reaſonable ſum, excluſive of, and unblended with the damages which he recovered; and that this cuſtom prevailed till the introduction of the modern juſtices of aſſiſe and *niſi prius*; at which time it became neceſſary, that the coſts ſhould be taxed by the court above, and not by the judges on their circuits. Gilb. Hiſt. C. P. 266.]

But it being thought exceeding hard that the plaintiff, for the coſts which he was out of pocket in obtaining his right, could not have any amends;

By the ſtatute of *Glouceſter*, made 6 *E.* 1. *cap.* 1. by which in an aſſiſe, *&c.* damages, upon the inſufficiency of the diſſeiſor, are given againſt him that is found tenant, and damages are given in a writ of *mort d'anceſtor*, *aiel*, *&c.*, reciting that whereas before that time, damages were not taxed but to the value of the iſſues of the land, it is provided the demandant may recover againſt the tenant the (*a*) coſts (*b*) of his writ, together with his damage; and that this act ſhall hold place (*c*) in all caſes where the party is to recover damages.

(*a*) This extends to all legal coſts of ſuit, but not his expences of travel, loſs of time, &c. 2 Inſt. 288. —In a writ by journeys accounts, the plaintiff ſhall recover his coſts of the firſt writ, and the proceedings thereupon. 2 Inſt. 288. *Secùs*, if the firſt writ was naught through the plaintiff's default, 2 Inſt. 288. as if brought againſt one joint-tenant only. Kelw. 127. (*b*) If judgment arreſted, the plaintiff, in a new action, ſhall not recover the coſts of the firſt. Cro. Car. 545. (*c*) Where a man before, or by this act, did not recover damages, though ſingle, double, or treble, are given by a ſubſequent act, the plaintiff ſhall recover no coſts. 10 Co. 116. a. As, in a *quare impedit*. 2 Inſt. 289. 10 Co. 116. a. Kelw. 26. a. *Decies tantum*. 10 Co. 116. b. So, in an action upon 5 E. 6. c. 14. of ingroſſers, 10 Co. 116. b.——But in all caſes where damages were recovered before, or by this act, the plaintiff ſhall recover his coſts alſo. 10 Co. 116. b. [This diſtinction, with reſpect to the plaintiff's right to coſts, between caſes where damages are originally given by a ſtatute ſubſequent to this act, and thoſe where damages might have been recovered at common law, is impugned by Lord Coke himſelf, who ſaith, "This clauſe doth extend to give "coſts, where damages are given, to any demandant or plaintiff, in any action by any ſtatute made *after* "this parliament." 2 Inſt. 289. And though it was recogniſed by three juſtices againſt Willes, C. J. in the caſe of Witham v. Hill, 2 Wilſ. 91. Barnes, 151. and by Aſton, J. in the caſe of Wilkinſon v. Allott, Cowp. 367. yet it ſeemeth not to be law at preſent, "for the ſtatute of Glouceſter is a remedial "act, and, conſequently, ought to have a favourable interpretation." *Per* Lord Loughborough, 1 H. Bl. 13. Coſts, therefore, have been allowed in actions againſt the hundred upon the ſtatute of 9 Geo. 1. c. 22. for ſetting fire to the plaintiff's houſe. Jackſon v. Inhabitants of Caleſworth, 1 Term Rep. 71. See too Greetham v. the Hundred of Theale, 3 Burr. 1723. Bull. N. P. 331. And it hath been repeatedly decided, that in an action of debt upon any ſtatute, by the party grieved, for a certain penalty, the plaintiff ſhall have his coſts, although the act on which the action is founded give no coſts. 1 Roll. Abr. 516. pl. 5. 574. pl. 1. Cro. Car. 559. 1 Salk. 206. 1 Ld. Raym. 172. 2 Term Rep. 154. Ward v. Snell, 1 H. Bl. 10.]

This was the original of coſts *de incremento*; for when the damages were found by the jury, the judges held themſelves obliged to tax the moderate fees of counſel and attornies that attended the cauſe.

10 Co. 116. (*d*) That in a *formedon*, no damages were recovered, and conſequently no coſts. Cro. Car. 425. Vent. 88. Lev. 146. Raym. 134. [The ſtatute of Glouceſter doth not extend to give damages upon the traverſe of an inquiſition, although damages may be found thereon for the proſecutor: for to recover coſts under this ſtatute, there muſt be a plaintiff or defendant, demandant or tenant. Ca. temp. Hardw 355. 2 Str. 1069.] For coſts on penal ſtatutes, *vide infra*, letter (E) and title *Damages*, in what actions damages were recovered.

And this was done in (*d*) all real actions in which there were damages at common law, and alſo in all perſonal actions; for even in an action of debt, there are damages given for the unjuſt detention.

(B) In what Cases the Plaintiff shall have no more Costs than Damages: And herein,

1. Of Actions of Trespass where the Right of Freehold or Inheritance may come in Question, or where the Trespass is wilful and malicious.

BY the 43 *Eliz. cap.* 6. it is enacted, "That if upon actions personal to be brought in any of her majesty's courts at *Westminster*, not being for any title nor interest of lands, nor concerning the freehold nor inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and so signified or set down by the justices before whom the same shall be tried, that the debts or damages to be recovered there in the same court, shall not amount to the sum of 40*s.* or above, that in every such case the judge and justices, before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions."

The intent of this statute was to reduce all actions where the debt or damages were under 40*s.* into the court-baron, or other county courts, whereby it was thought the profits of landlords would be increased, and the costs of defendants diminished; but the statute failed of effecting that purpose; for it does not put it merely upon the damages given by the jury under forty shillings, (for it would be hard when the jury gave too little damages, to have punished the plaintiff with the loss of his costs,) but leaves it to the judge to certify the damages proved were not above 40*s.* in approbation of the verdict; but the judges thought it extremely hard to certify, in order to make plaintiffs lose their costs where they had prevailed, unless the action were exceedingly impertinent and vexatious; and therefore seldom made use of this power (*a*).

Gilb. Hist. C. P. 265.

[(*a*) No instance of a certificate upon this statute is to be met with in the books, earlier than about the middle of the reign of George the Second. Gilb. Eq. Rep. 196. 3 Wilf. 325.]

[In an action for taking and carrying away sand and gravel upon *Hounslow Heath* the plaintiff recovered a verdict with damages under 40*s.*, and Lord Chief Justice *Willes* who tried the cause, having certified, under this statute, that the damages found by the jury, were the real damages to be recovered, the court held it to be a case within the act, and refused to allow any more costs than damages.

White v. Smith, C. B. P. 17 G. 2. cited in 2 Str. 1232. and 1 Wilf. 94.

So, in an action of trespass for assaulting the plaintiff, stopping his waggon, and taking away his cart-rope, the defendant justified the taking of the rope as a distress for toll, due to the corporation of *Doncaster* under whom he was collector, and likewise stated a demand and refusal previous to the making of the distress; the replication traversed any demand of the toll before the taking of the distress, and issue being joined thereon, the plaintiff obtained a verdict, at the trial, with one shilling and sixpence damages. The

Walker v. Robinson, 1 Wilf. 94. 2 Str. 1232.

judge who tried the cauſe, certified under the ſtatute. The plaintiff obtained a rule to ſhew cauſe why he ſhould not have full coſts, upon the grounds, that an *aſportavit* was laid in the declaration, and there was ſpecial pleading, either of which circumſtances, it was alleged, had been always holden ſufficient to carry full coſts; but after argument, the rule was diſcharged.

Howard v. Cheſhire, Say. Rep. 250.

In an action of treſpaſs, a caſe was reſerved for the opinion of the court, ſtating, that the action was brought for taking a diſtreſs; that the defendant juſtified as agent to General *Choldmondley*, by virtue of a reſervation in a leaſe of land from the general to the plaintiff; and that iſſue having been joined upon a traverſe of the agency of the defendant, a verdict was found for the plaintiff with one penny damages, and that the judge, who tried the cauſe, had certified purſuant to the ſtatute 43 *El. c.* 6. *Denniſon* and *Foſter*, the only judges in court, held, that the iſſue being collateral to the plaintiff's intereſt in the land demiſed, the plaintiff could have no more coſts than damages.

Bartlett v. Robbins, 2 Wilſ. 258.

Where a plea of tender was found againſt the defendant, yet, as the plaintiff did not recover damages to the amount of forty ſhillings, it was holden that there might be a certificate under the ſtatute.

Dand v. Sexton, 3 Term Rep. 37.

A notion formerly prevailed, that the ſtatute empowered the judges to certify only in thoſe actions which are within the juriſdiction of the county, and other inferior courts: but it hath been holden in a late determination, that the words of the ſtatute comprehend *all* perſonal actions (not being for any title to lands, or for any battery); even actions *vi et armis*, which cannot be brought in the county court.

Holland v. Gore, Say. Coſts, 18.

A certificate upon this ſtatute, may be granted after the trial of the cauſe.]

(*a*) The ſtatute 11 & 12 W. 3. c. 9. enacts, that this ſtatute ſhall extend to the principalities of *Wales*, and counties palatine.

* This ſtatute does not extend to the *Marſhalſea*, or other inferior courts, that may hold plea in ſuch actions; nor does it extend to any caſe where the defendant juſtifies, or pleads ſpecially.

"By the 22 & 23 *Car.* 2. *cap.* 9. for preventing triviall ſuits, contrary to the intention of 43 *Eliz.* commenced in the (*a*) courts at *Weſtminſter*, it is enacted, for the making the ſaid law effectual, that in all actions of treſpaſs, aſſault, and battery, and other perſonal actions, wherein the judge at the trial ſhall not find and certify under his hand, upon the back of the record, that an aſſault and battery was ſufficiently proved, or that the freehold or title of the land mentioned in the plaintiff's declaration, was chiefly in queſtion, if the jury find damages under 40*s.* the plaintiff ſhall not recover more coſts than the damage, and if more coſts given, the judgment ſhall be void, &c., and the defendant may have his action for ſuch vexatious ſuit*."

Gilb. Hiſt. C. P. 263. Gilb. Eq. Rep. 197, 198. 2 Vent 36. S. C. 180. 195. 215. 3 Mod. 39.

This ſtatute ſeems to have purſued the ſame purpoſe with that of the 43 *Eliz.* (*b*) but neither of them repealed the ſtatute of *Glouceſter*, (for a ſtatute cannot be repealed by implication,) nor did the ſtatute of *Car.* 2. take away coſts *de incremento*, except where the judge's certificate was neceſſary; and that was only where the treſpaſs was done to the freehold, or to things fixed to the freehold,

and the damages under 40*s.*; and in battery, where the damages were under ſuch ſum; for the wording of the ſtatute is, that there ſhould be no coſts in battery, treſpaſs, or other perſonal actions, unleſs the judge certify the battery to be proved, or the title of the freehold to have come in queſtion; hence theſe words in the act, *other perſonal actions*, were conſtrued to extend no farther than to caſes where the judge was permitted to certify, which was only in battery, and actions of treſpaſs relating to the freehold, and things fixed to the freehold.

2 Mod. 141. 2 Lev. 234. 1 Salk. 208. [(*b*) There is this difference between the ſtatutes of 43 Eliz. and 22 and 23 Car. 2., that the former, by certificate deprives the plaintiff of full coſts; the latter, by certificate entitles him to full coſts. 1 Wiſ. 95.]

Therefore in trover, or action of treſpaſs *de bonis aſportatis* of goods and chattels not fixed to the freehold, the plaintiff ſhall have his full coſts, though the damages be found to be under 40*s.* and though the judge do not certify purſuant to the ſtatute.

Salk. 208. pl. 7.

So, if an action of treſpaſs to the (*a*) freehold, and an action of treſpaſs *de bonis aſportatis*, are joined, and the plaintiff recovers in general upon both counts, he hath no need of a certificate to obtain his coſts; and therefore coſts *de incremento* ſhall go upon the ſtatute of *Glouceſter*.

Com. Rep. 19. pl. 12. (*a*) Though to the freehold only, yet if for hunting by an inferior tradeſman, the plaintiff ſhall recover full coſts. See ſtat. 4 and 5 W. and M. c. 23. § 10. Salk. 212. pl. 2. 1 Ld. Raym. 149. Com. Rep. 26. 12 Mod. 121. Comb. 420. Carth. 382. 5 Mod. 307.

[*A fortiori* then, if in an action of treſpaſs *quare domum fregit et bona aſportavit*, the defendant be acquitted as to breaking the houſe, and found guilty only of taking away the goods, the plaintiff ſhall have full coſts, of whatever amount the damages may be; for the acquittal as to the treſpaſs upon the freehold, reduces it to a queſtion of mere perſonal property, which is not within the ſtatute of 22 & 23 *Car.* 2.]

Anon. 1 Freem. 394.

So, in treſpaſs for breaking his cloſe, and impounding his cattle, the plaintiff ſhall have his full coſts; (*b*) for the impounding of his cattle is an injury to his perſonal property, in which no right of freehold can come in queſtion.

3 Mod. 39. Barnes and Edgar, adjudged. (*b*) So, in treſpaſs for chaſing his cow, and his domeſtick fowls, viz. hares, geeſe, &c., with dogs which were uſed to bite tame fowls, by whoſe biting they were killed; on not guilty, verdict for the plaintiff; and he had his full coſts, becauſe this is not a treſpaſs wherein the right of freehold may come in queſtion. Mich. 9 Geo. 1. in C. B. Keen and Whiſtler, Stra. 534.——So, in treſpaſs for breaking his cloſe, and chaſing his bull, verdict for the plaintiff, and one penny damages; and held by the court that he ſhould have his full coſts, becauſe the 22 & 23 Car. 2. c. 9. extends only to ſuch actions of treſpaſs where the freehold may come in queſtion. Paſch. 9 Geo. 1. in C. B. Thomſon and Berry, Stra. 551. Gilb. Rep. 197.

So, in treſpaſs for chaſing his ſheep, and that he the defendant *ad loca ignota eos abduxit & elongavit*, after verdict for the plaintiff, and 2*d.* damages, he had his full coſts, principally upon the word (*c*) *abduxit*, which is the ſame in ſignification with *aſportavit*.

Carth. 225 Salk. 208. pl. 7., like caſe. (*c*) And note that if any thing be carried off from the grounds, though of never ſo little value, it will be an *aſportavit*; for the words *abcarriavit* and *aſportavit* in declarations mean ſuch a carrying as amounts to the defendant's uſe. Gilb. Rep. 198. And *vide* 2 Vent. 215. where digging roots, and removing them about two yards in the ſame ground, amounted to an *aſportavit*. [But from later reſolutions, it ſhould ſeem, that the aſportation ſhould be an abſolute and entire removal of the property from the land of the owner, and not a partial conveyance of it to another part of the premiſes. Franklin v. Jolland, B. R. H. 8 W. 3. cited in 1 Str. 634. Anon. 1 Str. 633. Gilb. Eq. Rep. 198. However, if what is laid in the declaration as an *aſportavit* amount to nothing more than a deſcription of the mode in which the injury to the land was

was effected, and is laid as part of the ſame act, a certificate, although the plaintiff obtains a general verdict, is requiſite to entitle him to full coſts, unleſs the damages ſhould be found to the amount of forty ſhillings. Clegg v. Molyneux, Dougl. 780.]

Raym. 847. Smith and Batterton, adjudged. 2 Jones, 232., and 2Show. 258. S. C. adjudged.

So, in treſpaſs *quare vi & armis* the defendant flung down certain ſtalls of the plaintiff's, in a market-place; on not-guilty, and verdict for the plaintiff, but damages under 40*s.* the court held, that the plaintiff, without the judge's certificate, ſhould have full coſts; for this is a treſpaſs done to a chattel, in which no title of freehold can come in queſtion; and though they had been fixed to the freehold, yet if the defendant had carried them away, it would be out of the ſtatute.

Carth. 224.

But where the treſpaſs is merely to the freehold; as where in treſpaſs the plaintiff declared that the defendant *herbam depaſcendo, & ſolum & fundum carucis ſubvertendo, & in ſolo fodiendo, & cum terra inde projecta aquæ curſum ſuum obſtupand., per quod clauſum ſuum inundat. fuit, &c.* the plaintiff ſhall have no more coſts than damages.

Ventr. 48.

So, treſpaſs *quare clauſum fregit*, and put ſtakes in the plaintiff's ground, was holden within the ſtatute.

Trin. 11 G. 1. in C. B. adjudged. Anon. Stra. 633. Gilb. Rep. 198.

So, in treſpaſs *quare clauſum fregit, & quendam taurum perſonæ ignotæ fugavit, per quod* the plaintiff's gooſeberry buſhes, *necnon quinque perticas* (*angl.* poles) *in eodem clauſ. erect., affix., & exiſtent. fregit, laceravit, & ſpoliavit*, after verdict and one penny damages, the court held, that the taking and pulling up the poles was not ſuch an aſportation as amounted to converſion; and that though the treſpaſs begun by chaſing the bull, yet the damage is laid to be done to the freehold; and ſo the title thereof might well come in queſtion.

Mich. 12 Geo. 1. in C. B. Blunt and Miller, adjudged. Gilb. Rep. 197. Stra. 645.

So, in treſpaſs for breaking and entering the plaintiff's houſe, and keeping him out of poſſeſſion and uſe of the ſaid houſe, with a *continuando* for a month, *per quod* he was put to great expence to gain the poſſeſſion of his houſe, and in the mean time loſt the profit and uſe thereof; after verdict for the plaintiff, and 2*s.* 6*d.* damages, the court held, that this was a plain treſpaſs *quare clauſum fregit* within the ſtatute, and that the *per quod* was only matter of aggravation.

2Vent. 180. 195. [Bunb. 208. Gilb. Eq. Rep. 199.] * In trying ſuch caſes, it is very ne-

Alſo, if there be a treſpaſs upon the freehold, and likewiſe a count laid *de bonis aſportat.*, in order to put in for coſts merely, if there be no evidence of the carrying away of the goods, by which the defendant is acquitted as to that, though he is found guilty as to the treſpaſs to the freehold, yet if the damages be under 40*s.* the plaintiff ſhall recover no more coſts than damages*.

neceſſary attention, on the part of the defendant, ſhould be given to the declaration, and to the evidence, and if an *aſportavit* is not found, to ſee that the verdict be properly taken. Though if a verdict be taken generally, and no evidence given of an *aſportavit*, and damages under 40*s.*, the court, on motion, will amend the verdict, by the judges notes.

(*a*) 2 Mod. 141, 142. 2 Freem. 214. pl. 222. (*b*) Where the defendant juſtifies

It is further to be obſerved in the conſtruction of the ſtatute 22 & 23 *Car.* 2. that there is no need of a judge's certificate, where by the pleading it appears that the title or intereſt of the land is in queſtion; (*a*) as in an action for eating his graſs, *per quod* his common was impaired; ſo, (*b*) if the defendant juſtifies by any

any thing that brings the title of the land in queſtion, the judge need not certify, to entitle the plaintiff to his coſts.

for a way, and iſſue is joined upon *extra viam*, and found for the plaintiff, he ſhall have full coſts: Aſſer v. Finch, 2 Lev. 234. Higgins v. Jennings, 2 Ld. Raym. 1444. 2 Stra 726. Beale v. Moor, 2 Str. 1168. [But it is otherwiſe, if the way under which the defendant juſtifies, be defined by metes and bounds in the plea, and the plaintiff reply *extra viam*; for here no doubt can ariſe concerning the extent and locality of the way, ſince theſe circumſtances are admitted and agreed by the pleadings; and therefore a certificate from the judge, that the freehold or title was in queſtion, is neceſſary to entitle the plaintiff to full coſts, in caſe the jury find damages under forty ſhillings. Cockerill v. Allanſon, B. R. Tr. 22 Geo. 3. Hullock, 86. Bull. Ni. Pr. 330.]

[But if in treſpaſs *quare clauſum fregit*, the defendant plead a juſtification, and thereupon the plaintiff make a new aſſignment to which there is a plea of not guilty; in ſuch caſe, if the plaintiff do not recover damages to the amount of 40*s*., and there be no certificate, there ſhall be no more coſts than damages; for a new aſſignment is equivalent to a new declaration; and where the defendant pleads only not guilty to it, there is in reality no ſpecial pleading in the caſe.

Ibbotſon v. Brown, Barnes, 124. 129. Lloyd v. Day, *id.* 149.

So, if in ſuch action, the defendant plead two pleas, not-guilty and a juſtification, and a verdict be found for the plaintiff on the former, with damages under 40*s*., and a verdict for the defendant on the latter, there cannot be full coſts without a certificate, becauſe the iſſue joined on the ſpecial plea, being found for the defendant, the caſe is exactly the ſame as if only the general iſſue had been pleaded.]

2 Ventr. 180. 195.

If an action be commenced in an inferior court, and removed by *habeas corpus* or *certiorari* into the courts of *Weſtminſter*, the plaintiff ſhall have full coſts, although the damages are under 40*s*.

[Roop v. Scritch, 4 Mod. 379. Archbiſhop of Canterbury v. Fuller, 1 Ld. Raym. 395. but in Gavel v. Scudamore, 2 Lev. 124. this is doubted, where the cauſe is removed by the defendant.]

Alſo, by the 8 & 9 *W*. 3. *cap*. 11. for preventing wilful and malicious treſpaſſes, it is enacted, "That in all actions of treſpaſs, to "be commenced and proſecuted from and after the 25th of *March* "1697, in any of his majeſty's courts of record at *Weſtminſter*, "wherein at the trial of the cauſe at *Weſtminſter* it ſhall appear, "and be certified by the judge, under his hand, on the back of "the record, that the treſpaſs upon which any defendant ſhall be "found guilty was wilful and malicious, the plaintiff ſhall recover "not only his damages, but his full coſts of ſuit; any former law "to the contrary notwithſtanding."

[Although this ſtatute ſpeaks generally of "*all actions of treſpaſs*," and Lord C. J. *Willes* was of opinion that every wilful treſpaſs was within it, yet there is no inſtance of a certificate upon it, except in actions of treſpaſs *quare clauſum fregit*.

Milburne v. Read, 3 Wilſ. 325.

Every treſpaſs is wilful within the meaning of this act, where the defendant has notice, and is forewarned not to come upon the land; as every treſpaſs is malicious, where the intent of the defendant plainly appears to be to haraſs and diſtreſs the plaintiff.

3 Bl. Com. 214. 1 Term Rep. 636.

And it was holden by *Eyre*, J. at *Eſſex* Lent Aſſizes, 1719, that where a treſpaſs was *wilful*, a judge would certify, though *no malice proved*; which was ſaid to be the practice.

6 Vin. Abr. tit. *Coſts*, 332.

Ford v. Parr, 2 Wilſ. 21.

A certificate under this act muſt be made by the judge in open court; if made out of court, it is void.]

2. Of Costs in Actions of Slander.

[This ſtatute is a direct repeal of that of Gloucester *quoad* actions of ſlander; for in theſe if the damages do not amount to 40*s*, coſts *de incremento* are taken away by expreſs and poſitive words. Gilb. Eq. Rep. 196.]

By the 21 *Jac.* 1. *cap.* 16. it is enacted, "That in caſe for ſlanderous words to be ſued or proſecuted in the courts at *Weſtminſter*, or other courts that have power to hold plea thereof, after the end of that ſeſſion of parliament, if the damage is found to be under 40*s*. the plaintiff ſhall recover (*a*) no more coſts than damages."

(*a*) By this the power of the judges is taken away, as to giving coſts *de incremento*, where the damage is under 40*s*. but it is ſaid to have been the reſolution of the judges, that though the court cannot increaſe the coſts, yet the jury are not bound by the ſtatute, and therefore they may give 10*l*. coſts where they give but 10*d*. damages. Salk. 207.

Cro. Car. 141. Law and Horwood, adjudged, Ley, 82.

In the conſtruction of this ſtatute, it has been holden, that it extends not to actions for ſlander of title, for that is not properly ſlander, but a cauſe of damage; and the ſlander intended by the ſtatute is to the perſon.

Palm. 530. Jones 196. S. C. adjudged.

Topſall v. Edwards, Cro. Car. 163.

So, if for calling thief, and cauſing him to be arreſted, *&c.*, and the defendant is found guilty of both, it is not within the act.

[Blizard v. Barnes, *Id.* 307. S. P. Carter v. Fiſh, 1 Str. 645. S. P.]

Salk. 206. pl. 5. Browne and Gibbons adjudged, 2 Ld. Raym. 831. S. C. 7 Mod. 129. S. C. Andr. 375. S. P. Burry v. Perry, 2 Stra. 936.

So, where the plaintiff brought an action on the caſe for ſlanderous words ſpoken of his wife, *viz. that ſhe was a whore*, per quod *ſhe loſt ſuch and ſuch cuſtomers;* after verdict for the plaintiff, and damages under 40*s*. the court held, that the plaintiff ſhould have full coſts, for it is not the words, but the ſpecial damage which is the cauſe of action in this caſe; and it was incumbent on the plaintiff to prove the ſpecial damage, otherwiſe the action would not have lain for the words.

2 Barnard, K. B. 79. 84. 113. 2 Kel. 71. pl. 30. S. P.

Turner v. Horton, Barnes, 132. Surman v. Shelleto, 3 Burr. 1688. Collier v. Gaillard, 2 Bl. Rep. 1062.

[It is indeed now ſettled, beyond controverſy, that where the words are actionable in themſelves, without the ſpecial damage, the plaintiff can have no more coſts than damages, where the latter are under 40*s*. But where the words are not actionable in themſelves, but the action is maintainable only with reſpect to the ſpecial damage, then it is a caſe at large, and without the ſtatute; and, *if any* damages are recovered, the plaintiff will be entitled to full coſts.

Littlewood v. Smith, 1 Ld. Raym. 181. But if in an action for ſlander commenced originally in an inferior court, and afterwards removed into one of the courts at Weſtminſter, the plaintiff recover under 40*s*., he ſhall have no more coſts than damages. Anon. C. B. T. 12 Ann. 2 Com. Dig. 546. *Vide* Latch 2. 58.

It hath been holden, that this ſtatute of 21 *Ja.* 1. *c.* 16. notwithſtanding the comprehenſive words which the legiſlature hath uſed in it, doth not extend to courts baron, and other inferior courts; for as damages cannot be given in thoſe courts to the amount of 40*s*. it would be impoſſible to tax coſts *de incremento* in any action of ſlander beyond that ſum.

A plea

A plea of juſtification will not take the caſe out of this ſtatute. 2 Wilſ. 258. *per* Clive, J. Dovor v. Robinſon, Barnes, 128.

If upon a writ of inquiry, the damages be aſſeſſed under 40*s.* and the coſts be taxed above that ſum, and judgment be entered up accordingly, the judgment will be reverſed *in toto*. Lampen v. Hatch, 2 Str. 934.

In an action of *ſcandalum magnatum*, no coſts are recoverable, however large the damages may be.] 2 Show. 506.

3. Of Coſts in Actions of Aſſault and Battery.

By the 22 & 23 *Car.* 2. *cap.* 9. it is enacted, "That in actions "of aſſault and battery, wherein the judge at the trial ſhall not "find and certify, under his hand, upon the back of the record, "that an aſſault and battery was ſufficiently proved, if the jury "find damages under 40*s.* the plaintiff ſhall not recover more "coſts than damage."

On this part of the ſtatute it has been (*a*) holden, that if an aſſault be only proved, the plaintiff ſhall have no more coſts than damage. (*a*) 1 Vent. 256. 2 Lev. 102.

That if a man brings treſpaſs for beating his ſervant, *per quod ſervitium amiſit*, it is not an action of aſſault and battery within the ſtatute, but is an action founded upon the ſpecial damage, in which there ſhall be full coſts. Salk. 206. pl. 5. 5 Mod. 74. 7 Mod. 129. 2 Ld. Raym. 831.

[Neither is an action for criminal converſation with the plaintiff's wife within this ſtatute, for the criminal converſation is the giſt of the action, and not the aſſault.] Batchelor v. Bigg, 3 Wilſ. 319. 2 Bl. Rep. 854.

In treſpaſs of aſſault and battery, wounding and impriſonment, as alſo for entering and breaking his houſe, and opening the doors of the ſaid houſe, and breaking three locks and three bars belonging to the ſaid doors, the defendant pleaded not guilty to all except the impriſonment, and for that he juſtifies; and on the trial the juſtification was found for the defendant, and the not guilty for the plaintiff, and the damages 2*s.* 6*d.* and held by the court, that the damages being under 40*s.* he could not have full coſts for the battery, becauſe the judge had not certified the battery to be well proved; neither could he have full coſts for breaking the houſe, becauſe this is a treſpaſs relating to the freehold*. Mich. 10 Geo. 1. in C. B. Beck and Nicholls, Stra. 577. Gilb. Eq. Rep. 197. * But if defendant had not juſtified the impriſonment, and he had been found guilty of that, plaintiff would have been entitled to full coſts.

[Again, in an action of treſpaſs, the plaintiff declared for an aſſault and battery upon himſelf, and alſo for ſtriking his horſe, by which he was leſſened in value; the defendant pleaded not guilty, and there was a general verdict for the plaintiff with 20*s.* damages, but no certificate from the judge. The plaintiff moved for full coſts on account of the ſpecial matter ſtated relative to the horſe, which, on conſideration, were refuſed by the court. Clarke v. Othery, 1 Str. 624.

But where the declaration charged the defendant with *an aſſault, battery, and wounding, and with obſtructing the plaintiff in getting his coals, taking them away, treading and trampling upon them, breaking* Milburne v. Read, cited in 3 Wilſ. 322.

ing and ſpoiling the ſtandard and roller of the plaintiff, and taking away his goods and chattels, and a general verdict was found for the plaintiff upon the whole charge, except the taking away of the goods and chattels; it was holden, that he was entitled to full coſts, notwithſtanding the damages were under 40*s*., and the judge had not certified an aſſault and battery to have been proved: for there was a ſpoliation in this caſe diſtinctly ſtated, upon which the plaintiff might have brought his ſeparate action, and have recovered full coſts without a certificate.

Hampſon v. Adſhead, Say. Rep. 91. Bull. *Ni. Pri.* 329. Cotterill v. Tolly, 1 Term Rep. 655.

It hath been reſolved, that there ſhall be no more coſts than damages, (ſhould the latter be under 40*s*.,) without a certificate, in an action for aſſault and battery, and *for tearing or injuring the plaintiff's clothes*, if the *tearing* or other injury be *charged in the declaration*, or *found by the jury* to have been *in conſequence* of the beating.

Carruthers v. Lamb, Barnes, 120. Cotterill v. Tolly, 1 Term Rep. 655. (*a*) Mears v. Greenaway, 1 H. Bl. 291. Atkinſon v. Jackſon, *id.* 295. Lockwood v. Stannard, 5 Term Rep. 482.

But it ſeems to have been once thought, that where in ſuch an action *the tearing or damaging of the clothes* is laid in the declaration *as a diſtinct and ſubſtantive fact*, and not *as a conſequence of the beating*, even though ſuch charge ſhould be contained in the ſame count with the injury to the plaintiff's perſon, a certificate is not neceſſary to entitle the plaintiff to full coſts. However, it is now ſettled (*a*) that if the *tearing* of the clothes appear to have been at the ſame time with the injury to the perſon, the court will conſider it as part of the ſame tranſaction, and allow the plaintiff no more coſts than damages, notwithſtanding the declaration may not allege the former injury as conſequential to the latter.

Richards v. Turner, Bull. *Ni. Pri.* 330.

Where the defendant pleads a juſtification to the aſſault and battery, as *ſon aſſault demeſne*, there is no need of a certificate to entitle the plaintiff to full coſts, for the juſtification is an admiſſion of the battery, and is tantamount to a certificate of its having been proved. But if the defendant juſtify, and the plaintiff make a new aſſignment, to which the general iſſue is pleaded, he will have no more coſts than damages without a certificate. Neither will he, if the defendant juſtify the aſſault only.]

Page v. Creed, 3 Term Rep. 391.

(C) Where the Coſts ſhall be doubled or trebled.

10 Co. 116. a. 2 Inſt. 289. Hard. 152. Carth. 297. [1 Ld. Raym. 20. Gilb. Hiſt. C. P. 267. Cowp. 365.]

IT ſeems agreed that where damages were before recoverable and a ſtatute increaſes them to double or treble the value, the plaintiff ſhall recover his double or treble damages; and coſts alſo, as parcel of the damages, ſhall be trebled.

Vide ubi ſupr. (*b*) As upon the ſtatute 2 E. 6. c. 13., for not ſetting

But where a new ſtatute gives either ſingle, double, or treble damages, where there were no damages recoverable before, (*b*) there no coſts ſhall be allowed, becauſe the party can have nothing more than ſuch new ſtatute has already given, and that is damages only; for the ſtatute of *Glouceſter* cannot operate to add coſts to

what is given by a subsequent statute, because the new statute must be construed from itself, which gives damages only. out tithes, &c. 2 Inst. 651. Cro. Jac. 70. Cro. Car. 560. Hard. 152. but now *vide* the 8 and 9 W. 3. c. 11.

(*a*) In an (*b*) action for a forcible entry upon 8 *H.* 6. *cap.* 9. which gives treble damages, the plaintiff shall recover not only treble damages but (*c*) treble costs also. (*a*) 2 Inst. 289. 10 Co. 116. 1 Vent. 22. S. P. adjudged. (*b*) So, in an assise upon the statute for a disseisin with force. 10 Co. 116. b. (*c*) And the costs *de incremento*, as well as those given by the jury, shall be trebled. Cro. Eliz. 582. Leon. 282. 2 Leon. 52. Co. Lit. 257. 2 Stra. 1044.

But in an action of debt upon the statute of 1 & 2 *Ph.* & *M.* *cap.* 12. of distresses, upon the branch of the statute by which the 5 *l.* and triple damages are given to the party grieved, for driving a distress out of the hundred, no costs are to be given, because the statute, by intendment, gives triple damages in lieu of the whole. 2 Inst. 289. Kelw. 209. N. Bendl. 80. S. C. Roll. Abr. 516.

So, in an action of waste against tenant for life or years, by the statute of *Gloucester*, *cap.* 6., the place wasted, and treble damages shall be recovered, (*d*) but no costs, because no action lay against them at the common law; but the action and damages are merely given. 2 Inst. 289. Kelw. 26. a. Godb. 210. S. P. adjudged. (*d*) But now *vide supra* 8 and 9 W. 3. c. 11.

But in waste against tenant in dower, &c. treble damages and costs also shall be recovered, because (*e*) an action of waste lay against them at the common law; and for the waste, damages should have been recovered. 2 Inst. 289. (*e*) A prohibition of waste only, in which no damages were recoverable, but only for waste, after the prohibition delivered. 10 Co. 116. a.

In an action upon the statute of 2 *H.* 4. *cap.* 1. for suing before the admiral for a thing done upon the land, in which case the statute gives to the plaintiff double damages, without speaking of any costs, he shall recover as well double costs as double damages. Roll. Abr. 517. Dyer, 159. 10 Co. 116. [Sands v. Child, 3 Lev. 355. Smith v. Dunce, 2 Str. 1048.]

So, on the statute 2 *W.* & *M.* *cap.* 5. by which treble damages and costs are given against the rescouser of a distress for rent, in an action upon the case for a rescous upon the statute, the plaintiff shall recover treble costs as well as treble damages; for the damages are not given by the statute, but increased, and an action upon the case lay for a rescous at common law. Lawson v. Storie, Salk. 205. pl. 2. Skin. 555. pl. 4. Carth. 321. 1 Ld. Raym. 19.

[The 28th *sect.* of 25 *Geo.* 3. *c.* 50., respecting duties upon game-certificates, directs, "that if any person shall at any time "be sued, molested, or prosecuted, for any thing by him done or "executed in pursuance of that act, or of any clause, matter, or "thing therein contained, such person may plead the general issue, "&c. and if the plaintiff be nonsuited, or the defendant obtain a "verdict, such defendant shall be awarded his treble costs." This clause, it hath been determined, only extends to give treble costs to those persons, who are sued for something done in the execution of the act, not to those who are sued for penalties under it: and therefore, a person prosecuted under the act for shooting without Smith v. Wallis, 1 Term Rep. 252.

without a certificate, is not entitled to treble coſts upon obtaining a verdict.

Rex v. Poland, 1 Str. 49. Where treble coſts are to be recovered againſt a proſecutor for matter not appearing upon the *poſtea*, the court will, upon motion, allow a ſuggeſtion of the ſpecial matter to be made on the record.

Sands v. Child, 3 Lev. 355. Lawſon v. Story, Carth. 321. Where a perſon is entitled to double or treble coſts, not only thoſe aſſeſſed by the jury, but alſo thoſe adjudged *de incremento* by the court, ſhall be doubled or trebled.

Smith v. Dunce, 2 Str. 1048. 2 Tidd's Pr. 674, 5. But double or treble coſts are not to be underſtood to mean, according to their literal import, twice or thrice the amount of ſingle coſts. Where a ſtatute gives double coſts, they are calculated thus: 1. The common coſts, and then half the common coſts. 2. If treble coſts, 1. the common coſts; 2. half of theſe; and then half of the latter.]

(D) Of awarding the Defendant his Coſts.

BY the 23 *H.* 8. *cap.* 15. it is enacted, "That in any ſuit in "a court of record, or elſewhere, in any action, bill, or "plaint of treſpaſs, upon 5 *Rich.* 2. debt or covenant, upon any "ſpecialty or contract, detinue, account, charging as bailiff or "receiver, caſe, or (*a*) upon any ſtatute for any offence or "wrong (*b*) perſonal, immediately done to the plaintiff, if the "(*c*) plaintiff (*d*) after appearance of the defendant be (*e*) non-"ſuited, or (*f*) any (*g*) verdict (*h*) paſs by lawful trial againſt the "plaintiff, the defendant (*i*) ſhall have judgment to recover his "coſts, to be taxed by the judge of the court, and the defend-"ant ſhall have ſuch proceſs and execution for the ſame, as "the plaintiff ſhould have had, in caſe the judgment had been "for him."

(*a*) Extends not to an action for an eſcape; for though within the equity of *Weſtm.* 2., that gives it againſt the warden of the *Fleet*, yet it is not properly an action upon the ſtatute, becauſe no mention is made of the ſtatute in the declaration; and this was no perſonal wrong. 2 Leon. 9, 10. 4 Leon. 182. but *qu.*——Nor to an action upon 8 H. 6. c. 9 for a forcible entry, for that was no perſonal wrong; and the writ ſays *quod diſſeiſivit.* 2 Leon. 9, 10. 4 Leon. 182.——So, it extends not to an action upon 1 and 2 P. and M. c. 12. for unlawfully impounding a diſtreſs. 2 Leon. 52. 3 Leon. 92. And the rather, becauſe this action is grounded upon a ſubſequent ſtatute.——Nor to an action upon 5 Eliz. c. 9. for perjury. Hut. 22. Brownl. 66. Cro. Eliz. 177.——So, it extends not to an action upon 2 E. 6. c. 13. for not ſetting forth tithes, becauſe a mere non-feaſance, and no perſonal wrong. 2 Inſt. 651. Noy 32. (*b*) It extends not to an aſſiſe. Brownl. 28, 29. (*c*) Otherwiſe, if he is an infant, for commencing his ſuit by guardian, there can be no malice ſuppoſed in him. Cro. Eliz. 33. & *vide* Bulſt. 189.——Nor to perſons who ſue *in auter droit*; for which *vide infra*, concerning executors and adminiſtrators. (*d*) For this *vide* 2 Lev. 81, 82. (*e*) *Secùs*, if the original be diſcontinued. Leon. 105. Hut. 36. Cro. Car. 575.——The plaintiff the day before the trial came into court, and entered a *nolle proſequi*, and whether the defendant ſhould have coſts, Hard. 152. *dubitatur.* (*f*) Though ſpecial. Cro. Eliz. 465. Hard. 152. (*g*) In covenant againſt two for not building, judgment is given againſt one by default, and the other pleads performance, and it is found for him, the plaintiff can have no judgment, but the defendant ſhall have his coſts. Lev. 63. (*h*) Not upon demurrer that goes to the writ only; *ſecùs*, if to the action. And. 117. *vide* Hard. 152. Cro. Car. 533. March 30. and 8 & 9 W. c. 10. by which it is now certainly given. (*i*) Though judgment is not given upon the nonſuit, but upon the inſufficiency of the pleading. Moor 625. pl. 857. Winch 69. 3 Bulſt. 248. Godb. 220. & *vide* Dyer 32. Cro. Jac. 159.

[By

[By the 24 *H.* 8. *c.* 8. plaintiffs, suing to the use of the king in any action whatsoever, are exempted from the payment of costs, where they are nonsuited, or a verdict passeth against them.]

Also, by the statute of 4 *Jac.* 1. *cap.* 3. it is enacted, "That "if any (*a*) person, after the end of that session of parliament, "should commence or sue in any court, any action, bill, or "plaint of trespass, ejectment, or other action, (*b*) wherein "the plaintiff or demandant (*c*) might have costs, and after ap- "pearance of the defendant becomes nonsuit, or any verdict "passes by lawful trial against him, the defendant shall have "judgment to recover his costs, to be assessed and levied as costs, "by 23 *H.* 8."

(*a*) That it extends not to executors, *vide infra.*

(*b*) Not in an attaint, where the first verdict is affirmed, because if the jurors had been attainted, the plaintiff should have had such costs only as in the first action, if found for him, but not more in respect of the attaint. Daly and Bellamy, Cro. Car. 542. March 24. Jones 432. adjudged. [Nor shall the defendant have costs where there is a plea in abatement, which the plaintiff admits to be true, and enters a *nil capiat per breve.* Greenhill v. Shepherd, 12 Mod. 145. Allen v. Maxey, Barnes 120. Pocklington v. Peck, 1 Str. 638. But *qu.* where there is a motion to quash the writ before plea pleaded? Huer v. Whitebread, Cas. Pr. C. P. 74. Pr. Reg. 78. Poole v. Broadfield, Barnes 431. If issue be taken on a plea in abatement, and the plaintiff be afterwards nonsuited, the defendant is entitled to costs; for if the issue had been found for the plaintiff, it would have been peremptory, and he would have had costs. Asplin v. Constable, 1 Ca. Pr. C. P. 35.]

(*c*) Though the declaration is insufficient, yet the defendant shall have costs. 2 Roll. Rep. 113. Palm. 147. & *vide* Godb. 329. 345. Hob. 219. Hut. 16. Palm. 365. 3 Lev. 322. Style 153. —— Though the *nisi prius* roll varied from the plea-roll, so as the nonsuit was immaterial. Raym. 38. [If the defendant remove proceedings from a county-court by *recordari facias loquelam* into one of the superior courts, and sign judgment of *non-pros* for the non-appearance of the plaintiff, he shall have costs. Davies v. James, 1 Term Rep. 371. It was moved on the statute for setting off mutual debts, that no costs should be allowed the defendant, because he had not obtained a verdict, there being only an indorsement that 13*l.* was due to the plaintiff for rent, and that on balancing the account, there appeared due to the defendant 13*s.*; but the court declared, that the indorsement was equally a verdict to entitle the defendant to his costs, as a verdict in other cases. Geale v. Chapman, Ca. Pr. C. P. 65. It seems, that the defendant should be allowed all such costs upon a nonsuit, as have been incurred in taking the necessary measures for his defence in the action. Rex v. Midlam, 3 Burr. 1720. Davila v. Herring, 1 Str. 300.]

By the 8 & 9 *W.* 3. *cap.* 11. "In trespass, assault, false impri- "sonment, or ejectment against several, if any one or more are "acquitted by verdict, every person so acquitted shall recover his "costs, as if a verdict had been given against the plaintiff, un- "less the judge shall immediately after trial, in open court, cer- "tify upon record, that there was a reasonable cause for making "such person defendant."

[This act does not extend to *trespass upon the case for a tort.* Dibben v. Cooke, 2 Str. 1005. trover, Poole v. Boulton, Barnes 139. replevin. Ingle v. Wordsworth, 3 Burr. 1284. 1 Bl. Rep. 355. or an information. Reg v. Danvers, 1 Salk. 194. for torts are joint and several, so that one defendant may be acquitted, and the other found guilty. *Secùs*, as to actions upon contracts, for contracts are joint, and one of two defendants cannot have a verdict without a demonstration that there was no cause of a joint action against both; therefore, where one of two defendants in an action of *assumpsit* had suffered judgment by default, and the other obtained a verdict, the latter, it was holden, was entitled to costs. Shrubb v. Barrett, 2 H. Bl. 28. —— Where the costs payable to one defendant shall be deducted out of those payable by the others, see Schoole v. Noble, 1 H. Bl. 23. Mordecai v. Nutting, Barnes, 145.]

And by the same act, "In all actions of waste, debt upon "the statute for not setting forth of tithes, where the single value "or damages found by the jury exceeds not twenty nobles; and "in a *scire facias*, and suits upon prohibitions, the plaintiff "shall recover his costs; and if the plaintiff be nonsuit or dis- "continue, or a verdict pass against him, the *defendant shall* re- "cover his costs."

(E) What Persons are entitled to, or exempted from paying Costs: And herein,

1. Of Executors and Administrators.

Vide tit. *Executors*, 446.

(a) 31 H. 6. 13. Bro. Exec. 164. Plowd. 183.

(a) AN executor defendant pays costs in all cases, and the judgment is *de bonis testatoris si, &c. & si non tunc de bonis propriis:* also, (b) when he is defendant, and there is judgment for him, he shall have his costs.

[Yet it is said to have been determined in a late case, by the court of Common Pleas, that no costs shall be allowed on a judgment of assets *in future*, on a plea of *plene administravit*. Imp. Pr. C. P. 2 Ed. 374. Imp. Pr. K. B. 3 Ed. 275. Marg. If a bankrupt executor plead a false plea in an action commenced against him, between the issuing of the commission, and the obtaining of his certificate, by a creditor of his testator, he is liable to be taken in execution for the costs. Howard v. Jemmet, 3 Burr. 1368. 1 Bl. Rep. 400. Where an executor pleads *non assumpsit*, and a specialty debt sufficient to cover the assets, the court will permit him to withdraw the former plea, upon payment of the costs occasioned by that plea only. Dearne v. Grimp, 2 Bl. Rep. 1275.] (b) Cro. Eliz. 503. Hut. 69. 79.

N. Bendl. 19. pl. 28. Cro. Eliz. 69. 503. Winch. 10. 70. Savil, 133. Cro. Jac. 361. Roll. Rep. 63. Cro. Car. 289. Kelw. 207. Hut. 69. 79. Cro. Jac. 229.

But an executor or administrator is not within the 23 *H.* 8. *cap.* 15. or 4 *Jac.* 1. *cap.* 3. which give costs to the defendant after a verdict or nonsuit; nor within the 8 & 9 *W. & M. cap.* 11. which give costs upon a demurrer, being made upon the same platform; so that when they are plaintiffs they pay no costs, for they sue *in auter droit*, and are but trustees for the creditors, and are not presumed to be sufficiently conusant in the personal contracts of those they represent; and this by an equitable construction of the statutes, for there are no express words to exempt them.

Yelv. 168. Brownl. 107. 6 Mod. 93.

11 Mod. 135. pl. 17. 174. pl. 18. See Salk. 314. pl. 21.

But (c) if executors or administrators bring an action in their own right, as for a (d) conversion or trespass in their own time, they shall pay costs.

(c) 2 H. 7. 15. Sav. 134. Hut. 79. Although they name themselves executors, for it is but surplusage. Dalf. 96. Latch. 220. 1 Vent. 92.——But *vide* Mason and Jackson, 3 Lev. 60. adjudged *cont. per totam curiam*; because in the right of the testator, though a thing done in their own time.——So, in a ravishment of ward brought by executors, for a ravishment in their time. Peacock and Steer. Cro. Car. 29. By three judges *cont.* Yelv. But Hut. 78. S. C. by two judges against two; and in 6 Mod. 94. S. C. cited *per* Holt, and the reason of the resolution was, because the ward never came to the defendant's possession. (d) Where the trover is in the life-time of the testator, and the conversion in the time of the executor, he shall not pay costs. 6 Mod. 92.

Salk. 207. pl. 6. Jenkins & *Ux.* v. Plume. 6 Mod. 92. 181. S. C. adjudged.

So, in an *indebitatus assumpsit* by husband and wife, who declared, that the defendant was indebted to them in 20*l.* as executors of the last will and testament of *J. S.* for money had and received to their use as executors, which he promised to pay, *&c.* on the trial the plaintiffs were nonsuited; and it was held, that the plaintiffs should pay costs, for the cause of action arose in their time; for the receipt being since the death of the testator, if it was by the consent of the executor it is the receipt of the executor; or if without his consent, yet the bringing of the action is a consent, and the naming themselves executors is only to deduce their right, and set it forth *ab origine*.

But

But if an executor brings an *indebitatus* upon an account made in his time, it is in the right of his executorſhip, and he (*a*) ſhall pay no coſts. 2 Lev. 165. 2 Jones, 47 adjudged, 4 Term Rep. 280.

(*a*) If he brings an *inſimul computaſſet*, and is nonſuited, he ſhall pay no coſts; becauſe there was no new cauſe of action, but a new action upon aſcertaining an antient right, notwithſtanding which, it ſtill remains the teſtator's debt. Eaves v. Mocato, 6 Mod. 93. Said to have been adjudged, 2 Ann. Salk. 207. pl. 6. 314. pl. 21. [This caſe of Eaves v. Mocato is denied to be law in Andr. 359. and 5 Term Rep. 234. In the caſe of Goldthwayte v. Petrie, reported in this laſt book, the action was by huſband and wife, as executrix for money had and received after the teſtator's death to the uſe of the wife, as executrix, and there being a verdict for the defendant, the court held him entitled to coſts.]

So, if the goods of the teſtator be taken and converted before they come to the hands of the executor, he ſhall not pay coſts upon a nonſuit in an action brought for theſe, for they were never aſſets. Salk. 208. *per* Holt, C. J.

So, where an action was brought by an adminiſtratrix for money lent by the inteſtate, the defendant pleaded payment to the plaintiff after the death of the inteſtate, and iſſue joined upon it, and verdict for the defendant; it was inſiſted upon, that the defendant ſhould have coſts upon 4 *Jac.* 1. *c.* 3. this being a falſity in her own conuſance; but it was denied, the action being as adminiſtratrix; ſo that upon bringing the action, that which is pleaded to be in her own conuſance does not appear. Paſch. 27 Car. 2. in B. R. Anne Taylor v. Barebone.

If an adminiſtrator brings an action on the caſe in *C. B.* and there is a verdict and judgment againſt him, and thereupon he brings a writ of error in *B. R.* where the judgment is affirmed; yet he ſhall not pay coſts, for he is not a perſon within the intent of the ſtatute which gives coſts in this caſe, although it was objected, that it was his own act, and lay in his own knowledge, and was brought *in dilatione executionis*. Carth. 281. Gale and Till. 4 Mod. 244. and 3 Lev. 375. S. C.

[The queſtion, in what caſes a perſon ſuing as executor or adminiſtrator, ſhall be exempt from coſts, is embaraſſed with a variety of deciſions ſo contradictory, that it is impoſſible to reconcile them: its ſolution, however, ſeems now to turn upon this diſtinction, namely, whether it be neceſſary, or not, for him to ſue in his repreſentative character: if it be neceſſary, he ſhall not be liable to the payment of coſts: if it be not neceſſary, he ſtands preciſely in the ſituation of any other plaintiff, without any claim to exemption from the character he has aſſumed. Cockerill and Wife Executrix v. Kynaſton, 4 Term Rep. 277. Goldthwayte and Wife Executrix v. Petrie, 5 Term Rep. 234.

Although an executor proceed to trial, after the payment of money into court, and recover a verdict for a leſs ſum, yet he is not liable to pay any coſts. Knight v. Ducheſs Hamilton, Bunb. 44.

It was formerly holden, that money could not be paid into court in an action by an executor or adminiſtrator, becauſe the executor or adminiſtrator is not liable to coſts. But it is now ſettled (*b*) that money may be paid into court in ſuch caſe, for the effect of it is not to make the executor *pay*, but only *loſe* his ſubſequent coſts. Gregg's caſe, 2 Salk. 596. Bryan v. Holloway, Barnes, 279.

(*b*) Crutchfield v. Scott, 2 Str. 796.

Where the plaintiff is executor or adminiſtrator, he is not liable to coſts under 5 *Geo.* 2. *c.* 30. § 7. though the defendant plead the general plea of bankruptcy, and obtain a verdict. Martin v. Norfolk, 1 H. Bl. 528.

Neither does he pay coſts under the 14 *Geo.* 2. *c.* 17. upon a judgment againſt him, as in the caſe of a nonſuit, for not proceeding Howard v. Radburn, Barnes, 130.

Per Cur. acc. 4 Burr. 1928.

ceeding to trial according to the course of the court in which the cause is instituted.

7 Mod. 98. 118. 1 Salk. 314. 2 Ld. Raym. 806. 1 Str. 33.

But an executor or administrator shall pay costs for not proceeding to trial pursuant to his notice, if it be through his own default.

3 Burr. 1305. 1585. Ogle v. Moffat, Barnes 133.

Nunez v. Modigliani, 1 H. Bl. 217.

So, he hath been made to pay costs for withdrawing his record before trial.

Hullock on Costs, 193. Eccleston v. Clipsam, 2 Keb. 385. Baynham v. Matthews, 2 Str. 871. Fitzg. 130. Bird v. Smith, 2 Kel. 70.

It does not appear to be established, whether or not an executor or administrator is liable to pay costs upon discontinuing his suit; but though no general rule can be extracted from the cases upon this subject, which are contradictory, yet upon principle and the reasoning of the court in the cases referred to in the margin, it seems, that where the necessity of discontinuing is occasioned by the laches or default of the executor himself, the condition of paying costs will, generally, be annexed to the rule to discontinue.

2 Barnard. 154. Haydon v. Norton, Cas. Pr. C. P. 79. Harris v. Jones, 3 Burr. 1451. 1 Bl. Rep. 451. Bull. Ni. Pri. 332. Bennet v. Coker, 4 Burr. 1927. Say. on costs, 96. Hugh v. Lloyd, Bart. Pr. Exchcq. 156.

Lumley v. Nicholls, Cas. Pr. C. P. 14.

An executor shall pay costs upon being nonprossed for want of a replication, or for not declaring in due time, because guilty of a default.]

Hawes v. Saunders, 3 Burr. 1584.

2. Of Officers and Ministers of Justice.

This act extends to other actions against overseers besides trespass. Okely v. Salter, Yelv. 176.

[By 43 *El. c.* 2. § 19. (entitled *an act for the relief of the poor,*) if in any action of trespass or other suit to be brought against any person for making any distress or sale, or doing any other thing under the authority of that act, there shall be a verdict for the defendant, or a nonsuit of the plaintiff after appearance, the defendant shall recover treble damages with his costs also, and that to be assessed by the same jury, or writ to inquire of the damages, as the same shall require.]

But the costs shall not be trebled, only the damages. Noy, 137. S. C. If the jury who try the issue assess only single damages, or if they omit to assess any damages at all, the court will, on a verdict for the defendant, or nonsuit for the plaintiff, supply the omission by awarding a writ of inquiry of damages. As a ground, however, for this, a suggestion must be entered on the *postea* that the defendant was an overseer of the poor, &c., and that the injury complained of was an act done in the execution of his office. Such a suggestion indeed is not necessary, where the defendant's title to treble damages appears on the record; as, where in replevin, he avows as overseer of the poor, &c. Carth. 362. 1 Salk. 205. 5 Mod. 76. 118. Skin. 595. 1 Ld. Raym. 59. 2 Str. 1021. Ca. temp. Hardw. 138. Say. Rep. 214. 2 Bl. Rep. 921. 3 Wils. 442.]

[See further with respect to justices of the peace and constables, 24 G. 2. c. 44., and with respect to officers of the excise or customs,

By the statute 7 *Jac.* 1. *cap.* 5. it is enacted, "That if any "action upon the case, trespass, battery, or false imprisonment, "shall be brought in the courts of *Westminster*, or elsewhere, "against any justice of peace, mayor, bailiff of city or town corporate, headborough, portreeve, mayor, bailiff, (*a*) constable, "tithing-men, collectors of fifteenths and subsidies, concerning "any thing by them done by virtue of their office, they, and all "others, doing any thing in their assistance, or by their com-

"mand

" mand concerning their office, may plead the general issue, &c. " and (*b*) if the verdict shall pass with the defendant in any " (*c*) such action, or the plaintiff become nonsuit, or suffer a dis- " continuance, the justices, or (*d*) such judge before whom the " matter shall be tried, shall allow the (*e*) defendant his double " costs." 20 Geo. 3. c. 70. § 34. and 24 G. 3. Sess. 2. c. 47. § 35.]

(*a*) Extends to a deputy constable. 3 Bulst. 77. Roll. Rep. 274. Moor 845. (*b*) Though judgment is after given upon the insufficiency of the declaration. Helyer's case, Cro. Car. 175. [Willet v. Tidey, Carth. 188. 1 Show. 214. 12 Mod. 6. S. C.] (*c*) But this extends not to an action upon the case against a constable, for presenting that the plaintiff was an inhabitant of *A.*, by reason of which he was compelled to pay, &c. unjustly, because no trespass or false imprisonment, wherein liberty is given to plead not guilty. Cro. Car. 467.——Nor to an action by a freeman against a Mayor, for refusing his vote in the election of a mayor, because a non-feasance. 2 Lev. 251. And said *per curiam*, that the intent of the statute was to give double costs in false imprisonment, &c. where it enabled to plead the general issue. (*d*) They cannot be allowed, unless the judge of assise marks the *postea*. 2 Vent. 45. 2 Lev. 251. Winch 16. [Grindley v. Holloway, Dougl. 307. They may upon a special verdict, where it appears by the facts found, that the defendant was acting by virtue of his office. Rann v. Pickens, B. R. M. 23 Geo 3. Dougl. 308. n. If the plaintiff discontinue, the court will, upon an affidavit, that the act for which the defendant was sued, was done by virtue of his office, make a rule upon the master for the taxation of double costs. Devenish v. Mertins, 2 Str. 974. If judgment goes by default, the defendant may enter a suggestion on the roll. Ca. temp. Hardw. 138-9.] (*e*) All the defendants. Vaugh. 117.

By the statute 21 *Jac.* 1. *cap.* 12. § 3. the above statute is made perpetual, and it is thereby further enacted, " That church- " wardens, and all persons called sworn men, executing the office " of churchwardens, overseers of the poor, and others, which " shall do (*f*) any thing by their assistance or command, con- " cerning their office, shall have benefit of 7 *Jac.*"

(*f*) Not where an action is brought against churchwardens, for falsely and maliciously presenting the plaintiff for incontinency; because merely ecclesiastical, and the statute is intended only where troubled concerning temporal matters. Cro. Car. 286. Jones 305.

[In cases, under these acts, where it doth not appear on the face of the record, that the defendant is entitled to double or treble costs, (as, where he pleads the general issue,) and there is no particular mode appointed for the recovery of the costs, the proper mode, after a nonsuit or verdict for the defendant, is to apply to the court upon an affidavit of the facts, for leave to enter a suggestion on the roll. 1 Str. 49. Ca. temp. Hardw. 125. *Id.* 138. 2 Str. 1021. Say. Rep. 214. 3 Wilf. 442.

Where the defendant is entitled to double costs under these acts, the costs *de incremento*, as well as those assessed by the jury, shall be doubled.] Skin. 556.

3. Of Costs for and against Informers, and where the Prosecution may be said to be carried on at the Suit of the King.

It seems agreed, that a common informer, upon a popular statute, can in no case recover costs, unless they be expresly given by such statute; for it is certain, that he cannot recover them at common law, for that doth not give costs in any case; neither can he recover them by force of the statute of *Gloucester*, which gives the plaintiff his costs only in cases in which he shall recover his damages. 2 Keb. 781. Roll. Abr. 544. Lutw. 200. Vent. 133. Salk. 206. pl. 4. Moor, 65. 3 Lev. 374. 2 Inst. 288.

[But on a *bonâ fide* composition of a penal action by leave of the court, the plaintiff may be allowed a reasonable sum for his costs. And, on motion, the defendant may pay the penalty into court with costs. Wood *qui tam* v. Johnson, 2 Bl. Rep. 1157. Walker v. King, Bull. Ni. Pri. 197.]

Jones, 447. Cro. Car. 559. 2 Inst. 289. Roll. Abr. 516, 517. 574. March, 56. 1 H. Bl. 13.

But in an action on a statute by the party grieved, for a certain penalty given by such statute, the plaintiff within the statute of *Gloucester* shall recover costs, because such penalty is intended him by way of recompence for his particular damage by the offence prohibited; and if he could recover that only, and no more, it would be in most cases in vain for him to sue for it, since the costs of suit would exceed it.

3 Lev. 374. 3 Keb. 781. Lutw. 200. Carth. 230, 231. The Corporation of Plymouth v. Collings, adjudged. And the like point said to

So, in debt for a penalty of 20 *l.* brought by a corporation *qui tam*, *&c.* upon a private act of parliament concerning the *New River Water* brought to *Plymouth*, where the action was brought for diverting the water-course, contrary to the statute; after verdict for the plaintiffs it was holden, that though this was on a new and penal law, yet being brought by the parties injured, and for a certain penalty, they should have their costs; otherwise, where the action is brought by a common informer.

have been adjudged Mich. 5 W. 3. between the corporation of Cutlers and Buslin. 12 Mod. 46. Comb 224. Skin. 363. pl. 6. 367. pl. 14. Holt. 172.

Roll. Abr. 574. Lutw. 200. 10 Co. 116. Cro. Car. 560. Salk. 206. pl. 4.

But no costs shall be recovered in an action on a statute, which gives no certain penalty to the party grieved, but only his damages in general, *&c.* if such a statute be introductive of a new law, and give a remedy in a point not remediable at the common law; but there is not that inconvenience in this case as in the former, because no certain sum being specified, the jury may give the plaintiff full satisfaction by way of damages.

As to costs against *informers*, by the 24 *H.* 8. *cap.* 8. it is enacted, "That the defendant shall recover no costs on nonsuit or "verdict, when the plaintiff sues to the king's use."

[This statute extends to all actions by common informers, whether such actions may be grounded on statutes made prior, or subsequent, to it. Law q. t. v. Worrall, 1 Wilf. 177.]

But by the 18 *Eliz. cap.* 5. which is made perpetual by 27 *Eliz. cap.* 10. it is enacted, "That if any informer or plaintiff, on a "penal statute, shall willingly delay his suit, or shall discontinue, or be nonsuit in the same, or shall have the trial or matter passed against him therein by verdict or judgment of law; "that then in every such case, the same informer or plaintiff shall "yield, satisfy, and pay unto the party defendant, his costs, "charges, and damages, to be assigned by the court, in which "the same suit shall be attempted, *&c.*"

And. 116. Sav. 50, 51. Cro. Eliz. 177. 2 Leon. 116. Salk. 30. 2 Salk. 543. pl. 1. Ld. Raym. 27.

In the construction of this statute it hath been holden, that it extends only to common informers, who are to have the whole benefit of the penalty, and not where the penalty is given to the party grieved, or where part is given to the king, and part to him who will sue for it (*a*).

[(*a*) But prosecutors *qui tam* are looked upon as common informers; and shall pay costs. Salk. 30. Cowp. 366. And where the defendant obtains a verdict in a *qui tam* information, he shall have costs, although he himself removed the information from the sessions into the court of King's Bench. *Qui tam* by the Town of Dover v. Hodgson, 1 Wilf. 139.]

Sid. 311. 2 Keb. 106. 581. [Garland q. t. v. Burton,

Also, it hath been holden, that where judgment is given against an informer, because the court in which he sues has no jurisdiction of the cause, or because the statute on which he grounds his information is discontinued, yet he shall pay costs within the intent

tent of the statute, which shall have a liberal construction, and was intended to prevent all vexatious informations. 2 Str. 1103. *Vide* Hut. 35, 36.

[And it is said, that the entry of a *noli prosequi* by the plaintiff, in a popular action, comes within this statute. 2 Cr. Pr. 469. n.]

By the 18 *Eliz.* there is a *proviso*, that it shall not extend to any officers that have used to exhibit informations, *&c.* [But this must appear upon the record, else they will be taken as common informers, and affidavits to the contrary will not be admitted. 2 Ld. Raym. 1333. Bull. Ni. Pri. 334. 4 Ed.]

4. Of Paupers.

[A pauper, in the eye of the law, is one who will swear that he is not worth 5 *l.* (*a*) after all his debts are paid, exclusive of his wearing apparel, and the subject matter of the action. Such a person may, upon petition, and affidavit of his poverty, supported by a certificate of his cause of action, be admitted to sue *in formâ pauperis*; which admission may be either at the commencement of the suit, or afterwards *pendente lite* (*b*). And being so admitted, an attorney and counsel shall be assigned him; he shall be permitted to carry on the proceedings *gratis* without using stamps (*c*) or paying fees to the officers of the court, unless he obtain a verdict for more than 10 *l.*, and then the officers shall be paid their court fees, and for passing the record, *&c.* 3 Com. Dig. 388. Imp. Pr. K. B. 3 Ed. 496. Imp. Pr. C. P. 2 Ed. 566.

(*a*) 10 *l.* according to 1 Lill. Pr. Reg. 851. Tidd's Pr. 661. 3 Burr. 1388.

(*b*) Andr. 306. Ca. temp. Hardw. 254. 3 Wils. 24. But by order in the Exchequer 1717, the pauper, if admitted after the commencement of the suit, is to give security to pay the costs before admittance. 3 Com. Dig. 389.

(*c*) Stat. 5 W. & M. c. 21. § 14.—An admission to sue *in formâ pauperis* in the court of Chancery is not binding on the officers in the King's Bench; and therefore on an issue out of Chancery to be tried in B. R. there must be a new admission in the latter court. Ca. temp. Hardw. 311. Nor will an admission in one suit entitle a party to commence another suit *in formâ pauperis*. 1 Lill. Pr. Reg. 851.

This indulgence of suing *in formâ pauperis* was given by stat. 11 *H.* 7 .*c.* 12.; but as the enabling men to commence a litigation without expence, is tempting their resentments with too easy a gratification, it was found necessary to impose a restriction upon it in the following reign, and therefore,]

In the statute 23 *H.* 8. *cap.* 15. there is a provision, "That who-"ever sues *in formâ pauperis* shall not pay costs, but shall suffer "such other punishment as the judge of the court shall think fit."

But notwithstanding this statute, if he be (*d*) dispaupered, or (*e*) non-suited, the usual practice is to tax the costs, and for non-payment to order him to be (*f*) whipped.

(*d*) Roll. Rep. 88.

(*e*) 2 Salk. 506. pl. 1.

(*f*) But though the usual course in such case is to tax the costs, and if not paid, to whip the plaintiff; yet upon consideration of the circumstances of the case, it is in the discretion of the court to spare both. Sid. 261.——And *per* Holt Ch. Just. on motion to whip a pauper who had been nonsuited, there is no officer for that purpose, nor did I ever know it done. 2 Salk. 506. pl. 1.

[If the pauper do not proceed to trial according to notice, or otherwise misbehave himself, the court will order him to be dispaupered (*g*): but until this be done, they will not make any rule about the costs (*h*).

(*g*) Tidd's Pr. 6622. 2 Lill. Pr. Reg. 633. 2 Salk. 506. 2 Str. 1122.

(*h*) 2 Str. 878. 3 Wils. 24. Fitzg. 161.; but see Cas. Pr. C. B. 47. 1 Str. 420. semb. *contr.*

The court will not ſtay proceedings in a ſecond action, until the coſts are paid of a nonſuit in a prior action for the ſame cauſe (*a*): nor, if the pauper ſhould ſucceed in the ſecond action, will they deduct the coſts of the firſt, out of thoſe recovered in the ſecond.

(*a*) Anon. Fitzg. 161. So, if a perſon, after having failed in one action in which he ſued *in formâ pauperis*, commence a ſecond action for the ſame cauſe, but not as a pauper. Goodtitle v. Mayo, B. R. H. 29 G. 3. Hullock, 214. *Secùs*, if after a nonſuit in an action in which he did not ſue as a pauper, he commence a ſecond action for the ſame cauſe *in formâ pauperis*. Weſton v. Withers, 2 Term Rep. 511.

Ancell v. Slowman, 8 Mod. 344.

Where a plaintiff, at the time of a nonſuit, was a pauper, the deſcent of lands to him afterwards, ſhall not have relation back, ſo as to make him liable to the coſts of the nonſuit.]

Eq. Abr. 125. 3 Bl. Comm. 400. (*b*) But *vide* Preced. Chan. 219. Where a *pauper* having a decree to recover with coſts, it was held, on motion, *per curiam*, to be unreaſonable that any one ſhould have more coſts than he was out of pocket; and thereupon it was ordered that the plaintiff and his ſolicitor make oath before the maſter, and what they ſwore they had paid, or were to pay, was to be allowed, but no further.

A. brought a bill *in formâ pauperis*, to which the defendant put in plea, and demurrer, which were both over-ruled; and it was inſiſted upon that he ſhould have no coſts, being at none; but my Lord *Sommers*, after long debate, and inquiry of all the antient counſel and clerks, who agreed that he ſhould have coſts, ordered him his coſts (*b*) like other ſuitors; for though he is at no coſts, or but ſmall coſts, yet the counſel and clerks do not give their labour to the defendant, but to the *pauper*.

Hullock, 220. Anon. Barnes, 328. Ruled *acc.* in a late caſe by Gould, J. Imp. Pr. P. C. 2d ed. 567. 2 Keb. 378. Semb. *acc.* Sed. *vide* Comb. 77. 11 Mod. 84. Pr. Reg. C. P. 405. *contr.*

[A defendant in a civil (*c*) action cannot be admitted to defend *in formâ pauperis*; becauſe no perſon can be admitted either to ſue or defend as a pauper, but under ſome act of parliament; and the ſtatutes of 11 *H.* 7. and 23 *H.* 8. contain no proviſions on behalf of defendants, but merely enable plaintiffs to ſue in that form. And if the courts had a diſcretionary power, without the direction of a ſtatute to admit perſons in civil ſuits to proceed *in formâ pauperis*, they would in effect poſſeſs a power of diſpenſing, in many inſtances, with the operation of the ſtatutes relative to coſts.]

(*c*) But a perſon may be admitted to defend an indictment *in formâ pauperis*; becauſe the proſecutor not being entitled to coſts in criminal proceedings, he cannot be prejudiced by ſuch admiſſion, which is in effect nothing more than ordering the officers of the court to take no fees. Rex v. Wright, Ca. temp. Hardw. 211. 253. 2 Str. 1041. S. C. 6 Mod. 88. S. P. And by ſtat. 2 Geo. 2. c. 28. § 8. a perſon arreſted on *a capias*, or information relating to the cuſtoms, upon making affidavit before a judge, or commiſſioner appointed to take affidavits, that he is not worth 5*l.* excluſive of his wearing apparel, and upon petition to the court, may at the diſcretion of the court, be admitted to defend ſuch action or information *in formâ pauperis*, in like manner, and with the ſame privileges, as other poor ſubjects are permitted to ſue for the recovery of their rights.

(F) Of Coſts in Replevin.

Jones, 434.

IN replevin the plaintiff had damages at common law, and coſts by the ſtatute of *Glouceſter*, as a conſequence of ſuch damage, but the avowant or defendant in replevin had no coſts, although in many caſes where an avowry or conuſance was made, and a return prayed, the defendant was an actor.

(*d*) If defendant avows for 36*l.* for a

But now by 7 *H.* 8. *cap.* 4. "Every avowant and perſon that "makes conuſance, or juſtifies as bailiff in replevin, or ſecond "deliverance, for any rent, cuſtom, or ſervice, if (*d*) their avowry, "conuſance,

" conusance, or justification be found for them, or the (*a*) plain-
" tiffs otherwise barred, shall recover their damages and costs, as
" the plaintiff should have done if he had recovered."

year and a half's rent, and the plaintiff pleads payment of 12 *l.* and there is another issue for the 24 *l.* and the first issue is found for the plaintiff, and the second for the defendant, the plaintiff shall have no costs or damage; but the avowant shall have a return, damages and costs. Cro. Jac. 473. (*a*) Extends not to a nonsuit, Jones 423.

Also, by the 21 *H.* 8. *cap.* 19. by which the lord may avow, as in lands within his fee, without naming any tenant in certain, it is further enacted, " That (*b*) every avowant or other person (*c*)
" making justification or conusance, as bailiff or servant in replevin,
" or second deliverance, (*d*) for rents, customs, (*e*) services, (*f*) da-
" mage-feasant, or for other (*g*) rent or rents, if the avowry, conu-
" sance, or justification, be found for them, or the (*h*) plaintiff be
" nonsuit, or otherwise barred, they shall recover damages and
" costs, (*i*) as the plaintiff should have done."

(*b*) Extends to executors that avow; by 32 H. 8. c. 2. a subsequent statute. 2 Roll. Rep. 457. (*c*) Extends not to a defendant that claims property. Hard. 153. [Nor to pleas of *prisel en autre lieu*, upon which the writ is abated. Com. Rep. 122. 2 Ld. Raym. 788.] (*d*) The defendant avowed the taking as a stray within his manor; and whether he should have costs, Haslop and Chaplain, *dubitatur*; but judgment reversed for another cause. Cro. Eliz. 257. 329. Owen 13. but Jones 435. cited, and said, the judgment was reversed because damages and costs were given; and that this reason is entered upon the roll.——Not if an avowry for an amercement in a leet, &c. Porter v. Grey. Cro. Eliz. 300. Moor 893. Cro. Jac. 520. 2 Roll. Rep. 75. But releasing his damages, he had costs by 4 Jac. 1. & *vide* Jones 424. 435. But Cro. Eliz. 257. 329. It has been the constant practice since this act to give costs and damages. [See too stat. 8 & 9 W. 3. c. 11.]——Where the avowry was for a penalty upon breach of a bye-law. Cro. Jac. 497. 532. Jones 421. 435. March 29. (*e*) Where the avowry for relief *dubitatur*, because no service, but a flower thereof only, and goes to executors. Cro. Jac. 28. Cro. Car. 422. 533, 534. Jones 422. 2 Roll. Rep. 75.——But upon a distress for a heriot, no question but costs shall be paid. Cro. Jac. 28. Yet *vide* Cro. Eliz. 257. 329. (*f*) But he shall recover damages for the trespass at the time of the taking only, and not for the mean time. Dalt. 52. (*g*) Extends not to an avowry for a *nomine pœnæ*. (*h*) Therefore 2 Sid. 155. where the defendant avowed for a rent-charge, and the plaintiff, after evidence, was nonsuited, the court took the verdict of the jurors, who found for the defendant, and assessed damages and costs. [(*i*) *Qu.* Whether they shall have both damages and costs, where there are several issues, and some are found for, and the others against the defendants? Cro. Ja. 473. 2 Roll. Rep. 37. Brownl. 173. 2 Lutw. 1190. Under 4 Ann. c. 16. § 5. they shall pay costs on the special avowries found against them. Stone v. Forsyth, Dougl. 709. n. Where some issues are found on each side, and the judge does not certify that the plaintiff had probable ground for pleading those matters in regard to which any issues are found for the defendant, the latter is entitled to have the costs in respect thereof deducted out of the general costs of the verdict. Dodd v. Joddrell, 2 Term Rep. 235.]

[By the 17 *Car.* 2. *c.* 7. § 2. (extended to *Wales* and the counties palatine by 19 *Car.* 2. *c.* 5.) the defendant obtaining a judgment thereon for the arrearages of rent, or value of the goods distrained, is entitled to his full costs of suit.

By the 11 *Geo.* 2. *c.* 19. § 22. if the defendant avow, or make cognisance according to that statute, upon distress for rent, relief, heriot, or other services, and the plaintiff be nonsuit, discontinue his action, or have judgment against him, the defendant shall recover double costs of suit.] [This statute doth not extend to a seisure for a heriot-custom. Lloyd v. Winton, 2 Wils. 28. Barnes, 148. S. C.]

(G) Of Costs in a Writ of Error.

AS there were no damages given in a writ of error, but only a reversal or affirmance of the former judgment, there could be no costs, either at common law or by the statute of *Glouceſter*: hence it was thought necessary to make a statute to redress the mischiefs that arose from writs of error, in order to delay execution. Therefore, Cro. Eliz. 588.

By the (*a*) 3 *H.* 7. *cap.* 10. "Whereas plaintiffs or demandants had been delayed of execution, for that defendants, &c. against whom the judgment was given, or others bound thereby, brought error to reverse the judgment, to the intent only to delay execution, it is enacted, That if any defendant, &c. or others bound thereby, before execution had, bring any writ of error in delay of execution, then, if judgment be affirmed, or the writ of error discontinued through the default of the party, or the plaintiff therein be nonsuited in the same, the party against whom the writ of error is sued, shall recover his costs and damage, for the delay, and wrongful vexation, by the discretion of the justices before whom the writ of error is sued."

(*a*) By the statute of 19 H. 7. c. 20., this act is confirmed; and it is enacted, that the same should from thenceforth be put in execution.

Sid. 357. In the construction of this statute, it has been holden, that it extends not to *Ireland*, because not particularly named; therefore a judgment upon a writ of error in the King's Bench there, wherein costs were given, was for that reason (*b*) reversed here, as to the costs.

(*b*) Where a judgment in C. B. in *Ireland*, was affirmed in B.R., there, as also on a writ of error in B. R. here, and likewise on a writ of error in the House of Lords here, and a *capias ad satisfaciend.* in B. R. here, as well for the costs given by the courts in *Ireland*, as for those given by the court here, was superseded as irregular. Carth. 460. Ld. Raym. 427. 5 Mod. 421. Salk. 321. pl. 6.

(*c*) Vent. 166. Mod. 77. (*d*) 3 Lev. 375. Carth. 281. It extends not to executors or administrators, where they bring error upon a judgment against their (*c*) testator, or upon a judgment against (*d*) themselves; for being *in auter droit*, they are not presumed to bring the writ of error for delay.

4 Mod. 244. 2 Barnard. 450. [But where executors and administrators would be liable to pay costs in the original action, they will also be liable in error. Williams v. Riley, 1 H. Bl. 567. Caswell v. Norman. *Ibid.* n. 2 Str. 977.]

Cro. Jac. 636. Cro. Car. 401. There are no costs by this act where execution is executed, for then there can be no delay of execution.

Vent. 88. Hence, there can be no costs in a writ of error upon a judgment in ejectment, where execution was executed as to the costs and damages, though not as to the term.

Smith v. Smith, Cro. Car. 425. Winne v. Lloyd, 1 Lev. 146. Nor in error upon a judgment in *formedon*, because the plaintiff had no costs in the (*e*) first judgment; and the intent of the statute is to prevent the delay of execution for the first damages and costs.

Raym. 134. Andr. 113. But *vide* Graves v. Short, Cro. Eliz. 617. 659. Ferguson v. Rawlinson, 2 Str. 1084. *cont.* (*e*) But in a *quare impedit*, though therein no costs are recoverable, but damages only, the party shall have costs. Dyer 77. Cro. Car. 145. 175.

2 And. 123. Cro. Eliz. 588. This statute extends to a writ of error in the Exchequer-chamber, though given by a subsequent statute.

Also, the more effectually to prevent defendants from bringing frivolous writs of error, by the 13 *Car.* 2. *stat.* 2. *cap.* 2. it is enacted, "That if any prosecute a writ of error for reversal of any judgment *after verdict* in the courts of *Westminster*, counties palatine of *Chester*, *Lancaster*, or *Durham*, or of the great sessions in *Wales*, and the judgment is affirmed, they shall pay double

" double costs; popular actions upon penal laws (except debt for " tithes) indictments, informations, &c. excepted."

But as these statutes do not extend to cases where judgment is given for the (*a*) defendant, and the plaintiff brings a writ of error, it was thought necessary to remedy this inconvenience: And therefore,

2 And. 123. Cro. Car. 401. (*a*) A defendant in replevin, though he is considered in some cases as a plaintiff, shall not have costs within those statutes which are to be construed strictly, because costs are in nature of a penalty. Carth. 179. 4 Mod. 7. Show. 13. 165. 12 Mod. 1, 2. 2 Ld. Raym. 788. Salk. 205. pl. 1. S. C. [Dougl. 709. n.]

By the 8 & 9 *W.* 3. *cap.* 11. " If any action, &c. upon de- " murrer by plaintiff or defendant, judgment shall be given for " the defendant; or if after judgment for the defendant in such " action, &c. the plaintiff shall bring error, and the judgment " shall be affirmed, the writ of error discontinued, or the plain- " tiff nonsuited, the defendant shall have judgment for his " (*b*) costs, and execution for the same by *capias ad satisfa-* " *ciend.*"

8 Mod. 314. 316. 12 Mod. 523. 2 Ld. Raym. 992. Salk. 194. pl. 3. Comb. 482. 6 Mod. 88. (*b*) But not for double costs, for this shall not be presumed merely for delay, since the plaintiff keeps possession of nothing by his writ of error.

[By 4 *Ann.* *c.* 16. § 25. for preventing vexation, from suing out defective writs of error, it is enacted, " That upon the quashing of any writ of error, for variance from the original record, or other defect, the defendant shall recover against the plaintiff in error his costs (*c*), as he should have had, if the judgment had been affirmed, and to be recovered in the same manner."]

(*c*) These costs include those of the motion for quashing the writ of error. Cooper v. Ginger, 1 Str. 606. 2 Ld. Raym. 1403. Ratcliffe v. Burton, Ca. temp. Hardw. 135. Though no costs are recoverable in the original action, yet they are payable on quashing a writ of error. Archbishop of Dublin v. Dean of Dublin, 1 Str. 262. But where the defendant in error enters continuances to defeat the writ of error, the plaintiff in error is not liable to costs on quashing it. Gould v. Coulthurst, 1 Str. 139. Rajindoz v. Randolph, 2 Str. 834. But though the act of a defendant may occasion the quashing of a writ of error, yet if it be not reprehensible, he shall not pay the costs. Cooper v. Robins, Say. Costs, 207. And none of the statutes give costs on the reversal of a judgment. Wyvil v. Stapleton, 1 Str. 617. 8 Mod. 315.

[(H) Of Costs in a feigned Issue.

WHEN a feigned issue is directed by a court of law, whether in a civil or criminal proceeding, the costs always abide the event of the verdict. But when a feigned issue is ordered by a court of equity, the costs do not follow the verdict, as a matter of course; but the finding of the jury is returned to the court that ordered it, where the costs are discretionary.

Still v. Rogers, 1 Lill. Pr. Reg. 344. Palmer v. Williams, Barnes, 130. Rex v. Phillips, 1 Wilf. 261. Herbert v. Wilkinson, *Id.* 324. Say. Rep. 24. S. C. but in the case of Hoskins v. Lord Berkeley, 4 Term Rep. 402. the court of King's Bench strongly intimated an opinion, that as feigned issues were only granted with leave of the court, it would be prudent in future, when they permitted such issues to be tried, to compel the parties to consent, that the costs should be in the discretion of the court.

Where the issue is ordered by a court of law, on a rule for an information (*d*), or motion for an attachment (*e*), the costs of the original rule, or motion, do not in general follow the verdict, but

(*d*) Rex v. Nicholls, Say. Rep. 229.

Thomas v. Powell, 1 Burr. 603. Say. Coſts, 144. S. C. (e) Rex v. Griffith, Say. Rep. 253. Tidd's Pr. 672-3.

only the coſts of the feigned iſſue; which coſts are to be reckoned, from the time when the feigned iſſue was firſt ordered and agreed to (*a*). Yet when it was ordered, by the conſent rule, that the coſts ſhould abide the event of the iſſue, the court directed the *whole* coſts to be paid under it (*b*).

(*a*) Thomas v. Powell, 1 Burr. 603. (*b*) Oldknow v. Wainwright, 2 Burr. 1017.

Tempeſt v. Metcalf, 1 Wilſ. 331.

If any one of ſeveral iſſues be found for the plaintiff, he muſt have his coſts.

Williams v. Attorney-General, Burton's Pr. Exch. 248.

Where the crown is party, the plaintiff ſhall not pay coſts, though he ſubmit to a *nonpros.*

Anon. 2 P. Wms. 68.

If an iſſue be directed out of Chancery to be tried, and the plaintiff give notice of trial, and do not countermand it in time; upon motion, the court of Chancery will give coſts, and not put the defendant to move the court of law where the iſſue is to be tried.]

(I) Of Coſts in the ſeveral Steps and Proceedings of a Cauſe.

AS the courts exerciſe a diſcretionary power in awarding coſts, before there is a final judgment in the cauſe, it ſeems difficult to aſcertain the ſeveral caſes in which they will make uſe of this power; however, it may be obſerved in general, that the delays or contempts which either party is guilty of, can only be remitted or purged on payment of coſts.

12 Mod. 560. [It is laid down in the caſe here

As for not going on to trial, inquiry (*c*), &c. ſo if the plaintiff moves to amend his declaration, (which is ſeldom refuſed whilſt the proceedings are in paper,) it muſt be on payment of coſts.

referred to in 12 Mod. that, if upon notice of trial, the defendant draws briefs, retains counſel, and makes ready his witneſſes, before that notice is countermanded, upon affidavit thereof, and motion, he ſhall have ſuch coſts as the maſter ſhall tax. But it hath been ſince holden, that if a notice of trial be regularly countermanded, the defendant is not entitled to receive the coſts of a witneſs who reſided in London, and, before the countermand was delivered, ſet out to attend the aſſizes in the country. Heſter v. Hall, Barnes, 307. Goodright v. Hoblyn, *Id.* 298. Pr. Reg. C. P. 393. S. C. —— A plaintiff is not liable to coſts for not proceeding to trial according to notice, if the delay was the reſult of inevitable accident, Ogle v. Moffit, Barnes, 133. or occaſioned by the neglect of the defendant's attorney. Strong v. Harwood, Say. Coſts, 174. (*c*) Shadford v. Houſton, 1 Str. 317. Sutton v. Bryan, 2 Str. 728.] *Vide* title *Amendment*, letter (G).

10 Mod. 88.

There are no coſts in abatement upon demurrer, becauſe there are no damages given, but only a *reſpondeas ouſter* awarded.

6 Mod. 2. 1 Lill. Pr. Reg. 472. 2 Salk. 579. 3 Burr. 304. 2 Ventr. 1 6. Barnes, 125. Leon. 105. Hutt. 36. Cro. Car. 575. Hard. 152.

[No coſts are allowed to either party on a repleader, becauſe it is a judgment of the court upon the pleading; and both parties were in fault to allow an immaterial or inſufficient iſſue to be joined, and therefore, neither of them can have any claim to receive coſts from the other.]

But the ſtatutes give coſts on a *non pros.*, and this even before declaring, and then the plaintiff is demandable, for he is not in court by attorney until he has declared; but ſince he has put in his

his appearance by attorney, the court will vacate his appearance, if he does not do as he ought to do in declaring; and this ſort of nonſuit is as well within the ſtatutes, as when he is demandable at the *niſi prius*: But becauſe the *King's Bench* ſuffered them to lie three terms without awarding a *non pros.*, therefore,

By the 8 *Eliz. cap.* 2. If upon a *latitat*, *alias*, or *pluries capias* iſſuing out of the *King's Bench*, the plaintiff does not declare within three days after bail put in, or after declaration ſhall delay or ſuffer his ſuit to be diſcontinued, or be nonſuit, the court ſhall award the defendant his coſts and damage. Enlarged to the end of the 2d term, by an order of K. B. made Mich. term 10 G. 2.

Reg. 2. *Note* (*b*). [This ſtatute doth not extend to actions brought by executors or adminiſtrators, in their repreſentative character. Cro. El. 69, Cro Ja. 361. If the plaintiff enter a *noli proſequi*, the defendant is entitled to coſts upon this ſtatute. Cooper v. Tiffin, 3 Term Rep. 511.]

After a declaration put in by the plaintiff, if the defendant puts in a bar or demurrer, and the plaintiff does not reply, *&c.* there is a judgment againſt him on the bar, *&c.* and coſts awarded, becauſe he does not proſecute his writ with effect.

After iſſue joined or a verdict given, the plaintiff cannot diſcontinue without leave of the court, which is never granted but upon payment of coſts *. * *Qu.* if he can diſcontinue at any time, after ſuit commenced, without paying coſts?

The plaintiff cannot bring a new ejectment without paying the coſts of the firſt. 4 Mod. 374. *Vide* tit. *Ejectment*, (B. 3). That if a new trial, or ſecond iſſue be directed out of Chancery, it muſt be on payment of coſts. 2 Vern. 75. 8 Mod. 225. *Vide* tit. *Trial* (L).

[It was formerly not uſual (*a*) in any actions, but ejectments, to ſtay the proceedings in a ſecond action, until the coſts were paid in a prior one for the ſame cauſe; and, particularly, if the merits did not come in queſtion, on the former trial (*b*). But of late years, it hath been done, in ſeveral inſtances, on the ground of vexation (*c*); and in one caſe (*d*), where the action was brought by huſband and wife, the court ſtayed the proceedings, until the payment of coſts in the former action, at the ſuit of the huſband only; it being for the ſame demand.

(*a*) Tidd's Pr. 285. Real v. Macky, 2 Str. 1206. Engliſh v. Cox, Cowp. 322. Say. Coſts, 251. S. C. Lazarus v. Pritchard, Barnes, 125. Doe v. Alſton, 1 Term Rep. 491. but ſee Lord Biron's caſe, 1 Ventr. 100. (*b*) Baſs v. Fiſmen, 1 Ld. Raym. 697. (*c*) Weſton v. Withers, 2 Term Rep. 511. Gravenor v. Cape, Say. Coſts, 245. Melchar v. the Executors of Halſey, *Id.* 247. 2 Bl. Rep. 741. S. C. 3 Wilſ. 149. (*d*) Lampley and wife v Sands, H. 25 Geo. 3. B. R. Tidd's Pr. 285.

So, it was formerly not uſual (*e*), in any actions, but ejectments, or actions *qui tam*, to require ſecurity for coſts, where the plaintiff reſided abroad; for it was conſidered, that ſuch a proceeding might affect trade, by excluding foreigners from our courts; and would be a means of clogging the courſe of juſtice. But now although a plaintiff be not compellable to give ſecurity for coſts, merely as a foreigner, if he reſide in this country, yet, whether he be a foreigner or native, if he reſide abroad out of the reach of the proceſs of the court, the proceedings will be ſtayed till he return, or ſecurity be given for the payment of coſts (*f*).]

(*e*) Real v. Macky, 2 Str. 1206. Lamu v. Sewell, 1 Wilſ. 266. Maxwell v. Mayer, Say. Coſts, 156. 2 Burr. 1016. S. C. Boſewell v. Iriſh, 4 Burr. 2105.

Golding v. Barlow, Cowp. 24. Nuncomar v. Burdett, *Id.* 158. Engliſh v. Cox, *Id.* 322. (*f*) Pray v. Edie,

v. Edie, 1 Term Rep. 267. Fitzgerald v. Whitmore, *Id.* 362. Doe v. Alston, *Id.* 491. The practice of the court of Common Pleas in this respect hath not been altogether uniform: the circumstance of the plaintiff's being abroad, was at one time not thought to be *of itself* a sufficient ground for requiring this security. Parquot v. Eling, 1 H. Bl. 106. But the contrary was afterwards laid down as a settled point to guide the practice of the court in future. Ganesford v. Levy, 2 H. Bl. 118. It seems now, however, that the point is not so entirely settled, as not to admit of being departed from, where an adherence to it would induce serious hardships or inconveniencies. Henschen v. Garves, *Id.* 383.——The defendant before he makes this application, must put in bail. De la Preuve v. the Duc de Biron, 4 Term Rep. 697.

Vide title *Outlawry.*

The defendant shall not pay the costs of reversing an outlawry until the plaintiff declares against him; and if the plaintiff be nonsuit, the defendant shall have them again in his costs; and if there be more defendants than one, and they be all outlawed, they shall all be contributory for the costs, and not every one pay the whole costs.

(K) Costs, how assessed or taxed.

Roll. Abr. 517.

AFTER the making of the statutes that introduced costs, it was agreed on as a rule, that the jury should tax the damages a-part, and the costs a-part, that so it might appear to the court that the costs were not considered in the damages; and when it was evident that the costs taxed by the jury were too little to answer the costs of suit, the plaintiff prayed that the officer might tax the costs, and that was inserted in the judgments; and therefore said to be done *ex assensu* of the plaintiff (*a*), because at his prayer.

[(*a*) Formerly, if these words were omitted, or even misplaced, in the judgment, it was error. But this is now helped by 16 & 17 Car. 2. c. 8. § 1., and 4 Ann. c. 16. § 2. And in action of debt, if there be no writ of inquiry to ascertain the damages sustained by the detention of the debt, the damages assessed by the court, as well as the costs of the suit, should, in the judgment, be stated to be given *with the assent* of the plaintiff; but the omission of such statement, it seemeth, is aided by 16 & 17 Car. 2. or, at least, may be supplied at any time. Tully v. Sparkes, 2 Str. 868. 2 Ld. Raym. 1570. 1 Barnard. 325. 335. S. C. So, if a manifest miscomputation, or any plain mistake in figures, should apear on the face of the record with regard to costs, it may be amended. 4 Burr. 1989. 1 Roll. Abr. 205. pl. 5.]

7 Mod. 129. Hullock, 622.

[It is said, that if a judgment be entered up with a blank for the costs, they cannot be afterwards inserted.

Green v. Cole, 2 Saund. 257.

If the jury assess costs in a case, wherein none are recoverable by law, the judgment should be entered *nullo habito respectu* to such costs.

Stores v. Tong, Ca. Pr. C. P. 7. Ward v. Snell, 1 H. Bl. 10. *Vide* 1 Lill. Abr. 472.

The jury ought *ex officio* to give costs in an action in which costs are recoverable by law; but if they omit or refuse to do so, the court will, on motion, order costs to be taxed, and indorsed on the *postea.*]

10 Co. 117.

If there are several issues found for the plaintiff, or against several defendants, entire costs are given upon the whole pleadings, for that is the whole charge the plaintiff is at.

Keilw. 48. 2 Leon. 177. Brownl. 3.

So, if in debt the defendant pleads several pleas, upon which they are at issue, and the jury find one issue for the plaintiff, and damages 12*d.* another issue for the plaintiff, and damages 10*d.* and another issue for the plaintiff, and damages 6*d.* and one issue against the plaintiff, they must assess the costs entirely, and

and not according to the damage ſeverally, for every iſſue found for the plaintiff.

[In an action of *aſſumpſit*, the plaintiff declared upon two ſeveral promiſes, to which there was the general iſſue, and at the trial a verdict was found for the plaintiff, and ſeveral damages were aſſeſſed with entire coſts. A writ of error being brought, the judgment was reverſed as to the one promiſe, and affirmed as to the other, and the *entire* coſts.] Grymſton v. Reyner, Cro. Eliz. 527. Mo. 708. S. C. Jacob v. Miles, Cro. Jac. 343. S. P.

Upon a *ſcire facias* on a recogniſance in *C. B.* againſt bail, the plaintiff had judgment for execution upon the recogniſance, *& quod recuperet damna ſua occaſione dilationis executionis;* upon a writ of error in *B. R.* this was reverſed, for the bail are only liable to coſts of ſuit by the ſtatute; and damages, by reaſon of the delay of execution, are not coſts, nor coſts of ſuit, but damage ſuſtained by being ſo long out of his money, which uſed to be aſſeſſed by allowing the party what lawful intereſt would have come to him in the mean time; ſo that coſts and damages are different in this caſe, given for different ends, and aſſeſſed by different meaſures. Salk. 208. pl. 8. 2 Salk. 520. pl. 22. Fanſhaw and Morriſon, 6 Mod. 157. S. C. 2 Ld. Raym. 1138. 10 Mod. 306.

If baron and feme join in an action, and a verdict is given for the plaintiffs, and the jury aſſeſs damages *ultra miſas & cuſtagia per ipſum* (the baron) *circa ſectam ſuam expoſita*, to ſo much, *& pro miſis & cuſtagiis illis*, to ſo much; and thereupon judgment is given, that the baron and feme ſhall recover the coſts and damages; though it is found that the baron only expended and diſburſed the money for the coſts of the ſuit, in as much as the feme had nothing, yet the judgment is good, that the baron and feme ſhall recover the coſts; for there cannot be one judgment for the coſts, and another for the damages. Roll. Abr. 516. Cruſee and Berry, adjudged upon a writ of error.

[The huſband cannot have execution for the coſts on a plea of coverture found for the wife defendant, without a *ſcire facias*. Wortley v. Rayner, Dougl. 637.

A demand of coſts muſt be made at the time of ſerving the rule of court under which they are taxed; and upon an affidavit that the coſts were ſo demanded either by the party entitled to receive them, or by ſome perſon by him duly authorized, and that payment was refuſed, an attachment will be granted in the firſt inſtance, and may be moved for the laſt day of term. Barnes, 120. Say. Rep. 48. 1 Burr. 651. 5 Burr. 2686.

The coſts allowed to the plaintiff after obtaining judgment in an action on a ſimple contract, or for a debt certain, only extend to the time of ſigning final judgment. In ſuch caſe, the expences of levying, together with all other incidental charges of the execution, muſt be paid by the plaintiff, and not by the defendant; for the ſheriff can levy on the defendant only the ſum given by the judgment. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent on the expences of the execution, which, in that caſe, muſt be ſuſtained by the defendant. A defendant, if he prevail, can only levy the amount of his coſts, and that, at his own expence. Hullock, 624. 2 Term Rep. 157.

It was anciently the practice for the court, or one of the judges, to tax the coſts and make a ſpecial rule for their payment; upon ſervice Hullock, 625. Gilb. H. C. P. 261. 266.

ſervice of which, and refuſal of payment, an attachment iſſued. But, at this day, coſts are taxed in the King's Bench, by the maſter, and in the Common Pleas, by one of the prothonotaries, upon the attornies or agents of the parties attending them at their reſpective offices for that purpoſe. After the taxation, the maſter, or the prothonotary, marks the amount of the coſts on the *poſtea*, inquiſition, or demurrer-roll, as the caſe may be, when final judgment is ſaid to be ſigned, and execution may be immediately taken out.

Hullock, 625.

Where any extraordinary expences have been incurred in a cauſe, and generally in country cauſes, an affidavit (in which it is cuſtomary for the party entitled to the coſts and his attorney to join) ſtating the particulars of ſuch extra expences, is requiſite to enable the proper officer to make an adequate taxation. And it is ſaid, that more than ordinary coſts ought not to be taxed, until the attornies on both ſides have been heard for their clients, and an affidavit of the coſts produced, except where one of the attornies, having had notice of the intended taxation, neglects to attend. It is uſual to give ſuch notice to the attorney or agent of the party liable to the coſts; but as this is a matter of courteſy, and not of right, it may be prudent, in ſome caſes, to take out a rule from the office of the clerk of the rules in the King's Bench, or of the ſecondary in the Common Pleas, to be preſent at the taxation, which, when ſerved on the oppoſite party, renders it incumbent upon him to give notice.

1 Lill. Abr. 470. I.

Thelluſſon v. Staples, Dougl. 438.

In the taxation of coſts, no allowance can be made for the contingent loſſes, which the witneſſes may have ſuffered by obeying the *ſubpæna*.]

Covenant.

COVENANTS, contracts, and agreements, are often uſed as ſynonymous words, ſignifying an engagement entered into, by which one perſon lays himſelf under an obligation to do ſomething beneficial to, or to abſtain from an act, which if done, might be prejudicial to another.

As the good of ſociety requires a punctual performance of, and that no perſon ſhould be allowed to reſcind and break through his contracts, ſo the law has provided a remedy by action of covenant *, in which the injured party is to recover damages for the violation of the contract, in proportion to the loſs he has ſuſtained.

* Where the contract is by deed.

But here it may be neceſſary to obſerve, that where the covenant or agreement is for doing ſomething in *ſpecie*, as conveying lands, executing deeds, *&c.* the moſt uſual, and indeed the moſt proper remedy is by bill in Chancery; which court, in caſes reaſonable, will decree an execution in *ſpecie*, whereas at common law, the party can only be repaired in damages.

But if the matter of the bill is merely in damages, the remedy is only at law, becauſe the damages cannot be aſcertained by the conſcience of the Chancellor, and therefore muſt be ſettled by a jury at law. *Vide* Vol. 2. 107. (B).

But if there be matter of fraud mixed with the damages, as if *A.* ſues *B.* on a covenant at law for damages, and *B.* files a bill for an injunction, upon this equitable ſuggeſtion, that the covenant was obtained by fraud; if *A.* files his croſs-bill for relief upon that covenant, the court will retain it, becauſe the validity of the covenant is diſputed in that court, and on a head properly conuſable there; and therefore, if the validity of the deed be eſtabliſhed, the court will direct an iſſue for the *quantum* of the damages.

But for the better underſtanding of this action of covenant, I ſhall conſider,

(A) Of the Manner, and by what Words an expreſs Covenant is created.

(B) Of Covenants created by Implication of Law.

(C) Where an Action of Covenant is the proper Remedy.

(D) Where there are ſeveral Parties: And herein of joint Covenants.

(E) Of Covenants Real and Perſonal: And herein of the Perſons to whom they ſhall extend: And herein,

1. Of Covenants which ſhall extend to the Heir or Executor, ſo as to be bound by them, though not expreſsly named.
2. Of Covenants which the Heir or Executor may take Advantage of.
3. Where an Aſſignee ſhall be bound by the Covenant of the Aſſignor.
4. Where the Aſſignor continues ſtill liable.
5. Where an Aſſignee ſhall take Advantage of a Covenant.
6. Of Covenants which bind by Force of the Statute 32 H. 8. c. 34.

(F) How Covenants are to be conſtrued.

(G) Where

(G) Where the principal, and all auxiliary Covenants, ſhall be ſaid to be void and extinguiſhed.

(H) What ſhall be deemed a Breach, or conſtrued a good Performance.

(I) Where the Breach ſhall be ſaid to be well aſſigned.

(K) Where the Performance ſhall be ſaid to be well ſet forth and pleaded.

(L) What may be pleaded in Bar to the Action.

(A) Of the Manner, and by what Words an expreſs Covenant is created.

(a) 1 Chan. Ca. 294. Leon. 324. [1 Burr. 290. Dougl. 766. (b) A party may alſo covenant in reſpect of paſt tranſactions. Plowd. 308. So, he may covenant as to time *preſent*, for it is the conſtant language of deed of alienation, that the grantor has lawful power to convey. 3 Wooddeſ. 86.] (c) Roll. Abr. 518. Brownl. 23. S. C. (d) But it is ſaid, that without the word *agreed*, it would have been only a qualification of the covenant of the leſſee. Roll. Abr. 518. 2 Co. 72.

(a) THE law does not ſeem to have appropriated any ſet form of words, which are abſolutely neceſſary to be made uſe of in creating a covenant; and therefore it ſeems that any words will be effectual for that purpoſe, which ſhew the parties concurrence to the performance of a future act (b); as, (c) if leſſee for years covenants to repairs, &c. *Provided always, and it is agreed, that the leſſor ſhall find great timber*, &c. this makes a covenant on the part of the leſſor to find great timber, by the word (d) *agreed*, and it ſhall not be a qualification of the covenant of the leſſee.

40 E. 3. 5. b. Roll. Abr. 518. S. C.

So, if *A.* leaſes to *B.* for years, upon condition that he ſhall acquit the leſſor of ordinary and extraordinary charges, and ſhall keep and leave the houſes at the end of the term in as good plight as he found them; if he does not leave them well repaired at the end of the term, an action of covenant lies.

Roll. Abr. 518. Bret and Cumberland, adjudged. Cro. Jac. 399. 521. 3 Bulſt. 163.

So, theſe words in a leaſe of a mill, *and the leſſee ſhall repair the mills as often as need ſhall require, and ſhall leave them ſufficiently repaired at the end of the term*, make a covenant, (e) becauſe it is the clear agreement of the parties; for otherwiſe the words, *ſhall leave*, &c. would have no effect.

Roll. Rep. 359. 2 Roll. Rep. 63. S. C. adjudged. (e) As if *A.* by indenture agrees to give *B.* 70 *l.* for an houſe, if *B.* executes one part of the indenture to *A.*, *A.* may bring covenant for the houſe. Pordage and Cole. Lev. 274. *per cur.* Raym. 183. *per cur.* Sand. 319. for on the part of *B.*, it amounted to a covenant to convey.

Co. 155. Roll. Abr. 518. Moor, 478.

If *A.* leaſes to *B.* for life, with a *proviſo*, that if the leſſee dies within the term of forty years, that then the executors of the leſſee ſhall have it for ſo many of the years as amount to the

number of forty years, to be accounted from the date of the indenture of leaſe; this *proviſo* ſhall not be a leaſe, but only a covenant.

If there are articles of agreement between *A.* and *B.* by which it is agreed, upon a marriage intended between *A.* and *C.* that all the ſtock of *C.* ſhall remain in the hands of *B.* till *A.* ſhall make a certain jointure to *C. ipſo B. annuatim ſolvendo to A. intereſſe proinde ſecundum ratam* 8*l. per centum*, &c. if *B.* does not pay the ſaid intereſt, an action of covenant lies againſt him upon theſe words, becauſe (*a*) every (*b*) agreement by deed is a covenant, otherwiſe *A.* could not have any remedy for the money. Roll. Abr. 518, 519. (*a*) So, where a man acknowledges himſelf to be accountable to another for all money by him

charged upon *A.* to be paid to *B.* Lev. 47. ——Where the words were only by way of recital, that it was intended that a fine ſhould be levied, &c. 2 Mod. 89. 91. 2 Freem. 3. S. C. & *vide* Leon. 122. (*b*) Where a man aſſigns and transfers a choſe in action, though nothing paſſes, yet it amounts to a covenant, that the other ſhall have the thing. Mod. 113. 3 Keb. 304. Freem. 268. Ld. Raym. 683. [2 Ld. Raym. 1242. 1419. 2 Bl. Rep. 820.]

If *A.* makes a deed to *B.* in theſe words, *I have in my cuſtody one writing obligatory, in which writing obligatory, one* William *now ſtandeth bound to the ſaid* B. *for the payment of* 400 *l. upon ſuch a day, being the proper money of* B. *and* (*c*) *I will be ready at all times, when I ſhall be required, to redeliver the ſame writing obligatory to the ſame* B.; if *B.* after demands the ſaid obligation of *A.* and he refuſes to deliver it, *B.* may have an action of covenant upon this deed by force of the words, *and I will be ready at all times, when I ſhall be required, to redeliver the ſame*, &c. Roll. Abr. 519. (*c*) So, where the words of a deed are, I oblige myſelf to pay ſo much money at ſuch a day, and ſo much at another.

Hard. 178. adjudged; but the chief baron doubted, if the words had been *teneri & firmiter obligari*; for that theſe words ſound in debt, and not in covenant.

If *A.* enters into a ſtatute to *B.* and afterwards *B.* by his deed covenants, that upon payment of ſuch a ſum at a day to come, the ſtatute ſhall be void, and that he will deliver it in, and cauſe it to be vacated; if *B.* before the day ſues execution upon the ſtatute, *A.* may bring an action of covenant; for though it be true, that a covenant that is to take effect preſently is to ſtand or fall by the operation of law, and no action of covenant will lie; as if a man covenants that a bond ſhall be void upon doing ſuch an act, or to ſtand ſeiſed, no action of covenant will lie upon theſe; yet here the laſt words bind the party to the performance of a future act, *viz. to deliver in the ſaid ſtatute, and cauſe it to be vacated*, which, without all queſtion, ſound in covenant. Raym. 25. Robinſon and Ampton adjudged. Keb. 103. 118. S. C. Sid. 48. S. C.

If *A.* enters into an obligation to *B.* and afterwards *B.* covenants not to ſue *A.* without any limitation of time, this amounts to a releaſe, and may be pleaded as ſuch. Carth. 64. Comb. 123, 124.

But if the covenant be temporary, and limited to a certain time; as if it be, that *B.* will not ſue for ninety-nine years, &c. this ſtill remains a covenant; and for the violation thereof an action of covenant is the proper remedy, but it cannot be pleaded in bar; ſo if there be two obligors, and the obligee covenant that he will not ſue one of them, this is no releaſe, but only a covenant. Carth. 64.

A letter of licence containing the words following, *viz. that if the creditor ſue within ſuch a time, his debt ſhall be forfeited*, works a forfeiture Carth. 64.

a forfeiture by the commencement of the ſuit, and therefore, may be pleaded in bar to the action.

Roll. Abr. 518. Geary and Read. Cro. Car. 128, 129. S. C. adjudged; & *vide* Cro. Eliz. 242. 385. 2 Co. 71.

If there are articles of agreement made by indenture between *A.* and *B.* in which *A.* agrees that *B.* ſhall have a houſe in a ſtreet in *London*, for certain years; provided, and upon condition, that *B.* ſhall receive and pay the rents of the other houſes of *A.* in the ſame ſtreet mentioned in a ſchedule annexed to the indenture; and it is further agreed, that *B.* for his labour in collecting the ſaid rents, ſhall have the overplus of the rents, over and above ſuch a certain ſum; this is not any covenant on the part of *B.* to bind him to receive and pay the rents mentioned in the ſchedule; but the *proviſo* and condition will only make the eſtate of *B.* void in the houſe.

Cro. Jac. 281. Briſco and King, adjudged; Yelv. 206. S. C. adjudged; the *proviſo* being, that if *A.* paid for *B.* 40 *l.* to *C.* &c., for for the word *payment*, in the obligation, ſhall have reference to ſuch

If *A.* by deed enfeoffs *B.* provided that, if *A.* pays money to *B.* by a day, the feoffment ſhall be void, and covenants to ſave harmleſs from incumbrances and arrears of rent, and to make further aſſurance; and after *A.* enters into an obligation conditioned for the performance of all (*a*) covenants, payments, articles, and agreements compriſed in the deed; if *A.* pays not the money, yet the bond is not forfeited; for there being no covenant to pay the money, it is a *proviſo* in advantage of the feoffor, that, if he paid the money, he ſhould have the land again; ſo that it is in his election to pay the money or loſe the land, which is a ſufficient loſs to him, and the word *payment*, in the bond, hath reference to the covenant to ſave harmleſs from arrears of rent.

payments only, as by the deed are compulſory, not ſuch as are voluntary; for otherwiſe the obligation and condition would be repugnant, and contrary to the deed. 1 Brownl. 113. S. C. and Bulſt. 156. S. C. adjudged 2 Mod. 37. S. P. 10 Mod. 227. Gilb. Eq. Rep. 43. (*a*) Otherwiſe, if the condition of the bond had been for the performance of all covenants and conditions in the deed. Tooms v. Chandler, 2 Lev. 116. 3 Keb. 454. adjudged, and in 3 Keb. 460. Judgment is given for the defendant unleſs the plaintiff diſcontinue.

Roll. Abr. 517. (*b*) So, a writ of covenant lies upon the king's patent, though there is no counterpart ſealed by the leſſee, who is to be charged. Cro. Jac. 240. Bulſt. 21. Cro. Jac. 399. 521. 3 Bulſt. 163. Roll. Rep. 359. 2 Roll. Rep. 63. Poph. 136.

An action of covenant may be brought as (*b*) well on a deed poll, as on a deed indented.

Salk. 197. pl. 3. Green and Horn, adjudged.

But though covenant lies as well on a deed poll as upon a deed indented, yet the parties muſt be named therein; and, therefore, where in covenant the plaintiff declared, that *J. S.* being arreſted at his ſuit, and in the cuſtody of the bailiff, he, the defendant, promiſed and engaged to bring in the body of *J. S.* into the cuſtody of the bailiff ſuch a day; on demurrer it was holden, that the action would not lie, the plaintiff not being named in the agreement, and no averment *dehors* could avail him.

(B) Of Covenants created by Implication of Law.

THERE are ſome words, which of themſelves import no expreſs covenant, yet being made uſe of in certain contracts, they amount to ſuch, and are therefore called covenants in law, and will as effectually bind the parties, as if expreſſed in the moſt explicit terms. 48 E. 3. 2. b. 7. Roll. Abr. 519.

As if a man (*a*) makes a leaſe for years of land, by the words (*b*) *conceſſi* or *demiſi*, theſe import a covenant, and if the leſſee or his aſſignee are (*c*) evicted, they may bring an action thereupon. 5 Co. 17. a. reſolved.

(*a*) So, if an aſſignment thereof be made by the word grant. 2 Roll. Rep. 399. Palm. 388. (*b*) Carth. 98. S. P. admitted.—Where a man *aſſignavit & tranſpoſuit* all the money that ſhould be allowed by any order of a foreign ſtate, to come to him in lieu of his ſhare in a ſhip. Mod. 113. Said by Hale, though it cannot be aſſigned, yet this amounts to a covenant that he ſhall have all the money; & *vide* 4 Co. 81. Cro. Eliz. 214. 2 Leon. 104. [(*c*) But, in ſuch caſe, the eviction muſt be by one who hath a title, though it is otherwiſe, it hath been ſaid, where there is an expreſs covenant. 2 Leon. 104. Cro. El. 214. 2 Brownl. 161. though it ſeems now to be ſettled, that an expreſs covenant in the moſt general terms ſhall be reſtrained to lawful interruptions, 3 Term Rep. 584. Vaugh. 118. The diſtinction between *implied* covenants by operation of law, and *expreſs* covenants, is, that *expreſs* covenants are taken more ſtrictly. *Per* Ld. Mansfield, 3 Burr. 1639. Hence, an expreſs covenant to pay the rent is binding on the tenant, at law, in every event, and in every ſtate and condition of the premiſes. Paradine v. Jane, All. 27. Monk v. Cowp. 2 Str. 763. Belfour v. Weſton, 1 Term Rep. 312 Yet if, in ſuch caſe, the thing demiſed could not be enjoyed, a court of equity would give relief. Brown v. Quilter, Ambl. 1620.]——So, if the cattle of the leſſee are diſtrained by the lord paramount, he may have covenant againſt his leſſor. Raym. 257.

So, if a man leaſes for years, reſerving rent, an action of covenant lies for non-payment of the rent, for the (*d*) *reddendo* of the rent is an agreement for payment of the rent, which will make a covenant. Roll. Abr. 519. Style, 387. Carth. 135.

(*d*) So, the words yielding and paying make a covenant. Style 406, 407. 431. 2 Brownl. 215. Sid. 266. 401. Vent. 10. 2 Jones 102. 3 Lev. 155. 2 Mod. 92.

Alſo, if a man leaſes for years by the words *demiſe*, *grant*, &c. and in the deed there are ſeveral covenants on the part of the leſſor, and he enters into a bond conditioned for the performance of all the covenants, &c. in the deed; this extends as well to the covenants in law, as expreſs covenants. 4 Co. 80. b. Nokes and James, adjudged.

But if a man leaſes for years by the words *demiſi*, &c. and the leſſor covenants that the leſſee ſhall enjoy during the term, without eviction by the leſſor, or any claiming under him; this expreſs covenant qualifies the generality of the covenant in law, and reſtrains it by the mutual conſent of both parties, that it ſhall not extend farther than the expreſs covenant. 4 Co. 80. Cro. Eliz. 674. Yelv. 175.

If a man leaſes to me by indenture the land of (*e*) *J. S.* of which *J. S.* is ſeiſed at the time, upon which I enter, and he re-enters, I ſhall have a writ of covenant upon this indenture, though I was not in the land by the leaſe, but by eſtoppel, for the leſſor is eſtopped to ſay that I was not in of his leaſe. Roll. Abr. 520. Cro. Jac. 73. S. C. adjudged.

(*e*) So, if by indenture he leaſes to me my own land, and I am ouſted by a ſtranger. Cro. Jac. 73. Roll. Abr. 520. 871.

So, if a man leaſes to me land of *J. S.* of which *J. S.* is ſeiſed at the time, I ſhall have a writ of covenant before entry upon *J. S.* Roll. Abr. 520. Holder and Taylor.

2 Brown. 22. S. P. Hob. 12. S. C. But *vide* in Roll. the caſe immediately following; which ſeems *cont.*, and that if a man leaſes land for years, and a ſtranger enters before the leſſee enters he ſhall not have an action of covenant upon this ouſter, becauſe he was never a leſſee in privity to have the action. Roll. Abr. 520. Owen 105. S. P. *per* Fenner.*——* *Sed. qu.* If this is law? and if he may not maintain an action on the covenant, expreſs, or implied, that he ſhall hold and enjoy for the term?

J. S. and re-entry by him; for I need not allege an eviction, for this is a covenant in law, which is broken when he is not ſeiſed of the land at the time of the demiſe, for the word *demiſe* imports a power of letting; and it is not reaſonable to enforce the leſſee to enter into the land, and ſo to commit a treſpaſs.

Owen, 104. Roll. Abr. 519. (*a*) And therefore, in caſe of a leaſe of a houſe, together with the goods, it is uſual to make a ſchedule thereof, and affix it to the leaſe, and to have a covenant from the leſſee to re-deliver them at the end of the term; for without ſuch covenant the leſſor can have no remedy but trover or detinue for them after the leaſe ended.

But if a man leaſes certain goods for years by indenture, which are evicted within the term, yet he ſhall not have a writ of covenant; for the law does (*a*) not create any covenant upon ſuch perſonal thing.

(*b*) If for life. 2 Jones, 102. *dubitatur.*

So, in the caſe of a grant of an (*b*) inheritance, by the words *enfeoff*, *grant*, &c. the law does not create a covenant.

Carth. 97, 98. Coleman and Sherwin, adjudged. Salk. 137. pl. 1. Show. 79. S. C.

Alſo, if two or more join in making a leaſe by the words *conceſſimus*, &c. this creates a covenant in law, for the breach of which, all of them ſhall be jointly ſued; but if the breach be the perſonal tort of one of them, as if one of them enter and ouſt the leſſee, the action may be brought againſt him alone; for it is unreaſonable, that the others ſhould ſuffer for the perſonal wrong of their companion.

Comb. 163. Vent. 26. 44. Pomfret and Ricroft, adjudged, *cont.* Twiſden in B.R. Sid. 429. S. C. adjudged; *cont.* Twiſden in B. R. But Sand. 321, 322. S. C. reverſed for Twiſden's reaſons in *Cam. Scacc.*; and Hale ſaid, that if I lend one a piece of plate, and covenant he ſhall have the uſe thereof, yet if the plate be worn out by ordinary uſe, without any default, no action of covenant lies againſt me.——But if one by deed grants a water-courſe

A. by indenture granted and demiſed to *B.* certain lands, except a little piece upon which a pump was ſtanding, together with the uſe and occupation of the pump, in common with other the tenants of *A.* for thirty-one years; and after, the pump became uſeleſs for want of repairs, and *B.* brought covenant againſt *A.* and aſſigned the breach in *A.*'s permitting the pump to run to decay; it was holden by *Kelynge*, Chief Juſtice, *Rainsford* and *Moreton*, Juſtices, that the action lay; for that when the uſe of a thing is (*c*) demiſed, and it runs to decay, ſo that the leſſee cannot have the uſe and benefit thereof, he may have covenant upon the word *demiſi*; and here the leſſee himſelf could not repair, having no intereſt in the pump, or land where it ſtood. But *Twiſden totis viribus cont.* 1. Becauſe a covenant created by law, as this is, never lies but on an (*d*) actual ouſter. 2. This covenant created by law, is not (*e*) properly to recover damages, but the term itſelf, and the damages that are recovered are for the whole term, whereas the pump may be repaired the next day. 3. The leſſee may repair the pump himſelf, and may come on the ground without being a treſpaſſer; as where I grant that you may fiſh in my pond, you have liberty to come upon my ground; ſo, if you have a grant to lay pipes in my ground, you may dig up the ground for that purpoſe; and for theſe reaſons of *Twiſden*'s, the judgment was *unâ voce* reverſed *in Cam. Scacc.*

courſe, and after ſtops it, an action of covenant lies againſt him. Sand. 322. For by Twiſden, this is a voluntary misfeaſance.—So, if I leaſe a houſe, and therewith grant eſtovers out of ſuch a wood, if I cut down the wood, ſo that no eſtovers can be had, the leſſee may bring covenant againſt me. (c) But if *A.*, in conſideration that *B.* will build a mill upon the land, and a water-courſe through the land, demiſes to *B.* by the words *dedi & conceſſi*; and after *A.* ſtops the water-courſe, yet no action of covenant lies; for the covenant extends not to a thing which was not *in eſſe* at the making of the leaſe. Leon. 278.

(d) *Vide* Roll. Abr. 519. & 2. (e) *Vide* F. N. B. 145.

If *A.* leaſes a houſe to *B.* excepting two rooms, and free paſſage to them, and the leſſee aſſigns to *J. S.* who diſturbs the leſſor in the paſſage; this, though a covenant in law, ſhall bind the leſſee; for where the leſſee agrees to let the leſſor have a thing out of the demiſed premiſes, as a way, common, *&c.* covenant lies for a diſturbance; but if the diſturbance had been in the rooms excepted, covenant would not have lain. Carth. 232. Buſh and Cole, adjudged. Salk. 196. Show. 388. S.C. & *vide* Moor, 553. Cro. Eliz. 657.

(C) Where an Action of Covenant is the proper Remedy.

IF *A.* for valuable conſideration, promiſe by his *deed* not to do a certain thing, no action upon the caſe lies upon this promiſe, but a writ of covenant. Roll. Abr. 11. Cro. Jac. 505.

So, if *A.* recovers a debt againſt *B.* and *B.* pays him the condemnation, upon which *A.* releaſes all actions, executions, *&c.* to *B.* by deed, and by the ſame deed promiſes that he will withdraw and diſcharge all writs of execution againſt *B.* upon the ſaid judgment, yet no action upon the caſe lies upon this promiſe; becauſe it is made by deed, and ſo he ought to have a writ of covenant. Roll. Abr. 517. Bemiſh and Hilderſly, adjudged. Cro. Jac. 505. S. C. [But if articles of partnerſhip under ſeal be diſſolved, and a balance ſtruck, and an expreſs promiſe be made to pay it, an *aſſumpſit* may be brought. Foſter v Allanſon, 2 Term Rep. 479. So, if there be an expreſs promiſe to pay a balance ſtruck, though the articles, containing a covenant to account, are ſubſiſting. Moravia v. Levy, *Id.* 483. n.]

If a man leaſes for years, reſerving rent, he may have an action of covenant, as well as debt, for the rent arrear: ſo, if *A.* grants a rent to *B.* payable at a certain feaſt yearly, and covenants to pay the rent at the feaſt; an action of covenant lies for non-payment, though he might have an action of debt for it. 2 Stra. 1089. 12 Mod. 371. *Vide* title *Debt*, and *Actions in general.* Roll. Abr. 517, 518.

It ſeems by the better opinion, that upon the eviction of a freehold, no action of covenant will lie upon a warranty, either in deed or in law, for the party might have had his *warrantia chartæ*, or voucher; but in caſe of a leaſe for years upon an eviction, there can be no other remedy *. Brownl. 19. Keb. 821. *Vide* Hob. 4. Yelv. 139. Noy, 131. *The courſe now is, to introduce an expreſs covenant for quiet enjoyment, againſt all perſons claiming, and that the eſtate is free from incumbrances.

(D) Where there are ſeveral Parties: And herein of joint Covenants.

5 Co. 18. b. Slingſbey's Hob. 172. 2 Leon. 27. But where a covenant may be joint or ſeveral, *vide* 2 Roll. Abr. 149. Skin. 401. pl. 35.

IF *A.* covenants to do an act for the benefit of two or more, and *A.* breaks his covenant, one of them alone (*a*) cannot maintain covenant againſt him, for then might he be doubly or trebly charged for the ſame breach.

(*a*) In an indenture between *A.* and *B.* of the one part, and *C.* of the other part; among other covenants, there is one thus, viz. It is agreed between the parties, that *C.* ſhall enter into a bond to *B.* to pay him 100 *l.* at a day; in an action for non-performance, *A.* and *B.* muſt join. Yelv. 177.

5 Co. 19. a. Show. 8. Comb. 155.

So, if *A.* covenants to do an act for the benefit of *B.* and *C.* and enters into a bond to them *& cuilibet eorum* for performance; yet this being a joint intereſt, each cannot bring a ſeparate action, but two may bind themſelves ſeverally to pay money, or if jointly and ſeverally bound, the obligee may ſue which he pleaſes.

Sid. 107.

If *A.* covenants with *B.* that *A.* or his ſon, or either of them, ſhall work with *B.* at, *&c.* *B.* paying to each of them ſo much, *&c.* and *B.* requeſts the ſon to work with him, *&c.* if he doth not, the covenant is broken, for *B.* had the election to require both, or any one of them, to work with him.

Comb. 115. Spencer and Durant. (*b*) But *vide* Skin. 401. pl. 35. and Carth. 98. Comb. 163. * In this caſe it is to be preſumed the others who did not join in the action, were equally intereſted with him who ſued, and therefore they ought to have joined in the action.

If an agreement be entered into between ſeveral fidlers, that they would not play, *&c.* aſunder, unleſs on my *Lord Mayor's Day*, *&c.* and they bind themſelves in 20 *l.* each to the other jointly and ſeverally, and one only brings covenant, and aſſigns the breach, that the defendant played *ad quandam tabernam*, *&c.* this is naught, for they ought all to have joined, the intereſt being joint; and it is (*b*) repugnant and contradictory, for four perſons to bind themſelves one to the other jointly and ſeverally.

Lilly v. Hedges, 1 Str. 553. 8 Mod. 166. S. C.

[Where a covenant is joint and ſeveral, in an action againſt one only, the breach may be aſſigned in the neglect of both.

Enys v. Donnithorne, 2 Burr. 1197.

If two joint leſſees covenant jointly and ſeverally, and one of them die, ſuch covenant will be binding upon his executors, notwithſtanding he ſhould die before the commencement of the term, and the whole intereſt muſt neceſſarily ſurvive to his coleſſee.

Duke of Northumberland v. Errington, 5 Term Rep. 522.

If leſſees covenant jointly and ſeverally at the beginning of their covenants, theſe words extend to all their ſubſequent covenants, notwithſtanding the intervention of covenants on the part of the leſſor.]

(E) Of Covenants Real and Perſonal: And herein, of the Perſons to whom they ſhall extend; and herein,

1. Of Covenants which ſhall extend to the Heir or Executor, ſo as to be bound by them, though not expreſsly named.

IN every caſe where the teſtator is bound by a covenant, the executor ſhall be bound by it, (*a*) if it be not determined by his death. 48 E. 3. 2. Bro. Covenant, 12. S. C. Cro. Eliz. 553.

Same rule *per Curiam*; and ſo Dyer, 14. pl. 69. (*a*) *Viz.* where it was to be performed by the perſon of the teſtator, the executor cannot perform it. Cro. Eliz. 553. & *vide* 2 Mod. 268. ——[But an executor, it is ſaid, is not chargeable upon a covenant *implied*. Swan v. Searles, Moor, 74. *Sed qu.* & *vide* Porter v. Swetnam, Styl. 407. Gilb. Covenants, 327.]

If *A.* be (*b*) tenant for life, the remainder to *B.* in fee, and *A.* by indenture demiſe, &c. to *C.* for fifteen years, and after *A.* die, and *B.* enter upon *C.*, yet *C.* ſhall have no action of covenant againſt the executors of *A.* for the covenant was but (*c*) during the term, which determined by the death of the tenant for life. And. 12. adjudged. Moor, 74. pl. 204. Bendl. 150. S. C. Dyer, 257. S. P. by three

judges againſt one, who differed from the others, becauſe the leaſe was by indenture, which is a matter of concluſion; but if it had been by deed poll, he agreed with the reſt. Brownl. 22. S. P. adjudged. (*b*) So, if tenant in tail demiſe, and die without iſſue. And. 12. 1 Leon. 179. Cro. Eliz. 257. & *vide* Lit. Rep. 334. (*c*) So, if the leſſee had granted, bargained, and ſold all his eſtate to another (admitting there was, by theſe words, a warranty implied), yet it determines with the eſtate. Cro. Eliz. 157. Leon. 179.

If a man covenant that *A.* ſhall ſerve *B.* as an apprentice for ſeven years, and die, if *A.* depart within the term, a writ of covenant lies againſt the executor of the covenantor, without naming. 48 E. 3. 2. Bro. Covenant, 12. S. C.

If a man be bound to inſtruct an apprentice in a trade for ſeven years, and the maſter die, the condition is diſpenſed with, for it is perſonal; but if he were likewiſe bound to find him with meat, drink, clothes, and lodging, this the executors are obliged to perform. Sid. 216. Keb. 761. 820. Lev. 177.

[In general, the heir ſhall not be charged, unleſs expreſsly named. If indeed the leſſee be ouſted by the heir himſelf, it ſeems an action of covenant will lie againſt him; though not if he be ouſted by an elder title from the leſſor. Touchſt. 178. Dy. 257.

Hence, it is neceſſary in an *aſſumpſit* againſt the heir upon a promiſe to pay money due upon the anceſtor's bond, to aver that the heirs of the obligor were bound.] Barber v. Fox, 2 Saund. 136.

2. Of Covenants which the Heir or Executor may take Advantage of.

Covenants real, or ſuch as are (*d*) annexed to eſtates, ſhall deſcend to the heir of the covenantee, and he alone ſhall take advantage of them. 42 E. 3. 4. And. 55.

(*d*) *Secùs*, of covenants in groſs. Palm. 558.—Alſo, for a breach in the time of the covenantee, the action ſhall be brought by

his executor, though the covenant was with him, his heirs, and aſſigns only. Vent. 175. 2 Lev. 26. adjudged.

2 H. 4. 6. b. 5 Co. 18.

As if an abbot and convent covenant to ſing for the covenantee and his heirs in ſuch a chapel, his heirs at all times ſhall have a writ of covenant for the not doing thereof.

2 Lev. 92. Lougher and Williams, Skin. 305. pl. 1. S. C. cited.

If a man leaſes for years, and the leſſee covenants with the leſſor, his executors and adminiſtrators, to repair, and leave it in good repair at the end of the term, and the leſſor dies, &c. his heir may have an action upon this covenant; for this is a covenant that runs with the land, and ſhall go to the heir though he is not named; and it appears that it was intended to continue after the death of the leſſor, in as much as his executors, &c. are named.

Brudnell v. Roberts, 2 Wilſ. 143.

[But if the leſſor were only tenant for life, a leaſe for years made by him, abſolutely determines upon his death, and the heir cannot take advantage of the covenants in the demiſe.]

3. Where the Aſſignee ſhall be bound by the Covenant of the Aſſignor.

Roll. Abr. 521. Cro. Eliz. 457. Moor, 399. 5 Co. 24. S. C.

The aſſignee of a term is bound to perform all the covenants annexed to the eſtate; as if *A.* leaſes lands to *B.*, and *B.* covenants to (*a*) pay the rent, repair houſes, &c. during the ſaid term, and *B.* aſſigns to *J. S.* the aſſignee is (*b*) bound to (*c*) perform the covenants (*d*) during the life of the firſt leſſee, though the aſſignee be not named, becauſe the covenant runs with the land being made for the maintenance of a thing *in* (*e*) *eſſe* at the time of the leaſe made.

(*a*) Where the aſſignee ſhall be chargeable with a *nomine pœnæ* incurred after aſſignment, *vide* Cro. Eliz. 383. Moor, 357. pl. 486. Goldſb. 129. (*b*) By the common law, but without queſtion by the ſtatute of 32 H. 8. c. 37., Cro. Eliz. 457. (*c*) Lev. 109. Sid. 157. Raym. 80. S. P. (*d*) During the term. Moor, 399., & *vide* Cro. Eliz. 457. S. P. by two judges againſt two (*e*) When the covenant extends to a thing *in eſſe*, parcel of the demiſe, it is *quaſi* annexed to the thing demiſed, and runs with the land, and ſhall bind the aſſignee, though not expreſsly named. 5 Co. 16. b. Godb. 270.

5 Co. 15. Spencer's caſe.

But if *A.* leaſes for years to *B.*, and *B.* for himſelf, his executors and adminiſtrators, covenants with *A.* to build a wall upon part of the land demiſed, and after *B.* aſſigns, the aſſignee is not bound by this covenant, for the law will not annex the covenant to a thing not *in eſſe*.

5 Co. 15. *per Cur.* [And therefore, it ſhould ſeem, that the covenantee would be entitled in equity to a decree for a ſpecifick performance of a covenant to build. City of London v. Naſh, 3 Atk. 515. 1 Vez. 12. But ſee the caſe of Lucas v. Commerford, 3 Br. Ch. Rep. 166.]

But if *B.* had covenanted for him and his aſſigns to build the wall, &c. this would have bound the aſſignee, becauſe it is to be done upon the land, and the aſſignee is to have the benefit thereof.

Bally v. Wells, 3 Wilſ. 25.

[If a leſſee of tithes covenants for him and his aſſigns, that he will not let any of the farmers in the pariſh have any part of the tithes, this covenant runs with the tithes, and binds the aſſignee.]

If leſſee for years covenants for him and his aſſigns to rebuild and finiſh a houſe within ſuch a time, and after the time expired, the leſſee aſſigns over the premiſes, the houſe not being built and finiſhed according to the covenant; this covenant ſhall not bind the aſſignee, becauſe it was broken before the aſſignment; *aliter*, if broken after; as if the leſſee had aſſigned before the time expired. Salk. 199. pl. 5. Ld. Raym. 388. *per* Holt, Ch. Juſt. 3 Burr. 1271. 1 Bl. Rep. 351. S. P.

Alſo, though the covenant be for him and his aſſigns, yet if the thing to be done be *merely collateral*, and no way concerning the thing demiſed, the covenant ſhall not bind the aſſignee; as if it be to build an houſe upon other land of the leſſor, or (*a*) to pay a collateral ſum. 5 Co. 15. *per Cur.* (*a*) Cro. Jac. 438. S. P. adjudged.

So, if a man demiſes ſheep or other perſonal things for a certain time, and the leſſee covenants, for him and his aſſigns at the end of the term, to deliver ſuch ſheep, &c. or the price of them, and the leſſee aſſigns them over, the aſſignee ſhall not be bound by the covenant; for it is but a (*b*) perſonal contract, and there is not (*c*) ſuch privity as between leſſor and leſſee of land and his aſſigns. 5 Co. 16. b. 17. a. (*b*) So, of a leaſe of a fair, wine-licence, &c. Hard. 88. —But where ſuch an aſſignee may be made liable in equity, *vide* 2 Vern. 423. (*c*) If *A.* having land charged with the payment of a fee-farm rent, grants part of the land to *B.*, and covenants that the ſame ſhall be diſcharged of the ſaid rent, and after grants the reſidue of the land to *C.*, this ſhall not be taken as a covenant-real, which ſhall in equity charge the other land granted to *C.* with the whole rent. Hard. 87.

So, (*d*) if a man leaſes lands for years (*e*) with a ſtock of cattle, and the leſſee for him and his aſſigns covenants to deliver the ſtock at the end of the term. 5 Co. 17. a. 3 Wilſ. 27. (*d*) A man poſſeſſed of a tavern for ſix years, leaſes to another for three years; and it was covenanted, that during the three years *quolibet menſe* the leſſee ſhould give an account to the leſſor of the wine which he ſold, and ſhould pay unto him, for every ton ſo ſold, ſo much; and after the leſſor grants the remaining three years to another: the covenant being collateral, it paſſes not by the aſſignment of the three years, Godb. 120. Moor, 243., though the covenant was to account to the leſſor or his aſſigns. (*e*) As in Owen, 139. Leon. 42. Godb. 113.

If leſſee for years for himſelf, his executors and adminiſtrators, covenants with his leſſor to leave fifteen acres every year for paſture, *abſque culturâ*, and after the leſſee aſſigns; the aſſignee, though not named, muſt perform the covenant, becauſe it is for the benefit of the eſtate, according to the nature of the ſoil: but a collateral covenant, as to build *de novo*, &c. ſhall not bind him, unleſs named. Cro. Jac. 125. adjudged.

If *A.* demiſes to *B.* ſeveral parcels of land, and the leſſee covenants for him and his aſſigns to repair, &c. and after the leſſee aſſigns to *D.* all his eſtate in parcel of the land demiſed, and *D.* does not repair that to him aſſigned, the leſſor may have an action of covenant againſt *D.* the aſſignee. Roll. Abr. 522. Cro. Car. 221. S. C. adjudged, becauſe this covenant is deviſeable, and follows the land, with which the defendant is chargeable by the common or by ſtatute law. Jones, 245. S. C. adjudged. —— So, if the leſſor had granted the reverſion of part to one, and of another part to another, they might have brought an action of covenant. Lev. 109. Sid. 157. Raym. 80. Kitchen and Buckly.

If a man leaſes for years, and the leſſee covenants for him and his aſſigns, to pay the rent ſo long as he and they ſhall have the poſſeſſion of the thing let, and the leſſee aſſigns, the term expires, Stile, 407, Bromefield and Sir John Williamſon,

[Q. the form of action?] and the assignee continues the possession afterwards; an action of covenant (*a*) will lie against him for rent behind after the expiration of the term; for though he is not an assignee (*b*) strictly according to the rules of law; yet he shall be accounted such an assignee as is to perform the covenants.

(*b*) If a lessee for years, with covenants to repair, assigns to *J. S.* by way of mortgage, and *J. S.* never enters, equity will not compel him to repair, though he had the whole interest in him; and though it was his own folly to make an assignment of the whole term, when he should have taken a derivative lease, by which means he would not be liable at law. 2 Vern. 275.—But such an assignee, though he never entered, and had lost his mortgage money, was by law compelled to pay the rent; and having sued in equity, could have no relief. 2 Vern. 374. [But this case was overruled in Eaton v. Jaques, Dougl. 455., where it was determined, that covenant will not lie against a mortgagee of a term, though the mortgage be forfeited, *till he takes actual possession*. It is otherwise indeed in the case of an assignee under an absolute indefeasible assignment of the whole interest in the term; for there actual entry is not necessary to make him chargeable. Walker v. Reeves, *id.* 461. n.]

Carth. 519. Tilney and Norris, adjudged, Ld. Raym. 553. Salk. 309. pl. 13. If *A.* leases to *B.*, and *B.* covenants to repair, *&c.* and he assigns to *J. S.* who dies intestate; the premises being out of repair, the lessor may bring covenant against his administrator as assignee, and declare that he made a lease to *B. &c cujus status & residuum termini annorum, &c. devenit, &c. per assignationem* to the administrator.

4. Where the Assignor continues still liable.

Bro. Covenant, 32. Roll. Abr. 522. S. C. Jones, 223. S P. *per Cur.* If a lessee covenants that he and his assigns will repair the house demised, and the lessee grants over the term, and the assignee does not repair it, an action of covenant lies either against the assignee at common law, because this covenant runs with the land; or it lies against the lessee, (*c*) at the election of the lessor.

(*c*) He may charge both, but execution shall only be against one of them; for if he takes both in execution, he that is last taken shall have an *audita querela*. Cro. Jac. 523.

Roll. Abr. 522. Cro. Jac. 309. 521. S. C. adjudged, that it lay against the executor of the lessee. Roll. Rep. 359. 2 Roll. Rep. 63. So, if a man leases for years, rendering rent, and the lessee covenants for him and his assigns to repair the house during the term, and after the lessee assigns over the term, and the lessor accepts the rent from the assignee, and after the covenant is broken, notwithstanding the acceptance of the rent from the assignee, yet an action of covenant lies against the first lessee, for the lessee hath covenanted expressly for him and his assigns, and this personal covenant cannot be transferred by the acceptance of the rent.

Poph. 136. Godb. 276. Cro. Car. 188. 580. Jones, 223. Sand. 240. Brownl. 20. Style, 300. 2 Mod. 139. Sid. 402. 447. 2 Keb. 640. [But *debt* for the rent in such case would not lie. *Vide* the cases *supra*, and 1 Freem. 336., Cro. Ja. 309. Wadham v. Marlow, B. R. M. 1784. And if the covenant be merely implied by law, the lessor's acceptance of the assignee will entirely discharge the lessee. 1 Sid. 447. Cro. Ja. 523.]

3 Lev. 233. Edwards and Morgan, adjudged, Carth. 178. S. C. cited. So, if *A.* leases to *B.* rendering rent, and *B.* covenants to pay it, and after *B.* assigns to *C.* and *A.* grants the reversion to *D.*, and *D.* after accepts rent from *C.* yet for non-payment at another day, *D.* may have an action against *B.* it being upon an (*d*) express covenant.

(*d*) Brownl. 20. Sid. 447. S. P.

Knight v. Freeman, Raym. 303. 1 Ventr. 329. 331. T. Jones, 109. Also, an assignee, who assigns over, is liable, and shall pay the rent which incurred due before, and during his enjoyment.

[In this case of Knight and Freeman, the assignment was fraudulent,

fraudulent, and the fraud was averred, and upon that ground the decision proceeded. But in a later case, this circumstance, it is said, would not alter the case at all, but that immediately upon the assignment, the assignee is discharged. Lekeux v. Nash, 2 Str. 1221. Bull. *Ni. Pri.* 159. Be the rule of law upon this point what it may, it seems to be now settled, that courts of equity will compel an assignee of a term to account for the rent the whole time he enjoyed the land. Treacle v. Coke, 1 Vern. 165. Whether they will, in order to secure the future rents under any circumstances, restrain an assignee from assigning to a beggar, or insolvent person, was considered, but not determined, in the case of Philpot v. Hoare, 2 Atk. 219. Ambl. 480. S. C. See this point examined in Fonbl. Eq. Tr. 351. n.]

But in covenant against *A.* as assignee for non-payment of rent, he may plead, that before any rent was due and payable, *viz.* on such a day, he granted and assigned all his term and estate to *J. S.* who by virtue thereof entered, and was possessed for the residue of the term; and this shall be a good discharge, without alleging any notice of the assignment, or that the lessor accepted *J. S.* as his tenant.

Carth. 177. Tovey and Pitcher, adjudged. Salk. 80. pl. 1. 2 Vent. 228. S. C. 232. 1 Salk. 4 Mod. 71. 1 Salk. 81. Keightley v. Buckly, 1 Lev. 215. S. P.

S. C. 3 Lev. 295. S. C. Show. 340. S. C. 12 Mod. 23. S. C. Holt, 73. pl. 1. S. C. S. C. Boulton v. Canon, 1 Freem. 326. S. P. Cooke v. Harris, 1 Ld. Raym. 368.

[Although all the estate and interest of a lessee be divested out of him and assigned by act of parliament, yet, without express words of discharge, he is still liable upon his covenant for the rent.]

Hornby v. Houlditch, Andr. 40. 1 Term Rep. 93. n. S. C.

Hence an assignment under a commission of bankrupt will not discharge the lessee from his express covenant. Mills v. Auriol, 1 H. Bl. 433. affirmed in error, 4 Term Rep. 94.

5. Where an Assignee shall take Advantage of a Covenant.

As an assignee shall be bound by a covenant real annexed to the estate, and which runs along with it, so shall he take advantage of such; and therefore if the lessor covenants to repair, or if he grants to the lessee so many estovers as will repair, or he shall burn within his house during the term; these, as things appurtenant, shall go with it into whose hand soever it comes.

Roll. Abr. 521. 5 Co. 17. b. Godb. 270. Moor, 242. pl. 380. Preced. Chan. 39, 40.

[But in order to make a covenant run with the land, it is not sufficient that it be concerning the land; there must also be a privity of estate between the covenanting parties. If therefore a mortgagor and mortgagee of a term make a lease, in which the covenants for the rent and repairs are with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his assignor's interest in the land, and therefore do not run with it. Webb v. Russell, 3 Term Rep. 393. But such action may be maintained by the mortgagor himself. Stokes v. Russell, *id.* 678., affirmed in error, 1 H. Bl. 562.]

So, if a man leases lands to another by indenture, this covenant in law, created by the word *demise*, shall (*a*) go to the (*b*) assignee of the (*c*) term, and he shall have an advantage of it.

Roll. Abr. 521. Dyer, 257. 4 Co. 80.

5 Co. 17. b. S. P. resolved. (*a*) So, of tenant by statute-merchant, &c. of a term, &c. though they came to the land by act in law. 5 Co. 17. a. ——But not to an assignee of a lease by estoppel only. Moor, 419. Cro. Eliz 373. (*b*) The assignee of the assignee, the executors of the assignee, the executors or administrators of every assignee, are all comprised within this word *assigns*. 5 Co. 77. b. Carth 519. Ld. Raym. 553. Salk. 309. pl. 13. (*c*) When the estate passes, though by parol, the warranty and covenants follow it, and the assignee of the estate shall have the benefit thereof. Cro. Eliz. 373. 436.

But if one by indenture leases a house for forty years, and the lessee covenants with the lessor, that he will sufficiently repair the

Moor, 27. pl. 88. Skern's case, ad-

judged by three judges againſt one, who held, that the poſſibility was inherent to the land and term.

houſe during the term, and that the leſſor may enter every year to ſee if the repairs are done; and if upon view of the leſſor it be repaired according to the agreement, that then the leſſee ſhall hold the houſe for forty years after the firſt term ended; and the leſſee grants to another *totum intereſſe*, *terminum & terminos quæ tunc habuit in tenementis*, and after, the firſt term ends, the aſſignee ſhall not take benefit of this agreement.

5 Co. 18. Co. Lit. 384. b. S. P.

Upon equality of partition, if one coparcener covenants to acquit the other and her heir of ſuit, the aſſignee of the land ſhall have benefit of this covenant.

Roll. Abr. 521. Middlemore and Goodal, Cro. Jac. 503. 505. Jones, 406. S. C.

If *A.* ſeiſed of lands in fee, conveys it by deed indented to *B.* and covenants with *B.* heirs and aſſigns, to make any other aſſurance upon requeſt, for the better ſettlement of the land, *&c.* and after *B.* conveys it to *C.* who conveys it to *D.* and after *D.* requires *A.* to make another aſſurance according to the covenant, and he refuſes, *D.* ſhall have an action of covenant in this caſe againſt *A.* by the common law, as aſſignee to *B.*

Moor, 185. *per Cur.*

If *A.* by deed enfeoffs *B.* of certain lands, reſerving rent, fealty, and ſuit of court, and by the ſame deed grants, that if the feoffee ſhall be diſtrained, vexed, or charged for other rents or ſervices, then he may enter and diſtrain for his amends in other lands; this is annexed to the eſtate of the land, and ſhall go with it to every aſſignee.

Leon. 61. Maſchall's caſe, adjudged. Moor, 242. pl. 380. S. C. adjudged.

If *A.* leaſes an houſe to *B.* for years, who covenants to repair, and that *A.*, his heirs, executors, and adminiſtrators, may at all times enter, and ſee in what plight the ſame is; and if upon ſuch view any default ſhall be found in the not repairing, and thereof warning ſhall be given to *B.*, his executors, *&c.* then within four months after ſuch warning ſuch default ſhall be amended; and after, the houſe in default of *B.* becomes ruinous, and *A.* grants the reverſion to *C.* who upon view of the houſe gives warning to *B.* of the default, *&c.* if it is not repaired, *C.* may have an action as aſſignee of *A.* againſt *B.* though the houſe became ruinous before *C.* was entitled to the reverſion; (*a*) for the action is not founded upon the ruinous eſtate of the houſe, and the time when it firſt happened, but for not repairing within the time appointed by the covenant after the warning.

(*a*) But an aſſignee ſhall not have an action upon a breach of covenant before his time. Cro. Eliz. 863. 3 Leon. 51. 2 Vent. 278. ——But upon a breach after his time, though his eſtate is determined, he may. Roll. Rep. 80. Owen, 152. 2 Bulſt. 281.

Cro. Eliz. 599. 617. Gouldſ. 175. S. C.

If leſſee for years covenants to leave the houſes in good repair at the end of the term, and the leſſor grants his reverſion to another, (*b*) though this covenant is not to be performed during the term, yet for a breach thereof the grantee of the reverſion may bring an action, and there cannot be a more apt covenant to run with the land.

(*b*) So, where the leſſor covenants to make a new leaſe at the end of the term, and the leſſor grants over his reverſion. Moor, 150. And. 82.

Cro. Car. 137. Jones, 242. S. C.

If *A.* leaſes lands to *B.* for 200 years, and by the ſame deed covenants for himſelf, his heirs, and aſſigns, with *B.*, his executors, and aſſigns, that if *B.* is diſturbed for reſpite of homage, or enforced

enforced to pay any charge, or iſſues loſt, that he ſhall with-hold ſo much of his rent as he ſhall be enforced to pay, and *A.* grants his reverſion to *C.*, and *B.* aſſigns the term to *D.*, *D.* may take the benefit of this covenant againſt *C.*, for it runs with the land.

6. Of Covenants which bind by Force of the Statute 32 *H.* 8. *c.* 34.

By the 32 *H.* 8. *c.* 34. reciting, "Whereas divers had leaſed "manors, &c. or other hereditaments (*a*) for life or lives, or "years, by writing, containing certain conditions, covenants, and "agreements, as well on the part of the leſſees and grantees, "their executors and aſſigns, as on the part of the leſſors and "grantors, their heirs and ſucceſſors; and whereas by the com-"mon law, no ſtranger to any condition or covenant could take "advantage thereof, by reaſon whereof all grantees of reverſions, "and all grantees and patentees of the king, of abbey lands, "could have no entry or action for any breach, &c. it is enacted, "That all perſons, bodies politick, their heirs, ſucceſſors, and "aſſigns, which have, or ſhall have any grant of our (*b*) ſaid "lord the king, of any lordſhip, &c. rents, tithes, portions, or "other hereditaments, or any reverſion thereof which belonged "to the monaſteries, &c. or which belonged to any other per-"ſon, &c. and alſo all other perſons, (*c*) (*d*) being (*e*) grantees "or aſſignees, (*f*) to, or (*g*) by our ſaid lord the king, or to, or "by any other perſon or perſons, and the heirs, (*h*) executors, "ſucceſſors, and aſſigns of every of them, (*i*) ſhall and may "have (*k*) like advantage by entry for non-payment of rent, or "for doing waſte or (*l*) other forfeiture; and the (*m*) ſame re-"medy by action only for not performing other conditions, cove-"nants and agreements contained in the ſaid leaſes againſt the "leſſees and grantees, their executors, adminiſtrators, and aſſigns, "as (*n*) the (*o*) leſſors and grantors, their heirs or ſucceſſors, "ought, ſhould, or might have had at any time or times."

(*a*) Extends not to gifts in tail, Co. Lit. 215. Cro. Eliz. 863.

(*b*) It extends to his ſucceſſors, though not named. Co. Lit. 215. a.

(*c*) It extends not to grantees by fine till attorment; for it muſt be intended of ſuch only as have had all ceremonies requiſite by law. Co. Lit. 215. 5 Co. 112, 113.

(*d*) Though after breach, and before the action brought, their eſtate determines. Roll. Rep. 80. Owen, 151. 2 Bulſt. 281.

(*e*) It extends to grantees of part of the eſtate of the reverſion, &c. Co. Lit. 215. a. Godb. 162. Roll. Rep. 80. Owen, 151. 2 Bulſt. 181. & *vide* Leon. 252. Moor, 93. pl. 230.——But not to grantees, &c. of the reverſion in part of the land. Co. Lit. 215. Cro. Eliz. 833. Moor, 98.

(*f*) It extends to him that comes in by limitation of an uſe, though in the poſt; for coming in by the act and limitation of the party, he is a ſufficient grantee, &c. within the ſtatute. Co. Lit. 215. Moor, 98. 4 Leon. 27. 29.——But it does not extend to ſuch as come in merely by act in law, as the lord upon an eſcheat, alienation upon a mortmain, &c. Co. Lit. 215. b.—Nor to him who is in of another eſtate. Moor, 876.

(*g*) But if a copyholder by licence of the lord leaſes for years, &c., and after ſurrenders the reverſion to the uſe of another in fee, who is admitted, yet he is not a grantee, &c. within the act, for he is not privy to the leaſe made by the copyholder, nor in by him, but may plead a grant of his eſtate immediately from the lord. Braſier and Beal, Yelv 222. *per Curiam*, upon the firſt opening. Cro. Jac. 205. Adjudged by two judges, & *vide* Cro. Car. 25. 44. Hob. 178. But in the caſe of Glover and Cope, 3 Lev. 326. it is adjudged, that ſuch ſurrendree may have an action of covenant by this act.

(*h*) Leſſee for twenty years leaſes for ten years, and his leſſee covenants, &c., and the firſt leſſee grants his reverſion, this grantee is a ſufficient aſſignee within the ſtatute. Moor, 525. 527. Cro. Eliz. 599. 617. 649. Gouldſ. 175. Godb. 161.

(*i*) Whether this doth not imply that the grantor ſhall not, 3 Lev. 155. *dubitatur*, & *vide* Sid. 402.

(*k*) But he ſhall not take advantage of a condition before he has given notice to the leſſee. Co. Lit. 215. 5 Co. 113. b.—*Secùs*, of a covenant. Godb. 262. Cro. Jac. 476. Bridg. 130.

(*l*) *Viz.* by force of a condition incident to the reverſion, as rent, or for the benefit of the eſtate, as for doing waſte, not keeping houſes in repair, &c., and not for the payment of any ſum in groſs, delivery of corn, &c. Co. Lit. 215. b. & *vide* 5 Co. 18. Moor, 159. 243. 876. Owen, 41. And. 82. Raym. 250. Sand. 159. If the *proviſo* be to enter for non-payment of a rent, or groſs ſum by way of a fine, the grantee of the reverſion ſhall not take advantage of it; for the condition cannot be apportioned. Style, 316. *Sed qu.?*

qu.? (*m*) The privity of action is transferred, and it may be brought in the county where the covenant was made, though the lands lie in another. Sand. 237. adjudged; but a writ of error was brought in *Cam. Scacc.*, and it was after compounded. Sid. 401. Lev. 259. Vent. 10. & 3 Mod. 338. and tit. *Actions Local and Tranſitory.* (*n*) Therefore if the conuſee of the reverſion before attornment, bargains and ſells to another, to whom the leſſee attorns, the bargainee may, &c., though his bargainor could not. 5 Co. 113. a. (*o*) *A.* deviſes to *B.* for years, rendering rent, upon condition to re-enter for non-payment; and afterwards deviſes the reverſion in fee to another, and dies; the deviſee may take advantage of the condition, though there never was any reverſion, &c. in the deviſor. 2 Leon. 33.

(*a*) But if leſſee for 30 years leaſes to another for 10, he is no aſſignee within the ſtatute; for he is not tenant to the firſt leſſor. Moor, 93. pl. 230.

And by the ſame act it is enacted, "That all farmers, leſſees, "and grantees of lordſhips. *&c.* rents, tithes, portions, or other "hereditaments for years, life or lives, their executors, admini-"ſtrators, and (*a*) aſſigns, ſhall and may have like action and "remedy againſt all perſons, bodies politick, their heirs, ſucceſ-"ſors, and aſſigns, which by grant of the king, or other perſons, "ſhall have the reverſion of the ſame lordſhips, *&c.* ſo letten, "or any part thereof, for any condition, covenant, or agreement "contained in their leaſes, as the leſſees, or any of them, might "or ſhould have had againſt the leſſors and grantors, their heirs "and ſucceſſors; recovery in value, by reaſon of any warranty "in deed or law, only excepted."

Carth. 289, 290. Midgly and Gilbert v. Lovelace, adjudged.

A. demiſed a houſe for a term of years to *B.* who aſſigned to *J. S.* the leſſor deviſed one moiety of the reverſion to *C.* and the other to *D.* who granted the reverſion to *J. S.* after which grant *C.* and *D.* brought covenant againſt *J. S.* for rent due before the aſſignment by them; and it was holden, 1. That *C.* and *D.* being tenants in common, may at their election join or ſever, as well in debt as in covenant, for the rent; but if they ſever, they muſt not each of them make his demand of ſuch a certain ſum, which amounts to a moiety; but the demand muſt be *de unâ meditate* of the whole rent; and if they can count in debt, they may in covenant, and if debt will lie, *a fortiori* covenant. 2. That this action was maintainable for the arrears of the rent, notwithſtanding the reverſion was out of the plaintiffs; for though the defendant was but an aſſignee of a term, yet the very privity of contract was transferred by the ſtatute of 32 *H.* 8. *c.* 34. which gives the action for and againſt aſſignees; and the contract ſtill remains, though the privity of eſtate is gone.

(F) How Covenants are to be conſtrued.

Moor, 458. 8 Co. 83. Sir Richard Pexhall's caſe. (*b*) Lev. 102. Hookes and Swain, Sid. 151. Keb. 511. S. C. (*c*) If I co-

ALL contracts are to be taken according to the intent of the parties, expreſſed by their own words, and if there be any doubt in the ſenſe of the words, ſuch conſtruction ſhall be made as is moſt ſtrong againſt the covenantor, leſt, by the obſcure wording of his contract, he ſhould find means to evade and elude it; hence, (*b*) if *A.* covenants with *B.* that, if *B.* marries his daughter, he will pay him 20*l.* *per ann.* without ſaying for how long, yet it ſhall be for the life of *B.* and not for one year only; for by the word *per annum*, the (*c*) meaning of the parties appears to

to be, that it ſhould continue longer than one year; and this is the conſtruction that is moſt ſtrong againſt the grantor.

venant to deliver ſo many yards

of cloth, and I cut it in pieces, and then deliver it, this is a breach; for the law regards the real and faithful performance of contracts, and diſcountenances all ſuch acts as are done *in fraudem legis*. Raym. 464.——So, if the condition of a bond be to pay 50*l*., though it is not ſaid of money, yet it muſt be ſo intended. Sid. 151.——But if a man covenants that his ſon, then *infra annos nubiles*, ſhall marry the daughter of *B*. before ſuch a day, and he marries her accordingly, but at the age of conſent diſagrees to the marriage, yet is the covenant performed; for it was a marriage, though ſubject to be defeated by diſagreement, and no other could be had within the time. Owen, 25. adjudged.

If two men leaſe for years, and covenant that the leſſee ſhall enjoy free from all incumbrances made by them, and, after, the leſſee be diſturbed by *J. S.* to whom one of the leſſors had made a precedent leaſe; this is a breach, for they ſhall be taken ſeverally, and not jointly only.

Noy, 86. Meriton's caſe. Latch. 161. and Poph. 200. S. C.

If a man leaſes for ſix years, and covenants, that if he ſhall be diſpoſed to leaſe the land after the expiration of the term of ſix years, that the leſſee ſhall have the refuſal; and within the ſix years he leaſes to another; this is no breach, becauſe (*a*) out of the words of the covenant.

Godb. 335. & *vide* 2 Roll. Rep. 332. 347. S. C.

(*a*) If *A.* leaſes land to *B.* for ſix years, and covenants, that he ſhall enjoy it during the term without interruption, diſcharged from tithes, and after the ſix years he is ſued for tithes, this is a breach; for the meaning was, that he ſhould be freed from ſuits, and the payment of tithes; and a ſuit after the expiration of the term, is as prejudicial, as if before. Cro. Eliz. 916. 2 Brownl. 22.

If a man leaſe for nine years by indenture, dated 1 *Jan.* 16 *Car.* 2. and covenant to ſave the leſſee harmleſs from all evictions during the term, but this deed be not delivered till 1 *Jan.* 17 *Car.* 2. if he be in poſſeſſion and evicted before the delivery, this is a breach; for during the term, ſhall be conſtrued during the term in computation, and not only from the time of the delivery of the deed, when it firſt commenced, in point of intereſt.

Sid. 374. Lewis and Hilliard.

If *A.* leaſes three meſſuages to *B.* for forty-one years, and *B.* covenants to pull them down, and erect three other in their place, *ac etiam de tempore in tenpus* to maintain the meſſuages agreed to be erected in ſufficient repair, *ac etiam* to repair the pavements, *&c. ac etiam dicta præmiſſa, & domos ſuperinde fore erect.*, at the end of the term to leave in good repair; and after *B.* pulls down the three houſes, and builds five, he muſt leave them all in good repair at the end of the term; for though by the firſt covenant he is bound only to repair, *&c.* the meſſuages *agreat. fore erect.*, yet by the laſt covenant he is obliged to leave in good repair *domos ſuperinde erect.* indefinitely, which extends to all houſes which ſhall be built upon the premiſes during the term.

3 Lev. 264. Douſe and Earl. 2 Vent. 126, 127. S. C. adjudged; becauſe taken as ſeveral covenants; but Rokeby doubted, it ſeeming to him to be all one covenant; and

that the ſubſequent matter, concerning leaving the houſes in good repair, muſt be reſtrained to, and underſtood of, thoſe agreed to be built.

So, if a man takes a leaſe of a houſe and land, and covenants to leave the demiſed premiſes in good repair at the end of the term, and he erects a meſſuage upon part of the land, beſides what was before, he (*b*) muſt keep or leave this in good repair alſo.

3 Lev. 265. *per Curiam.* (*b*) S. P. adjudged between Brown and Blunden, Skin. 121. For it is a continuing covenant; and though the houſe had no actual, yet it had a potential being, at the time of the leaſe.

Lant v. Norris, 1 Burr. 287.

[But where in a building and repairing leaſe, the leſſee covenanted to lay out a given ſum in erecting and rebuilding meſſuages or tenements, or ſome other buildings upon the ground and premiſes; and from time to time, &c. all and ſingular the ſaid meſſuages and tenements ſo to be erected, with all ſuch other houſes, edifices, &c. as ſhould at any time or times thereafter be erected, &c. to repair, &c.; and the ſaid demiſed premiſes, with all ſuch other houſes, &c. ſo well repaired, &c. at the end, &c. of the term to deliver up, &c. it was holden, that the covenant to repair extended only to the new erections.]

Carth. 135. Giles and Hooper.

If a leaſe be made for years, rendering 80*l. per annum* rent, free and clear from all manner of taxes, charges, and impoſitions whatſoever, the leſſee is bound to pay the whole rent without any manner of deduction, for any old or new tax, charge, or impoſition whatſoever.

Brewſter v. Kidgil, Salk. 198. pl. 4. Ld. Raym. 318. S. C. 12 Mod. 169. 171. S. C. Comb. 424. 467. S. C. Carth. 438. S. C. 5 Mod. 368. S. C.

So, where *A.* by deed, dated 1649, granted a rent-charge of 40*l. per ann.* to *B.* and his heirs, and on the ſame deed there was an (*a*) indorſement, that the rent was to be paid clear of all taxes: by the 3 *W. & M.* 4*s. per* pound is laid upon land, and power given to the tenant to deduct 4*s.* in the pound, with a *proviſo*, not to alter the covenants or agreements of parties; it was holden, that ſuch a covenant, if made in the year 1640, would not have freed the rent-charge from the taxes impoſed by thoſe acts, becauſe there were no ſuch parliamentary tax in being, or known at that time; but becauſe there were ſuch taxes in the year 1645, which was before the grant, therefore this covenant muſt be conſtrued to extend to them.

(*a*) Which muſt be preſumed to have been made before the deed was executed, and ſo parcel thereof. Carth. 439. *per Cur.*

Bridges v. Hitchcock, 1 Br. P. C. 522.

[In a demiſe of corn-mills, there was a covenant on the part of the leſſor, that "if the leſſee, his executors, &c. ſhould before the expiration of the term, be minded to renew, then, upon application, &c. the leſſor, his heirs or aſſigns, ſhould grant ſuch further leaſe, as ſhould by the leſſee, his executors, &c. be deſired, without any fine to be demanded therefore, *and under the ſame rents and covenants only* as in the then leaſe;" and the queſtion was, Whether there muſt be a covenant for renewal again in the ſecond leaſe? The court of Exchequer were of opinion, that under the words *the ſame rents and covenants*, the covenant for renewal ought to be inſerted; and on appeal to the Houſe of Lords, their decree was affirmed.

Furnival v. Crewe, 3 Atk. 83.

Again, in a leaſe for three lives, the leſſor covenanted, that he, his heirs, &c. ſhould and would (in conſideration of a certain ſum to be paid to him, &c. at *Crewe Hall*, or at the place where the ſaid hall then ſtood, in the name of a fine, for adding one life to the remaining lives therein before mentioned) execute one or more leaſe or leaſes, *under the ſame rents and covenants* which were expreſſed in the then leaſe, *and ſo to continue the renewing of ſuch leaſe or leaſes* to the leſſee, or his aſſigns, paying as aforeſaid to the leſſor, his heirs or aſſigns, the ſum before mentioned for every life ſo added or renewed from time to time. Lord *Hard-*

wicke

wicke held this to be a covenant of perpetual renewal, and decreed a new leaſe to be granted to the aſſignee of the original leſſee with a covenant inſerted in it to that effect.

Cook v. Booth, Cowp. 819. Where the terms of a covenant are plain and unambiguous, a court of law cannot admit of evidence *dehors*, to explain the intent of the parties, though the conduct of one of them may be a fraud upon the covenant. Clifton v. Walmeſley, 5 Term Rep. 564.

Again, in ſuch a leaſe, the leſſor had covenanted, that if the leſſee, his heirs, *&c.* ſhould be minded upon the falling in of any of the lives, to ſurrender the demiſe and take a new leaſe; and thereby add a new life to the then two in being, in lieu of the life ſo dying, that he the leſſor, his heirs, *&c.* upon payment of ſo much for every life ſo to be added, in lieu of the life of every of them ſo dying, would grant a new leaſe for the lives of the two perſons named in the former leaſe, and of ſuch other perſon, as the leſſee, his heirs, *&c.* ſhould appoint in lieu of the perſon named in the preceding leaſe, as the ſame ſhould reſpectively die, *under the ſame rents and covenants. There had been ſucceſſive renewals from the time of the firſt leaſe; and in every leaſe the like covenant for renewal had been inſerted.* The court of King's Bench held, that the leſſors *by their own acts* conſtrued this to be a covenant for perpetual renewal.

Ruſſell v. Darwin, 2 Br. Ch. Rep. 639. n.

But where in a leaſe for years determinable upon lives, the covenant was, that the leſſor would upon the death of any of the appointees (by name) add a new third life upon payment of 200*l.* within ſix months; or upon the death of two of them (by name) within ſix months add two new lives upon payment of 500*l.*; or upon the death of all of them (by name) would, upon payment of 1150*l.* make a new leaſe or grant for any three new lives to be nominated and appointed by the leſſee, his executors, *&c.* for the like term as was thereby demiſed, *at and under the like rent, covenants, and agreements therein contained;* Lord *Camden* was of opinion, that the leſſors were not under any obligation to grant any further leaſe than for three new lives only, and that the leſſee was not entitled to have any covenants inſerted for any further renewal; the words of the covenant not obliging the leſſors to grant a new leaſe, but upon the death of ſome one of the perſons named in that leaſe; and they being all dead, no further renewal could be claimed.

Tritton v. Foote, 2 Br. Ch. Rep. 636.

So, under a covenant in a leaſe for twenty-one years, that the leſſor, his executors, *&c.* would, at the end and determination of the ſaid term of twenty-one years, execute a new leaſe of the demiſed premiſes, for the further term of ſeven years to commence from the end of the ſaid term of twenty-one years, thereby demiſed, *ſubject to the ſame rents, and purſuant to the ſame exceptions, covenants, reſervations, conditions, and agreements in all reſpects, as were in and by the then granted indenture of leaſe mentioned and expreſſed,* in caſe the leſſee, his executors, *&c.* ſhould deſire the ſame; the leſſee, his executors, *&c.* firſt giving twelve months notice in writing to the leſſor, his heirs or aſſigns, of his or their deſiring ſuch further term of years as aforeſaid; Lord *Thurlowe* declared the leſſee entitled to a leaſe for ſeven years only, it appearing that the leſſee himſelf had put that conſtruction upon it.]

(G) Where the Principal, and all Auxiliary Covenants ſhall be ſaid to be void and extinguiſhed.

6 H. 4. 1. Roll. Abr. 522. (a) But if he had not retaken ſuch eſtate, ℣. Roll. Abr. 55.

IF a man covenants with tenant for life of an houſe, to find a chaplain to ſing, &c. every *Saturday* during the life of the covenantee, if the covenantee ſurrenders the houſe, and (a) retakes an eſtate for years, yet the covenant remains.

Mod. 223. Boſcawen and Herle, adjudged, 2 Mod. 138. S. C.

If *A.* grants a rent-charge to *B.* for the life of *C. habend.* to *B.* his heirs and aſſigns, to the uſe of *C.*, and *A.* covenants to pay it *ad uſum C.* if the rent is behind, *B.* may have an action of covenant againſt *A.* for though the rent-charge is executed by the ſtatute, and the power of diſtraining, as incident thereto, transferred to *C.* yet the covenant being collateral, is not transferred nor diſcharged, but remains with *B.*

2 Lev. 26. Lucy and Levinſton, Vent. 175. 2 Keb. 831. S. C.

If a man hath good title to lands by virtue of a fine, and ſells the ſame, and covenants with the vendee, his heirs and aſſigns, that he ſhall enjoy againſt him and *B.* and all claiming under them; and after, by an act of parliament, reciting that *B.* had ſettled this eſtate upon *C.*, and that certain perſons had unduly procured the ſaid fine from her, it is enacted, That the fine ſhall be void, and that every perſon may enter as if no ſuch fine had been; and after, one enters, claiming title under *C.*, this is a breach of the covenant; for the act makes no new title, but removes the obſtruction of the old; and it was ſaid, that doubtleſs *B.* was named in the covenant for this purpoſe, in caſe this fine unduly obtained ſhould be avoided.

Salk. 198. pl. 4.

As to covenants which are repealed or extinguiſhed by act of parliament, the following diverſities are laid down, *viz.* Where *A.* covenants not to do any act or thing which was lawful to do, and an act of parliament comes after, and compels him to do it, the ſtatute repeals the covenant; ſo, if *A.* covenants to do a thing which is lawful, and an act of parliament comes and hinders him from doing it, the covenant is repealed; but if a man covenants to do a thing which then was unlawful, and an act comes and makes it lawful to do it, ſuch an act of parliament does not repeal the covenant.

Cro. Eliz. 329. Lee and Colſhill, 2 And. 55. S. C. by the report of which it appears, that by the agreement, *B.* was to pay 600 *l.*, and to allow *A.* 100 *l.* yearly for this deputation, and adjudged, becauſe the obligation is one entire act and deed of the party; & *vide* 2 And. 207, 208. 3 Co. 82. S. C. cited.

If *A.*, being a cuſtom-houſe officer by patent, makes *B.* his deputy, and covenants, *inter alia*, to ſurrender the old patent, and procure a new one to *B.* and himſelf before a day, and that if *B.* dies before *A.*, that *A.* ſhall pay 300 *l.* to the executors of *B.*, and gives bond for the performance thereof; admitting theſe covenants void by (b) the 5 *Ed.* 6. *cap.* 16. the whole bond is void, though ſome of the covenants are not void or illegal.

(b) So, where a ſheriff takes a bond in part againſt 23 H. 6. c. 9., and alſo for a juſt debt, the whole bond is void according to the letter of the ſtatute; for a ſtatute is a ſtrict law, but the common law divides according to common reaſon; and having made that void which is againſt law, lets the reſt

reſt ſtand. Hob. 14. *per Cur.* Moor, 856. Godb. 213. 10 Co. 100. Latch. 143. Mod. 35. Brownl. 282. Vent. 237. Carter, 230. 2 Wilſ. 351.

If the principal thing to be performed, as the conveying an eſtate, *&c.* be void, further covenants which are relative and dependant thereon are ſo likewiſe. Sid. 309. Yelv. 19. Style, 357.

So, if leſſee for years grants ſo much of the term as ſhall be to come at the time of his death, and covenants that the leſſee ſhall enjoy it, although he gives bond for performance of covenants, yet the principal thing, *viz.* the grant, being void for uncertainty, (*a*) both bond and covenants are void likewiſe. Lev. 45. Caponhurſt and Caponhurſt, Raym. 27. S. C.

(*a*) For tho' they are ſeveral deeds, yet they make but one aſſurance, and are but one contract. 4 H. 7. 6. 20 H. 6. 293. Bro. Obligation, 6. Dyer, 4. 28. Hob. 168.

But where the dean and chapter of *Norwich*, 8 *Eliz.* leaſed to *B.* for ninety-nine years, and after in 42 *Eliz.* they leaſed to *C.* for three lives, and covenanted to ſave him harmleſs againſt *B.* if he is diſturbed by *B.* he may have an action of covenant againſt the dean and chapter, though the leaſe is void, becauſe the covenant is for a thing collateral, as that the leſſor is owner, *&c.* and the covenant was broken immediately upon ſealing the leaſe to *C.* Owen, 136. Waller and the Dean and Chapter of Norwich, Brownl. 21. Moor, 877. S.C. *& vide* 2 Brownl. 134. 136. 158., &c.

So, where in covenant the plaintiff declared, that the defendant by his deed did grant, bargain, and ſell to the plaintiff and his heirs, *&c.* provided that if the grantor paid ſo much money, it ſhould be lawful for him to re-enter; and that he covenanted to pay the ſaid money; and the breach aſſigned was the non-payment of the money; although it was admitted that nothing paſſed by the deed for want of inrolment, yet the covenant in this caſe being to pay money, it is a diſtinct, ſeparate, and independent covenant; and therefore not material whether any eſtate paſſed or not. Salk. 159. pl. 5. Ld. Raym. 388. Northcote and Underhil, adjudged.

(H) What ſhall be deemed a Breach, or conſtrued a good Performance.

IF *A.* enters into a ſtatute to *B.*, and afterwards *B.* by his deed covenants, that, upon payment of ſuch a ſum at a day to come, the ſtatute ſhall be void, and that he will deliver it in, and cauſe it to be vacated; if before the day *B.* ſues execution, *A.* may bring covenant; and it is no objection, that nevertheleſs *B.* at the day may deliver it in, and cauſe it to be vacated; for it is an apparent preſent breach; for after the ſtatute was ſet a-foot, and had its courſe, *tranſit in rem judicatam*, and could not be vacated. Sid. 48. Robinſon and Ampton, adjudged. Raym. 25. Keb. 103. 118. S. C. The ſame law, in caſe of a promiſe. Roll. Abr. 448.

If *A.* leaſe to *B.* for twenty-one years, and covenant at any time during the life of *B.*, (*b*) upon ſurrender of the old leaſe, to make a new leaſe, and after *A.* leaſe to a ſtranger, he hath diſabled himſelf, and broken his covenant. 5 Co. 20, 21. Sir Anthony Scot and Main, 2 And. 18.

Moor, 452. Cro. Eliz. 450. Poph. 109. S. C. adjudged. (*b*) So, if the leſſee aſſign his old leaſe, he diſables himſelf to take benefit of the covenant. Bulſt. 22.

Raym. 464. Griffith and Geoland, 2 Jones, 191.

If *A.*, being a common brewer, covenants that *B.* ſhall have ſeven parts of his grains made in his brewhouſe for ſeven years; and after *A.* renders them unfit for the uſe of *B.*, this is a breach. S. C. adjudged. Skin. 39. pl. 8. If one covenants to leave all the timber upon the ground at the expiration of a term, and after cuts it down, it is a breach of covenant, though he carry it not away; but if a ſtranger cuts it down, it is no breach of covenant. Skin. 40. *per Cur.*——So, if a man covenants to deliver a horſe, and he poiſons him, and then delivers him, this is a breach. Skin. 40. *per Cur.*

2 Jones, 195. Naſh and Aſhton, adjudged.

If two men, upon ſale of their wives lands, covenant that they and their wives have good right to convey lands, and to make further aſſurance; if one of the women is under age, this is a breach, for ſhe hath not power to convey the eſtate according to the covenant.

2 Vent. 213. adjudged.

If the leſſor covenants with his leſſee for years, that he quietly and peaceably ſhall enjoy the land without the impediment or diſturbance of the leſſor, if the leſſor exhibits a bill in Chancery againſt the leſſee, to reſtrain his committing waſte, this is no breach, though the bill be diſmiſſed with coſts, becauſe the ſuit does not relate to his title or poſſeſſion.

4 Leon. 39. adjudged. (*a*) But if leſſee for years, rendering rent, with a condition of re-entry for non-payment, leaſes

If a parſon leaſes his rectory for years, and covenants that the leſſee ſhall have and enjoy it during the term, without expulſion, or any thing to be done by the leſſor, and after, for not reading the articles, he is *ipſo facto* deprived by the ſtatute 13 *Eliz. c.* 12. and the patron preſents another, who ouſts the leſſee; this is no breach, for he was not ouſted by reaſon of any act done by the leſſor, but for a (*a*) non-feaſance; and ſo it is out of the compaſs of the covenant.

part for a leſs term, and covenants that his leſſee ſhall enjoy, without impeachment of him, or any other, occaſioned by his impediment, means, procurement, or conſent, and after he neglects to pay his rent, upon which the firſt leſſor enters, &c., this is a breach. Bulſt. 182. adjudged.

Owen, 7. *per Cur.* but *vide* Co. Lit. 389. a.

Tenant in tail of a rent purchaſes the land out of which it iſſues, and makes a feoffment thereof, and covenants that it is free from all former incumbrances; this is a charge, though not *in eſſe*, yet in ſuſpence; for if tenant in tail dies, his iſſue may diſtrain, and then the covenant is broken.

Cro. Eliz. 517. Woodruff and Greenwood, adjudged.

If *A.* be tenant in tail, the reverſion in the king, and *A.* leaſe for years, and covenant that the leſſee ſhall enjoy it againſt all perſons, and without the interruption of any, except the king, his heirs and ſucceſſors, kings and queens of *England*, and the king grant his reverſion to *B.*, and *A.* die without iſſue, and *B.* enter, the covenant is broken, for that extends only to the king and his ſucceſſors, in which words his patentee is not included.

Cro. Jac. 657. Butler and Swinnerton, adjudged *per totam Curiam.* Palm. 339. S. C. adjudged; *abjente* Chamberlain, though objected, *by his means and procurement*, muſt refer to ſubſequent acts. 2 Roll. Rep. 286. S. C. *adjornatur.*

If *A.*, by the means and procurement of *B.*, by fine conveys lands to *B.* and his wife, and the heirs of *B.*, and after *B.* leaſes the ſame for years, and covenants that the leſſee ſhall quietly enjoy during the term, without the diſturbance of him, his heirs or aſſigns, or of any other perſon, by or through his means, title or procurement, and *B.* dies, and his wife enters, this is a breach, for ſhe claims by the means of the baron; and therefore it is within the covenant.

(I) Where the Breach ſhall be ſaid to be well aſſigned.

IF in an action of covenant the plaintiff declares upon a leaſe for twenty-one years to the defendant, and that he covenanted to pay 20*l. per ann.* by equal portions, at *Michaelmas* and *Lady-day*, and aſſigns for breach, that he did not pay the rent *debit. ad præd. ſeparalia feſta durante termino*; this breach is (*a*) ſufficiently aſſigned, and it ſhall be intended that the rent was not paid at either of thoſe days.

Lev. 78. Coniers and Smith. (*a*) In covenant for not repairing, the breach was generally alleged, without ſhewing in what; 1 Brownl. 23. adjudged, it was helped after verdict; ſo, 2 Mod. 176.; and ſee Sir T. Jones, 125., where the covenant was to repair all the pales, except thoſe on the weſt ſide; and the breach aſſigned was, in not repairing the pales, *contra formam conventionis*, and held good after verdict, though objected, that the defect might be in the parts excepted ——The breach aſſigned by the plaintiff ſhould ſpecify the particulars, and he may aſſign every poſſible breach, within the meaning of the covenant, and though he proves only *part*, he will be entitled to recover. As to the defendant, if he means to plead, that he did repair, and if the term is ended, that he yielded up the premiſes in repair, he ſhould purſue the words of the covenant, fully, without regarding the *particulars* aſſigned by the plaintiff.

If in debt upon an obligation, the condition whereof is of three parts, 1. That he ſhall ſerve the plaintiff well; 2. That he ſhall duly account; 3. That within three months after notice he ſhall make ſatisfaction for all loſſes ſuſtained by his apprenticeſhip; the defendant pleads performance ſpecially, and the plaintiff aſſigns for breach, that upon account he was found in arrear 60*l.* which he received and converted to his own uſe, and ſo had not ſerved the plaintiff well; this is a good replication, without alleging notice; for though it might be alleged as a breach of the third part of the condition, yet the converſion of the money to his own uſe, may be alleged as an ill ſervice.

Cro. Eliz. 830. Cutle and Brewſte adjudged.

In an action of covenant ſeveral breaches may be aſſigned; otherwiſe, in debt upon an obligation, conditioned to perform covenants.

Cro. Car. 176. Ld. Raym. 106.

But now by the 8 & 9 *W.* 3. *cap.* 11. it is enacted, " That in " all actions upon any bond or on any penal ſum, for non-per- " formance of any covenants or agreements in any indenture, " deed, or writing, contained, the plaintiff may aſſign as many " breaches as he ſhall think fit; and the jury, upon trial of ſuch " action, may aſſeſs not only ſuch damages and coſts of ſuit as " have heretofore been uſually done in ſuch caſes, but alſo " damages for ſuch of the ſaid breaches ſo to be aſſigned, as the " plaintiff, upon the trial of the iſſues, ſhall prove to have been " broken, and that the like judgment ſhall be entered on ſuch " verdict as heretofore hath been uſually done in ſuch like " actions; and if judgment ſhall be given for the plaintiff on a " demurrer, or by confeſſion, or *nihil dicit*, the plaintiff upon the " roll may ſuggeſt as many breaches of the covenants and agree- " ments as he ſhall think fit; upon which ſhall iſſue a writ to the " ſheriff of that county where the action ſhall be brought, to ſum- " mon a jury to appear before the juſtices or juſtice of aſſiſe, or " *niſi*

[It is now ſettled, that it is compulſory on a plaintiff to proceed in the manner pointed out by the ſtatute in caſes within the proviſo is of this ſection,—that he muſt aſſign the breach of ſuch covenants as he proceeds to recover a ſatisfaction for: and if the defend-

ant plead to issue, and the cause go to a jury for trial, the jury, upon the trial of such cause, must assess damages for such of the breaches assigned, as the plaintiff upon the trial of the issues shall prove to have been broken. If this be not done, a *venire facias de novo* will be awarded. Drage v. Brand, 2 Wilf. 377. Hardy v. Bern, 5 Term Rep. 510. 636. So, if judgment go by default, he cannot enter up judgment for the whole penalty, as he might have done at common law. Roles v. Rosewell, 5 Term Rep. 538. Goodwin v. Crowle, Cowp. 357.

" *nisi prius* of that county, to inquire of the truth of every one of " those breaches, and to assess the damages which the plaintiff " shall have sustained thereby, in which writ it shall be command- " ed to the said justices, *&c.*, that he or they shall make a return " thereof to the court from whence the same shall issue at the " time in such writ mentioned; and in case the defendant after " such judgment entered, and before any execution executed, shall " pay into the court where the action shall be brought, to the " use of the plaintiff, or his executors or administrators, such " damages so to be assessed, by reason of all or any of the breaches " of such covenants, together with the costs of suit, a stay of ex- " ecution on the said judgment shall be entered upon record; or " if, by reason of any execution executed, the plaintiff, or his ex- " ecutors or administrators, shall be fully paid or satisfied all such " damages so to be assessed, together with his costs of suit, and " all reasonable charges and expences for executing the said ex- " ecution, the body, lands or goods of the defendant, shall be " thereupon forthwith discharged from the said execution, which " shall likewise be entered upon record; but notwithstanding in " each case such judgment shall remain as a further security to " answer to the plaintiff, and his executors or administrators, " such damages as shall or may be sustained for *further* breach of " any covenant in the same indenture, deed, or writing con- " tained, upon which the plaintiff may have a *scire facias* upon " the said judgment against the defendant, or against his heir, " terre-tenants, or his executors or administrators, suggesting " *other* breaches of the said covenants or agreements, and to sum- " mon him or them respectively to shew cause why execution shall " not be had or awarded upon the said judgment, upon which " there shall be like proceeding, as was in the action of debt upon " the bond or obligation, for assessing of damages upon trial of " issues joined upon such breaches, or inquiry thereof, upon a " writ to be awarded in manner as aforesaid, of such future da- " mages, costs and charges as aforesaid, all further proceedings on " the said judgment are again to be stayed, and so *toties quoties*; " and the defendant, his body, lands, or goods, shall be discharged " out of execution, as aforesaid."

——Whether an obligee in a bond of this kind may recover damages beyond the amount of the penalty, is a point which hath not yet received a final adjudication. See White v. Sealy, Dougl. 49. Brangwin v. Perrot, 2 Bl. Rep. 1150. Wilde v. Clarkson, 6 Term Rep. 303., that he cannot. But Lord Lonsdale v. Church, 2 Term Rep. 388. *contr.*]

9 Co. 60, 61. Bradshaw and Salmon, Cro. Jac. 304. S. C. adjudged, and that the defendant must shew he was seised

If *A.* leases to *B.* for years, and covenants that he hath full power and lawful authority to lease, *&c.*, and in an action upon this covenant, *B.* says he had (*a*) not full power and lawful authority to lease, *&c.*, the breach is well assigned, for he hath well pursued the words of the covenant *negative*; and what estate he had lies more in the knowledge of the lessor than lessee; and therefore he ought to shew what estate he had at the time of making the lease, that it may appear that he had full power, *&c.*

in fee, and then the plaintiff must shew a special title in somebody else; but the covenant being general, the general assignment of a breach *prima facie* is good. (*a*) That he was not lawfully seised in fee of an indefeasible estate. Cro. Jac. 369. *& vide* Raym. 14, 15.

If

If *A.* leaſes to *B.* for years, and *B.* covenants to repair during the term, and at the end of the term to leave the premiſes well repaired, in an action upon this covenant, it may be aſſigned for a breach, that he did not leave them well repaired at the end of the term; and if the defendant pleads, that at the end of the term he delivered them up well repaired, then if the plaintiff will aſſign a breach, he ought to ſhew particularly in what part it was not repaired, ſo that the defendant may give a particular anſwer thereto; but it was ſaid that in a declaration in covenant, it ſufficeth to aſſign the breach as (*a*) general as the covenant is*.

Cro. Jac. 171. Hancock and Field.

(*a*) Cro. Jac. 661. S. P.

* *Sed vide* the laſt note on the firſt clauſe under this head.

In an action of covenant the plaintiff declared that queen *Elizabeth* leaſed a meſſuage, *&c.*, to the defendant for twenty-one years, and that the defendant, his executors and aſſigns, were thereby bound to repair and leave the premiſes at the end of the term in good repair, and that the queen granted the reverſion to *B.*, and that *B.* granted the ſame to the plaintiff; and for not repairing, *&c.*; this a good declaration, though the plaintiff is not named aſſignee.

Cro. Jac. 240. Lord Ewre and Strickland, adjudged.

If in an action of covenant the plaintiff declares, whereas by indenture, bearing date, *&c.*, *teſtatum exiſtit*, that the plaintiff had demiſed to the defendant a meſſuage and garden for two years, and the defendant, by the ſaid indenture, covenanted not to erect any building in the garden, *&c.*, and avers *in facto*, that he did erect, *&c.*, this is a good declaration, though he does not expreſsly ſay *quod demiſit & convenit*; and it is the (*b*) uſual courſe in *B. R.*, to declare in this manner.

Cro. Car. 188. Batchelor and Gaye, adjudged. Cro. Eliz. 195. Cro. Jac. 383. S. P. adjudged, *& vide* Sid. 375., where the plaintiff declares *per quoddam ſcriptum per quod teſtatum exiſtit*, &c. are the precedents in *B.* Cro. Eliz. 195. 2 Roll. Rep. 210, 211.

(*b*) And ſo —— But the uſual method now is to declare, that whereas by ſuch an indenture made between, &c., at, &c. (with a profert) ſuch a one demiſed, &c.

If baron and feme being ſeiſed of an houſe, to them and the heirs of the baron, leaſe to *A.*, and he covenant with them and the heirs and aſſigns of the baron, to repair, *&c.*, and the baron and feme convey the inheritance to *B.*; in an action upon this covenant, *B.* may ſhew the whole matter, and conclude *quod actio ei accrevit*†, as aſſignee of the baron, without ſhewing the death of the feme; for the eſtate for life being transferred with the fee, it is drowned therein.

Cro. Car. 285. Major and Talbot, adjudged. Jones, 305. S. C. adjudged; but by the report thereof, the baron was dead, and the feme and the heir of the baron conveyed, and the action was brought as aſſignee of the heir, and ſaid that it was no benefit to the leſſee to have the eſtate for life continue, and therefore, &c.

† This concluſion is not now uſed, unleſs in caſes of debt on penal ſtatutes, &c. But in ſuch actions of covenant, the uſual concluſion, after ſigning the breach, is, And ſo the plaintiff ſays that the defendant (although requeſted, &c.) hath not kept with the plaintiff, the covenant made between ſuch an one and ſuch an one, but hath therein failed and made default, to the plaintiff's damage of ſo much; wherefore the plaintiff ſaith he is injured, and hath ſuſtained damage, &c.

If in an action of covenant the plaintiff declares upon an indenture, in which the defendant had covenanted that he was ſeiſed in fee, *&c.*, and would free the premiſes from all incumbrances, and that the plaintiff ſhould quietly enjoy, and for breach aſſigns an entry and eviction by a ſtranger, *& ſic conventionem ſuam* (in the ſingular number) *fregit*, this is well enough; (*c*) for *conventio eſt nomen*

2 Mod. 311. After and Mazeen, adjudged.

(*c*) *Quod teneat*, &c. *& de conventione*

fractâ, all one. Hard. 178.—— *nomen collectivum*, and if twenty breaches are aſſigned, the count is *de placito quod teneat ei conventionem.*

If a breach of covenant is ſufficiently alleged, the plaintiff need not conclude *& ſic non tenuit conventionem in hoc*, &c., for that is but repetition. Cro. Jac. 298. adjudged. 2 Mod. 229. S. P. adjudged, though it is the uſual way.

Cro. Jac. 446. Sheers and Briton, adjudged. If in an action of covenant the plaintiff declares upon a leaſe in *London*, of a meſſuage in *D.*, *in com. S.*, and that the leſſee covenanted to repair, *&c.*, and aſſigns for a breach, that *apud London* he permitted the houſes to decay, *&c.* this is naught, becauſe the breach is in a matter local, and not tranſitory.

3 Lev. 170. Procter and Burdet, adjudged. 3 Mod. 69. S. C. Cro. Jac. 486. *contr.* If in an action of covenant the plaintiff declares upon a covenant, to find the plaintiff with meat, drink, apparel, and other neceſſaries, and aſſigns the breach as general as the covenant, *viz.* that he did not find him with meat, drink, apparel, and other neceſſaries; this is good, without ſhewing in particular what other things are neceſſary, and the *alia neceſſaria* ſhall be intended ſmall things, as trimming, waſhing, *&c.*, which would be too long to inſert, and the *breach* being aſſigned in the words of the covenant, it is ſufficient.

Lev. 94. French and Pierce, adjudged. (*a*) *Vide ſupra* 8 & 9 W. 3., and Salk. 137. pl. 1. * So, aſſigning that he had received of divers perſons divers ſums of money, in the whole amounting to a large ſum, to wit, the ſum of 100 *l.*, and converted the ſame to his own uſe, contrary to the condition, would be good. So, in debt, upon an obligation conditioned to ſatisfy for all goods that an apprentice ſhall waſte, in his replication, the plaintiff aſſigned for breach, that he had waſted *diverſa bona ad valentiam* 100 *l.* and adjudged that it was good, without ſhewing in particular, what the goods were; for (*a*) the penalty of the obligation is to be recovered upon any breach, but ſaid that it would be otherwiſe in covenant, where there is to be a recompence for the damages*.

Yelv. 226. Brownl. 117. 2 Bulſt. 19. S. C. & *vide* Cro. Jac. 259. † *Qy.* alſo, if he ſhould not have alleged he was obliged to pay the legacy, or paid it to avoid a ſuit? If in debt upon an obligation conditioned to ſave the plaintiff harmleſs from all charges and troubles, by reaſon of the laſt will of *A.*, or any thing therein mentioned, touching one *B.*, or any legacy to her given, *&c.*, the defendant pleads *non damnificatus*, and the plaintiff replies that he paid 60 *l.* to *B.*, for a legacy, *&c.*, this is no good replication; for he ought to ſhew that a legacy of 60 *l.* was given her by the will; for though the will is recited in the date, againſt which recital the defendant cannot ſay he made no ſuch will, yet the legacy given to *B.*, is not recited, but in general; againſt which the defendant may take a traverſe †.

Jones, 218, Symons and Smith, Cro. Car. 176, S. C. & *vide* Hard. 432. If *A.* covenants to permit *B.*, his heirs and aſſigns, to take and enjoy the rents, iſſues and profits of certain lands, and in an action of covenant the plaintiff aſſigns for breach, that *A.* took the profits, & (*b*) *non permiſit B.* to enjoy, *&c.*, this breach is well aſſigned, for the taking of the profits by *A.* is a ſpecial diſturbance.

(*b*) But *non permiſit* alone is too general. 8 Co. 89. b. 91. b. & *vide* And. 137. 2 Vent. 278.

Mod. 233. Boſcawin & *al.* and Cook, If *A.* grants a rent to *B.* and his heirs, for the life of *C.*, to the uſe of *C.*, and covenants with *B.* to pay the rent *ad opus & uſum* of *C.*, and in an action upon this covenant, *B.* aſſigns the breach, in not

not paying the rent to him *ad opus & uſum* of *C.*, this breach is well aſſigned in the words of the covenant, though a (*a*) negative pregnant. 2 Mod. 138. S. C. adjudged; and ſaid, that if it was paid to *C.*, which is a performance in ſubſtance, the defendant ought to have pleaded it. (*a*) For this *vide* 2 Leon. 197.

If in an action of covenant the plaintiff declares upon a charter-party, by which the plaintiff, being maſter of a ſhip, was to pay two parts of the port-charges, and the factor of the defendant the other part, and the plaintiff ſhews that he ſailed from *L.* to *C.*, and there paid all the port-charges, *viz.* two parts for himſelf, and the other part for the defendant, and that the defendant had not repaid him; this breach is well aſſigned; for when the plaintiff ſays he paid the third part, it ſhall not be intended the defendant did, but that the plaintiff was neceſſitated to pay it, or otherwiſe his ſhip would have been ſtayed in the port. 2 Jones, 186. Bellamy and Ruſſel, adjudged.

In covenant, which was that the defendant ſhould make out a good title in law and equity, before ſuch a time, to the ſatisfaction of the plaintiff, his heirs or aſſigns, or to his or their counſel learned in the law, the breach was aſſigned in the very words of the covenant; and it was objected, that the covenant, being in the (*b*) disjunctive, *viz. to ſatisfy the plaintiff or his counſel*, he had his election, and therefore the plaintiff ought to have given notice who his counſel was, before which time the defendant could not ſatisfy him; but it was reſolved that the breach, being in the very words of the covenant, was ſufficient; and if the truth was, that the defendant did not know who the plaintiff's counſel was, he ſhould have ſet it forth in pleading. Carth. 124. Rawline and Vincent, adjudged. (*b*) *Vide* Cro. Eliz. 348. 5 Mod 133. Salk. 139. pl. 4.

If an aſſignee of a term has a covenant from the aſſignor, that he ſhall quietly enjoy, free and clear from all taxes, and all arrears of rent, *&c.*, though there be rent arrear, yet he cannot aſſign this as a breach of the covenant; for the rent being arrear, is no damage to him, unleſs he be ſued or charged therewith; and if paid at any time before he is damnified, it is ſufficient for him. Salk. 196. pl. 2. Griffith and Harriſon, adjudged.

So, if a counter-bond or covenant be given to ſave harmleſs from a penal bond, after the condition of the obligation be broken, or to ſave harmleſs from a ſingle bill, without a penalty, the counter-bond cannot be ſued without a ſpecial damnification. Salk. 196. pl. 2. *per Cur.*

But where the counter-bond or covenant is given to ſave harmleſs from a penal bond, before the condition broken, there, if the penal ſum be not paid at the day, and ſo the condition not preſerved, the party to be ſaved harmleſs does by this become liable to the penalty, and ſo is damnified, and the counter-bond forfeited. Salk. 197. pl. 3. *per Cur.*

The defendant covenanted to pay ſo much *per* chaldron for all coals laden either at *Newcaſtle*, or upon the river *Tyne*, and brought to *London*; and the breach aſſigned was, that the coals were laden on ſuch a ſhip *infra portum de Tinmouth*, *viz.* at *North Shields*, and brought from thence to *London*; and on demurrer, the court inclined that the breach was not well aſſigned, for that they could not take notice judicially, that *Tinmouth* is upon the river *Tyne*, 5 Mod. 352. Toddard and Middleton.

but they gave the plaintiff leave to diſcontinue upon payment of coſts.

Loggin v. Comitem Orrery, 1 Ld. Raym. 133.

[In an action on a covenant to pay money on one of two contingencies, which ſhall firſt happen, if the plaintiff ſhew that one has happened, he need not aver it to be the firſt.

Dougl. 667. Cowp. 665. 727.

In a declaration in this ſpecies of action it is not merely unneceſſary, but improper, to ſtate the whole of the deed. So much only as will entitle the plaintiff to his action muſt be ſhewn; and that part need not be literally recited, but may be ſet forth according to its ſubſtance and effect; though it is uſual and adviſeable to deviate as little as may be from the expreſſions in the inſtrument.]

(K) Where the Performance ſhall be ſaid to be well ſet forth and pleaded.

Co. Lit. 303. b. Kelw. 95. Leon. 136.

IF a man is bound to perform all the (*a*) covenants in an indenture, if they are all in the affirmative, he may plead performance thereof generally.

Palm. 70. Lev. 303. S. P. (*a*) But in debt upon an obligation, conditioned to do ſeveral things in the condition mentioned, the defendant cannot plead performance generally, but ought to plead to every thing particularly by itſelf. Lev. 303. *& vide* Sid. 215. Kelw. 95. b. ——*Quod conditio nunquam infracta fuit*, is naught. 2 Vent. 156. [See too Sayre v. Minns, Cowp. 578.]

Co. Lit. 303. b. Moor, 856. Cro. Eliz. 691. Palm. 70.

But to (*b*) ſuch as are in the (*c*) negative, he (*d*) muſt plead ſpecially, (for a negative cannot be performed,) and to the reſt generally.

(*b*) But if the negative covenants are all void and againſt law, and the affirmative good and lawful, he may plead performance generally, and the court ſhall take notice that the negative covenants are void and againſt law. Moor, 850. Godb. 212. Hob. 12, 13. (*c*) Unleſs the negative covenant is only in affirmance of the affirmative covenant precedent. Sid. 87. (*d*) But it is only matter of form, and helped upon a general demurrer. Cro. Eliz. 232. Leon. 311. *& vide* All. 72. Style, 63.

Co. Lit. 363. b. Sav. 120.

If any of them are in the diſjunctive, (*e*) he muſt ſhew which part he hath performed.

S. P. *arguendo*. Cro. Eliz. 560. Palm. 70. S. P., and if performance generally is pleaded, it is naught upon a general demurrer; for that the court cannot tell which part he hath performed. Cro. Eliz. 232. Leon. 311. (*e*) But if the condition of an obligation be to perform the award of *J. S.*, and he award the obligor to pay 100 *l.*, or to procure a ſtranger to be bound in 200 *l.* &c., the defendant may plead performance generally, becauſe one part is void; and it will be intended that he pleads performance of that part which he was bound to perform, and not the other part. Sav. 120.

Co. Lit. 303. b. (*f*) As to levy a fine.

If any of them are to be done (*f*) of record, the performance thereof muſt be ſhewn ſpecially, and it cannot be involved in the general pleading.

Cro. Jac. 560. 2 Roll. Rep. 159. Palm. 70. S. P. adjudged; and the reaſon given, becauſe the record ſhall be tried by itſelf, and its credit ſhall not be examined by a jury; and perhaps the plaintiff will reply, that all the lands are not compriſed in the fine, or other matter upon which the fine ſhall be examined.

2 Co. 4. a. Manſer's caſe, adjudged. Cro.

If in debt upon an obligation conditioned that the plaintiff ſhall enjoy certain lands (*g*) diſcharged, or otherwiſe ſaved harmleſs (*h*) from all incumbrances, the defendant pleads that the plaintiff

plaintiff hath enjoyed the lands discharged, and kept indemnified from all incumbrances; this plea is naught; for being in the affirmative (*i*) it ought to have been shewn (*k*) how; but if he had pleaded in the negative *non fuit damnificatus*, it had been otherwise. Jac. 363. Winch. 9. March, 121. Like point adjudged.

(*g*) If the condition be to acquit, discharge, and save harmless from such a bond *non damnificatus*. Leon. 71.——But in an action upon a bond, conditioned to acquit, discharge, and save harmless, a parish from a bastard child, the defendant pleaded *non damnifica*, and the plaintiff demurred; and because it did not appear upon the whole record, that the parish was damnified, it was adjudged for the defendant. 3 Mod. 252. *vide* March, 121.——But if in debt upon a bond, conditioned to save harmless *J. S.* and the mortgaged premises, and to pay the interest for the principal sum, the defendant pleads *J. S. non fuit damnificatus*; for that the defendant paid the principal money, and all interest due at such a day; this is no good plea, because *non damnificatus* goes to the person, and not to the premises. 2 Mod. 305. adjudged.——If the condition be to save harmless the obligee against another, *non damnificatus* is a good plea. Kelw. 80. ——But if to discharge the obligee, it ought to be shewn in the affirmative how. Kelw. 80. *per* Frowick. (*h*) So, if the condition be to save harmless from all bonds entered into for the obligor, *exoneravit & indempnem conservavit* is no good plea, without shewing how. Cro. Eliz. 216. But that he need not shew from what bond he saved him harmless; and *per* Cro. Eliz. 433. *per* Gaudy, there is a diversity when the condition is to discharge from a particular thing, and when from a multiplicity of things; for in the last case it is sufficient to plead generally. (*i*) Cro. Jac. 165. S. P. adjudged. All. 72. S. P. adjudged, & *vide* Cro. Eliz. 477. Cro. Jac. 503. (*k*) But a man may plead *quod exoneravit*, &c. from an arrest, without shewing how, for that it may be done by composition, &c. without deed. Cro. Eliz. 914. adjudged.——So, in debt upon a bond, conditioned to perform the award of *J. S.*, if it is awarded that a suit in Chancery, by the defendant against the plaintiff, shall cease, and the plaintiff shall stand acquitted *de quâlibet materiâ in eâdem contenta*; the defendant may plead *quod stetit inde quietus*, without shewing how, or that he *in facto* discharged him; for it was not intended that an actual discharge should be given, but that by the arbitrament he should be acquitted. Cro. Jac. 339. Roll. Rep. 8. 2 Bulst. 93, 94.——Otherwise, if the award had been, that he should discharge and save him harmless from a certain obligation. Leon. 71.

In debt upon an obligation, conditioned that the defendant shall repair and do other things, and also pay his rent every day of payment, he cannot plead performance generally, but must plead specially. Kelw. 95. b.

But where the condition refers to such a generalty, that by intendment it is past the remembrance of man; as if the undersheriff is bound to discharge his master from all accounts and returns of writs within the county, he may plead performance of the condition generally. Kelw. 95. b.

In debt upon a bond, conditioned that the defendant shall enfeoff the plaintiff of all his lands, the defendant must plead performance specially. Kelw. 95. b. S. P. *per Cur. cont.* Sid. 215. Latch. 16.

But if the condition be that (*a*) a stranger shall enfeoff the obligee, a general performance may be pleaded. Kelw. 95.

(*a*) But by the case of Lee and Luttrell, Cro. Jac. 559. 2 Roll. Rep. 159. Palm. 70., it is otherwise.

If the condition of an obligation be to make to the obligee a lawful estate in certain lands, it is safe to plead that he hath (*b*) enfeoffed him thereof, which is a lawful estate, though in strictness it is not necessary, because it appears to be a lawful estate. Kelw. 95. b.

(*b*) If the condition be to convey an estate, in pleading, it must be shewn by what manner of conveyance it was done. Leon. 72 2 Leon. 39. Godb. 360. 2 Mod. 240. So, if the condition be to shew a sufficient discharge of an annuity, in pleading performance it must appear what manner of discharge it was, that the court may judge whether sufficient or not. 9 Co. 25. a. Hob. 107. 2 Mod. 240.

But if the condition be to build a sufficient house, the defendant must say that he hath built such an house, which is sufficient. Kelw. 95. b.

In

Kelw. 95. b. (a) But in Cro. Eliz. 869. *per Cur.*, he may plead that he hath delivered all, &c.; and the contrary, in ſome particular, ought to be ſhewn on the other ſide.

In debt upon an obligation conditioned to deliver all evidences concerning ſuch lands, the defendant (*a*) muſt plead that he hath delivered ſuch and ſuch charters, which are all the charters concerning the land.

Cro. Eliz. 749. & *vide* Sid. 215. 334. Cro. Eliz. 916. Like point.

In debt upon an obligation, conditioned that the defendant at all times, upon requeſt, ſhould deliver to the plaintiff all the fat and tallow of all beaſts which ſhould be killed or dreſſed by the defendant, his ſervants, or aſſigns, before ſuch a day; the defendant may plead, that upon every requeſt to him made, he did deliver to the plaintiff all the fat and tallow of all beaſts, *&c.* without ſhewing how many beaſts were killed or dreſſed, or what quantity of fat he delivered; for when matters tend to infinity and multiplicity, whereby the rolls would be incumbered with length, the law allows of ſuch general pleading.

Cro. Eliz. 281. Fox and Lee, adjudged. (*b*) But ſuch general pleading is not good, where a certain day of payment is not mentioned in the condition. 2 Bulſt. 267.—In debt upon an obligation conditioned to deliver ſuch briefs ſuch a day, the defendant pleads that he delivered them *ſecundum formam conditionis præd.*, and the court inclined to think it bad; but the matter was adjourned. Lev. 145.

In debt upon an obligation, conditioned for the payment of 60*l.* *viz.* 30*l.* at one day, and 30*l.* at another day, the defendant may plead payment of the 60 *l. ſecundum formam & effectum conditionis præd.*; for *reddendo ſingula ſingulis*, it is as if he had pleaded the ſeveral payments at the ſeveral (*b*) days.

Cro. Eliz. 870. Waller and Croot, adjudged.

If in debt upon an obligation, conditioned that if the obligee ſhall enjoy ſuch lands till the full age of *J. S.* and if *J. S.* within one month after his full age, makes an aſſurance thereof to the obligee, then, *&c.* the defendant pleads that *J. S.* is not yet of full age; this plea is not good, without ſhewing the obligee hath enjoyed the lands in the mean time; for the condition is in the copulative.

Cro. Jac. 359. 2 Bulſt. 267. S.C. Halſey and Carpenter, Bulſt. 43. S. P. (*c*) If the condition be to ſurrender a copyhold, the defendant muſt not plead generally, that he hath ſurrendered it, but muſt ſhew when the court was held, &c. Winch. 11. adjudged.——If the condition be, that the obligee ſhall enjoy an office according to letters patent, the defendant muſt not plead *in hæc verba*, but ſhew the effect of the letters patent, and the enjoyment accordingly. Hob. 295.

If in debt upon an obligation, conditioned that if the obligee ſhall enjoy ſuch lands till the full age of *J. S.* and if *J. S.* within one month after his full age, makes an aſſurance thereof to the obligee, then, *&c.* the defendant pleads that he paid thoſe ſums *tam cito* as they came of age, this is no good plea; for the (*c*) time, place, and manner of performance, ought to be ſhewn in certain; ſo that a certain iſſue might be taken upon it.

2 Mod. 33. Duck and Vincent, adjudged.

If in debt upon an obligation, conditioned to perform covenants, one of which was for the payment of money upon the making of an aſſurance, the defendant pleads that he paid the money ſuch a day, but ſaith not when the aſſurance was made, this is naught; for that it ought to appear that the money was immediately paid, purſuant to the covenant.

2 Sand. 420. Walton and Waterhouſe.

In an action of covenant, the plaintiff declared that his father was ſeiſed in fee of a meſſuage, and leaſed to the defendant for twenty-

twenty-one years, and that the defendant covenanted to repair, ſupport, and amend the ſame, during the term, and that his father died, &c. and that the meſſuage was *totaliter dirut. & ruinoſ.*, and the defendant pleaded, that before the houſe was ruinous, &c. he aſſigned to *J. S.* and that after the houſe was burnt, *quodque in convenienti tempore poſt deſtructionem domus præd.*, and before the action brought, *meſſuag. præd. cum pertinentiis ſufficienter reædificat., &c. fuit, & adhuc in bonâ reparatione ſufficienter exiſtit.* Adjudged, upon a ſpecial demurrer, that this plea was naught; becauſe it was not ſhewn by whom it was rebuilt; though it was objected, that (*a*) it was not material by whom it was rebuilt; and if by a ſtranger, it could not be built again by the defendant; and he having aſſigned all his intereſt before, it lay not in his notice by whom it was built; but that it could not be preſumed to be built by the plaintiff; for that he could not intermeddle with the poſſeſſion during the term; but by the report, it being alleged that the plaintiff had rebuilt it at his own charge, *Hale* refuſed to hear the reaſons, and *quaſi* in a paſſion, without conſidering the matter in law, gave judgment for the plaintiff.

(*a*) 1 Vent. 38. S. P. *dubitatur.*

In debt on a bond, for performance of covenants in an indenture, the defendant cannot plead performance generally, without ſetting forth the indenture.

Carth. 4, 5. Seems to be admitted, that he cannot plead performance, without ſhewing it. All. 72. 1 Vent. 37. Sid. 50. Mod. 266.——Where he ſwears he never had part thereof, or hath loſt it. Sand. 8, 9. Cro. Jac. 429.

In covenant by an aſſignee of a leaſe, againſt the aſſignor, who covenanted to indemnify the aſſignee from all rent arrear, &c. the breach aſſigned was in the non-payment of the rent; to which the defendant pleaded as to part, payment to the leſſor; and as to the other part, that he left money with the plaintiff *eâ intentione quod ſolveret* to the leſſor; though it was objected, no iſſue could be taken on his intention, yet the court (*Holt*, C. J. *contra*) inclined the plea was good, but held clearly that if it had been *reliquit ad ſolvendum*, it had been good, and that *non reliquit modo & forma*, had been a good traverſe.

Skin. 397. pl. 31. Griffin and Harriſon, 4 Mod. 249. Salk. 196. pl. 2. S. C. adjudged.

[On a covenant "to permit the plaintiff in the laſt year of the term to ſow clover among the barley and oats ſown by the defendant," the breach aſſigned was, "that the defendant ſowed barley and oats *without giving notice* to the plaintiff;" to which the defendant pleaded, "that he did not prevent the plaintiff from ſowing as much clover as he thought fit;" and adjudged a good plea.]

Hughes v. Richman, Cowp. 125.

(L) What may be pleaded in Bar to the Action.

IN an action of covenant for non-payment of rent, the defendant cannot plead *levied by diſtreſs*, for that is a confeſſion it was not paid at the day; for it could not be diſtrained for till after the day; but it was agreed, that the covenant alters not the nature of the rent; but that nothing behind, or payment at the day, is a good plea.

2 Brownl. 237. Hare and Savil, adjudged.

In

2 Lev. 7. Watton and Weddington.

In debt upon an obligation, conditioned that if a ſhip that was going ſuch a voyage ſhould return, (the perils of the ſea excepted,) the defendant ſhould pay ſo much; but if the ſhip ſhould be loſt, nothing, &c. the defendant pleaded, that the ſhip did go on her voyage, and, in her return, ſuch a day *amiſſa fuit*; and it was adjudged a good plea, though it was not ſaid *quod amiſſa fuit periculo maris*; and ſhe might be loſt by the defendant's own default; for the plea is in the laſt part of the words of the condition, which makes the bond void, as well as if the ſhip had returned, &c.

(*a*) Lev. 152. Johnſon and Carr.

It has been adjudged, that to avoid circuity of action where there are reciprocal covenants in the ſame deed, one covenant may be pleaded in bar to another; as (*a*) in an indenture of a leaſe for years, where the covenant was that the leſſee might ſubduct for charges, and he pleaded this covenant in bar to an action of debt for the rent, it was holden good.

2 Mod. 309. *Et vide* 5 Co. 78. 7 Co. Ughtred's caſe. Cro. Jac. 645. 3 Keb. 352. 3 Lev. 41, 42. Show. 391. Comb. 265.

But in 2 *Mod.* 309. it is ſaid, that reciprocal covenants cannot be pleaded one in bar of another, and that in the aſſigning of a breach of covenant it is not neceſſary to aver performance on the plaintiff's ſide.

Sand. 319. Pordage and Cole, Lev. 274. Sid. 423. Raym. 183. 2 Keb. 542. S. C.

As, where a writing was drawn in theſe words, *It is agreed that* A. *ſhall pay to* B. 170*l*. *for his land and houſe*, &c. *the money to be paid before* Midſummer. *In witneſs*, &c. It was ſealed by both parties. The money not being paid at the day, [*B.* brings an action of debt upon the bill, but makes no averment in his declaration that he had conveyed the land, or tendered any conveyance of it; it was holden to be well brought notwithſtanding, for both parties ſealed the deed; and if the plaintiff had not conveyed the land to the defendant, he might have had an action againſt the plaintiff on the agreement contained in the deed, and ſo each party had mutual remedy againſt the other: but it might have been otherwiſe, if the ſpecialty had been the words of the defendant only, and not the words of both parties by way of agreement, as in the caſe ſtated.]

Hil. 29 and 30 Car. 2. Dyeſly and Tuer, adjudged.

So, in an action of covenant the caſe was, *A.* covenants with *B.* to make him a good leaſe of his land and his ſheep, and that *B.* ſhould have fire-wood upon his land, and *B.* covenants to pay one half year's rent at *Michaelmas* following; in an action of covenant for this rent, *B.* pleads, that *A.* refuſed to leaſe the land before *Michaelmas*; *& per totam curiam*, The plaintiff muſt have judgment; for *B.* has his remedy upon the covenant of *A.*

Howlett v. Strickland, Cowp. 56. Turner v. Goodwin, 10 Mod. 190. 2 Barnard. 308. Jones v.

[Unliquidated damages ariſing from a reciprocal breach of covenant, cannot be pleaded by way of *ſet-off*.

But where the covenants are dependent, no action will lie by the one party againſt the other, unleſs he have performed, or offered to perform his covenant; the performance of the one being a condition precedent to the performance of the other: therefore, where

where two acts are to be done at the same time, neither party can maintain an action without shewing a performance, or offer to perform on his part.] Barkley, Dougl. 684. Kingston v. Preston, *id.* 689. Goodisson v. Nunn, 4 Term Rep. 761. And where mutual covenants go to the whole of the consideration on each side, they are mutually precedent conditions. Boone v. Eyre, cited in 1 H. Bl. 273. Duke of St. Alban's v. Shore, *id.* 270.

But if there be a covenant, that an obligee shall not put the bond in suit at any time, such covenant is pleadable in bar as a release, because in effect it is so; but where the covenant is that it shall not be put in suit for a certain time limited in the deed, this is only a covenant; and for breach thereof an action is maintainable, but is not pleadable in bar to the bond. Carth. 64. *per Cur.*

[*Accord with satisfaction by deed*, is a good plea in discharge of covenant, as well before breach as after; because it is an action merely personal; in which only damages shall be recovered, and it enures as a release of the covenant. Robards v. Stoker, Palm. 110. In Russell v. Russell, 3 Lev. 189., it is said to be no plea, unless executed on both parts.

So, *accord with satisfaction by parol*, made after the breach, is a good plea, the defendant alleging that the terms of the agreement were duly complied with on his part.] Co. Entr. 117. However, a variation, by parol, of the terms of an agreement under seal, can avail neither plaintiff nor defendant at law, though such new dispensation may be a ground for resorting to a court of equity. Littler v. Holland, 3 Term Rep. 590.

Courts, and their Jurisdiction in general.

FOR the better understanding of the nature and jurisdiction of courts, it may be necessary to premise some considerations concerning them in general, before each particular court comes to be treated of; and this I shall do by considering,

(A) The Nature and Original of our Courts, and by what Authority constituted.

(B) Of the Judges and Persons exercising a Jurisdiction.

(C) What determines their Jurisdiction and Authority.

(D) Of

(D) Of their Diviſion, and the Subordination of one Court to another: And herein,

1. In general, of the ſeveral Kinds of Courts which exerciſe a Juriſdiction.
2. Of ſuch as are of Record or not.
3. How inferior Courts muſt claim their Juriſdiction; and herein of Pleading to the Juriſdiction, and demanding Conuſance.
4. Where it muſt appear that inferior Courts have a Juriſdiction.

(E) What is incidental to all Courts in general.

(A) Of the Nature and Original of our Courts, and by what Authority conſtituted.

Lamb. Arch. 57. 239. 245. Mirorr, c. 5. § 1.

IN the *Saxon* times, the *Wittingham Mote* * was the chief court of the kingdom, where all matters both civil and criminal, and alſo relating to the revenue, were debated and determined; but for civil and criminal matters, it was only a court in the firſt inſtance, for facts ariſing within the county where it ſate; but by way of appeal from the injuſtice of other courts, it heard and determined cauſes from all other counties.

* Or *witenagemot*, or *witten-agemot*. See *Squire* on the *Angle-Saxon Government*, 165.

Lamb. Arch. 239.

To this court were ſummoned the earls of each county, and the lords of each leet, and likewiſe repreſentatives of towns, who were choſen by the burgeſſes of the town, who appeared on the king's ſummons, which iſſued once a year at leaſt; and here new laws were enacted, or old ones repealed, after the manner of our parliaments.

Maddox, c. 7.

But *William* the Conqueror cauſed the ſtates to recognize him, and fearing that theſe parliaments, conſiſting of *Engliſhmen*, might prove dangerous, he eſtabliſhed a conſtant court in his own hall, made up of the officers of his palace, and they tranſacted the buſineſs both criminal and civil, and likewiſe the matters of the revenue; and as they ſate in the hall, they were a court criminal, and when up the ſtairs, a court of revenue; the civil pleas they heard in either court.

Maddox, c. 9.

The court conſiſted, 1. Of the *Juſticiar*, who preſided, and was called *Capitalis Juſticiarius totius Angliæ*, and chiefly determined all pleas civil and criminal, and was alſo the chief officer of ſtate. 2. The chancellor who formed all patents, and put the ſeal to them, and had the cuſtody thereof, both for writs and patents.

patents. 3. The treasurer, before whom all accounts were chiefly audited; and he it was that presided in matters relating to the revenue. 4. The constable and marshal, to whom all matters of honour and of war and peace were referred, to determine according to the law of nations and of arms. 5. The seneschal or steward, and marshal, who determined the quarrels and disputes between the king's menial servants; the marshal was also to keep the prisoners, and take care that no indecency was committed in the king's house. 6. The chamberlain, who was to count the king's money as it came in, and issued out of the treasury.

This was the sovereign court of the kingdom, where justice was administered, and where all matters of the highest moment were transacted by the king himself and these officers; yet, in some cases, of great importance, as upon the levying of a new war, or raising an escuage, most of the great persons that held *in capite* were called, and then it was termed the *commune concilium regni*, or the parliament; to which afterwards the representatives of boroughs that held *in capite* were called. Maddox, c. 8.

Towards the *Norman* period, the power of the *justiciar* became formidable, and in the barons' war was turned against the king; the king also found, that the barons who held large districts, were likely to grow more and more troublesome to the crown; for though in the Conqueror's time, and for some reigns after the conquest, they were kept in very good subjection, the *Norman* and *English* barons being a balance for each other; yet time wearing away the distinction, and the *Normans* growing up *English*, they became fond of those liberties and privileges that the *English* had enjoyed in the *Saxon* times; hence it was necessary to introduce a new policy, and hence the original of our courts, as we have them at this day in *Westminster-hall*. Maddox, c. 8.

To give countenance to this new erection and division of courts, (which was completed by *E.* 1.) as also that it might still be seen, that all justice flowed from the king, the king himself (*a*) sat in person in the court of (*b*) *King's Bench*; and hence the power of this court, which it still retains, of exercising a superintendency over other jurisdictions; but though the king was sometimes present, yet the chief justice gave the rule, that the king might not decide in his own cause. Maddox, c. 19. fol. 21. and 135. Roll. Abr. 94., *& vide* 2 Inst. 24, 25. (*a*) Speed. 521. Roll. Abr. 535. (*b*) Is still

Ed. 4. * and Rich. 3. † sat there in person. *How. Mod. Hist. Ang.* * 131. † 136. supposed to have always the king himself in person sitting in it. Dyer, 187. pl. 6. Maddox, 543. Crompton of Courts, 78.—And hence every process in the King's Bench is made returnable before the king himself. 28 Ass. pl. 52.

But however this regulation might have been begun, or however it might have been formerly, as to the king's sitting and determining in causes, it seems now agreed, that our kings having delegated their whole judicial power to the judges of their several courts, those judges, by the long, constant, and uninterrupted usage of many ages, have now gained a known and stated jurisdiction, regulated by certain and established rules, which our kings themselves cannot make any alteration in without an act of parliament. 2 Inst. 73. 2 Hawk. P. C. 2.

But

S. P. C. 54, 55. 2 Hawk. P. C. 2.

But as the king is the fountain of juſtice, and the ſupreme magiſtrate of the kingdom, intruſted with the whole executive power of the law, no court whatſoever can claim (*a*) any juriſdiction, unleſs it ſome way or other derive it from the crown.

(*a*) Therefore if an ordinary certify, or try baſtardy, without a writ from the king's temporal courts, it is void; for the ſpiritual juriſdiction within theſe kingdoms is derived from the king, and muſt be exerciſed in the manner the king has appointed. Roll. Abr. 361.

6 H. 7. 4. b. 5. a. 4 Inſt. 125. 127. 6 Co. 11. b. 12. a.

But it is clearly agreed, that the king cannot give any addition of juriſdiction to an ancient court, but that all ſuch courts muſt be holden in ſuch manner, and proceed by ſuch rules, and in ſuch caſes only as their known uſage has limited and preſcribed; and hence it followeth, that the court of *King's Bench* cannot be authorized to determine a mere real action between ſubject and ſubject; ſo neither can the court of *Common Pleas*, to inquire of treaſon or felony.

4 Inſt. 87. Sid. 338.

And it is ſaid, that the king is ſo far reſtrained by the ancient forms, in all caſes of this nature, that his grant of a (*b*) judicial office for life, which has been accuſtomed to be granted only at will, is void.

(*b*) That the king cannot grant a mere ſpiritual juriſdiction, as to ordain, inſtitute, &c., to a lay perſon, nor can he exerciſe them himſelf; but muſt adminiſter thoſe laws by biſhops, as he does the common law by judges. *Vide* Cro. Eliz. 259. 314.

4 Aſſ. 5. Bro. Commiſſion, 3. 15, 16. 12 Co. 30, 31. 2 Inſt. 478.

Alſo, commiſſions to ſeize the goods, and impriſon the bodies of all perſons who ſhall be notoriouſly ſuſpected of felonies and treſpaſſes, without any indictment or other legal proceſs againſt them, are illegal and void.

A commiſſion under the great ſeal to take *J. N.*, a notorious robber, and to ſeize his lands and goods, illegal. 2 Inſt. 54.

(*c*) 4 Inſt. 163. 18 E. 3. 1. 4. (*d*) 2 Inſt. 478.

And it is ſaid, that the king cannot grant any new commiſſion whatſoever that is not warranted by ancient precedents, however neceſſary it may ſeem, and conducive to the publick good; and, therefore, (*c*) commiſſions to aſſay weights and meaſures, being of a new invention, were condemned by parliament; and it is (*d*) ſaid, that the king could not authorize perſons to take care of rivers, and the fiſhery therein, according to the method preſcribed by the ſtatute of *Weſtm.* 2. *cap.* 47. before the making of that ſtatute.

(B) Of the Judges, and Perſons exerciſing a Juriſdiction.

4 Inſt. 70, 71. 2 Inſt. 103. 8 H. 4. 13. b. S. P. C. 54. Dalt. c. 1.

THE king himſelf, though he be intruſted with the whole executive power of the law, cannot ſit in judgment in any court, but his juſtice, and the laws, muſt be adminiſtered according to the power committed to and diſtributed among his ſeveral courts of juſtice.

All judges must derive their authority from the crown, by some commission warranted by law: the judges of *Westminster* are (all except the Chief Justice of the *King's Bench* (*a*), who is created by writ) appointed by patent, and formerly held their places only during the king's pleasure; (*b*) but now for the greater security of the liberty of the subject, by the 12 & 13 *W.* 3. *c.* 2. their commissions are to be *quamdiu se bene gesserint;* but upon the address of both houses of parliament, it may be lawful to remove them.

4 Inst. 74, 75. [(*a*) He was anciently made by patent also: the alteration took place under E. 1., when his title was changed from *summus* to *capitalis justiciarius. Ibid.* (*b*) The chief and other barons of the Exchequer were created in Sir E. Coke's time, *quamdiu se bene gesserint. Id.* 117.]

And by the 27 *H.* 8. *cap.* 24. it is enacted, "That no person or "persons of what estate, degree, or condition soever they be, shall "have any power or authority to make any justices of *eyre*, justices "of assise, justices of peace, or justices of gaol-delivery, but that "all such officers and ministers shall be made by letters patent "under the king's great seal, in the name, and by the authority of "the king's highness, in all shires, counties palatine, *Wales*, &c., "or any other his dominions, &c., any grants, usages, allowance, "or act of parliament to the contrary notwithstanding."

As all judges must derive their authority from the crown, by some commission warranted by law, they must also exercise it in a legal manner, and hold their courts in their proper persons, for they cannot act by (*c*) deputy, nor any way transfer their power to another, as the judges of ecclesiastical courts may.

Bro. Judges, 11. Latch. 7. Cro. Car. 259. Cro. Eliz. 314. (*c*) That a recorder of a town, unless the custom allows, cannot make a deputy; for this is a judicial office. *Vide* Raym. 88. Lev. 125. Keb. 538. 639. 659., and the title *Office and Officers.*

But it seems, that, regularly, where there are divers judges of a court of record, the act of any one of them is effectual, especially if their commission do not expressly require more.

2 Hawk. P. C. 3. and *vide* the authorities there cited.

The judges are bound by oath to determine according to the known laws and antient customs of the realm; and their rule herein must be the judicial decisions and resolutions of great numbers of learned, wise and upright judges, upon variety of particular facts and cases, and not their own arbitrary will and pleasure, or that of their prince.

Vide the statutes 18 E. 3. c. 1. 20 E. 3. c. 1, 2. 4 Inst. 88. 109. Dalt. 13. S.P.C. 173. Co. 24. 12 E. 4. 18. 21 E. 4. 67. a. Salk. 397.

But though they are to judge according to the settled and established rules and antient customs of the nation, approved for many successions of ages, yet are they freed from all prosecutions for any thing done by them in court, which appears to have been an (*d*) error of their judgment. (*d*) But where for wilful corruption they have been complained of in the star-chamber, *vide* Vaugh. 139. And may still be called to an account in parliament. Hawk. P. C. c. 72. § 6. 12 Co. 24.

Nor is a judge, constituted by the king, and thereby stampt with his approbation, and to whom alone it belongs to judge of his fitness, to be reflected on, censured, defamed, or vilified with respect to his ability, parts, fitness for his place, &c.; for, if this were allowed, it would be impossible to keep in the people that

Vaugh. 138, 139.

veneration of their persons, and submission to their judgments, without which it is impossible to execute the laws with vigour and success; and hence all scandalous reflections on the judges of *Westminster-Hall*, are within the statute of *scandalum magnatum*.

8 H. 6. 19. b. 2 Roll. Abr. 92. Salk 398.

No person can be a judge in his (*a*) own cause, but the chief justice of the Common Pleas may bring an action in that court, but then the entry must be special, *viz. placita coram Johanne Blencow milite, &c.*

(*a*) The Mayor of *Hereford* was laid by the heels, for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he by the charter was sole judge of the court. Salk. 396.

1 H. 7. 26. a. 3 Inst. 29. Fortesc. Rep. 389.

No judge of any court of record is compellable to deliver his opinion before-hand, in relation to any question which may afterwards come judicially before him.

See 12 G. 2. c. 27. [whereby judges are enabled to act as judges of *oyer* and *terminer* or gaol-delivery in their own counties, which they were incapable of doing by the st. 8 R. 2. c. 2.]

By the 33 *H.* 8. *cap.* 24. it is enacted, "That no justice, nor "other man learned in the laws of this realm, shall use nor exer- "cise the office of justice of assise, within any county where the "said justice was born, or doth inhabit, on pain of 100*l. &c.*, "provided the said act shall not extend to any person who shall "be clerk of assizes, and associate to any justice of assise; nor to "any mayor, sheriff, recorder, steward, bailiff, suitor, or other "officer, being born, or dwelling within any city, borough, or "town within this realm of *England, &c.*, nor to justices of "either bench, for taking, hearing, or determining assises in the "one bench or the other; nor to the justices, justice clerks, or "clerk of assises in the dutchy and county palatine of *Lancaster*."

(C) What determines their Jurisdiction and Authority.

And. 44. Dyer, 165. 7 Co. 30. a. Cro. Car. 1, 2. N. Bendl. 79.

IT has been determined, that at common law the patents of the judges, (*b*) sheriffs, escheators, commissioners of *oyer* and *terminer*, gaol-delivery, and of the peace, and of the attorney-general, are determined by the death of the king, in whose name they are made. But see *infra*.

(*b*) But the office of a sheriff, in such places where he is chosen by a corporation, having by its charter the inheritance of the office, does not determine by the demise of the king. 7 Co. 30. b.——Nor the authority of a coroner or verderor. Dalt. 15. Dyer, 165. 2 Inst. 175. 1 Lev. 120.——Nor does any corporation officer, who by the charter is invested with judicial authority, lose it by such demise. 2 Hawk. P. C. 3.

But to prevent the disorders and other inconveniencies which may happen upon the death of a king, from the want of persons armed with competent authority to execute the laws before the successor can have time to appoint others; by the 7 & 8 *W. & M. cap.* 27. it is enacted, "That no commission either civil or military shall "cease, determine, or be void, by reason of the death and demise "of his said late majesty, or of any of his heirs or successors, kings "or queens of this realm; but that every such commission shall "be, continue, and remain in full force and virtue for the space "of

" of six months next after any such death or demise, unless in the " mean time superseded, determined, or made void by the next " and immediate successor, to whom the imperial crown of this " realm, according to the act of settlement in the said statute " before mentioned, is limited and appointed to go, remain, or " descend."

And by the 1 *Ann. cap.* 8. it is further enacted, "That no pa- " tent or grant of any office or employment either civil or mili- " tary, hereafter to be made, shall cease, determine, or be void, by " reason of the death or demise of any king or queen of this " realm; but that every such patent or grant shall be, continue, " and remain in full force for six months next after any such death " or demise, unless in the mean time superseded, determined, or " made void by the next immediate successor, to whom the crown " is limited and appointed to go, remain, or descend."

And it is further enacted by the same act, "That no commis- " sion of assise, *oyer* and *terminer*, general gaol-delivery, or of " association, writ of admittance, writ of *si non omnes*, writ of assist- " ance, or commission of the peace, shall be determined by the " death of any king or queen of this realm; but every such com- " mission and writ shall be and continue in full force for six " months next ensuing, notwithstanding such demise, unless su- " perseded or determined by the next successor; and also no ori- " ginal writ, writ of *nisi prius*, commission, process, or proceedings " whatsoever, in, or issuing out of any court of equity, nor any " process or proceedings upon any office or inquisition; nor any " writ of *certiorari*, or *habeas corpus* in any matter or cause, either " criminal or civil; nor any writ of attachment, or process for " contempt, *&c.*, shall be determined, abated, or discontinued by " the demise of any king or queen of this realm; but every such " writ, *&c.*, shall remain in full force, to be proceeded upon as if " such king or queen had lived*."

* And now by the stat. 1 Geo. 3. c. 23., the judges are to continue during good behaviour, notwithstanding the demise of the crown.

If a judge of the Common Pleas is made a judge of the King's Bench, by this the inferior authority is determined; for it would be impertinent for him to reverse his own judgment, which otherwise he might do upon a writ of error. Dyer, 159. Cro. Car. 128. S. C. cited, and agreed.

The authority of justices in *eyre*, *oyer* and *terminer*, *&c.*, is (*a*) determined by (*b*) the King's Bench sitting in the same county. Dyer, 159. 4 Inst. 73. 9 Co. 118.

(*a*) Their authority, how suspended by writ of *supersedeas*, which is grantable on proof that their commission was unduly obtained, *vide* Reg. 124, 125. 12 Ass. 21. 4 Inst. 163. H. P. C. 162. (*b*) Whether they have notice thereof or not. 4 Inst. 73. But *qu.* 21 H. 7. 29. b. [Bro. Commission, 10., saith that it is not determined, unless proclamation is made of the coming of the King's Bench. But see 2 Hawk. P. C. c. 3. § 11.]

If a commission is made to judges of assise, and after the king makes other judges of assise in the same county, (*c*) by this the first commission is not determined, but they may proceed thereupon (*d*) till notice of the second; and they are not bound to take notice of a proclamation thereof in the county, for the law hath not provided that any such proclamation thereof should be made. Kelw. 116.

(*c*) But where, by the issuing and notice of the second commission, the first is determined, and what shall be sufficient notice, *vide* Leon. 270. Godb. 105. 34 Ass. 8. Bro. Commission, 14. Moor, 186. pl. 333. H. P. C. 162. 4 Inst. 165. Dyer, 355 p. 36.——And yet the proceedings shall not be discontinued, *vide* the statutes of 11 H. 6. c. 6. and 1 E. 6. c. 7., and 2 Hawk. P. C.

P. C. c. 5. § 12. (*d*) The old ſheriff may act till the new patent is ſhewn him, ſo that he may have notice of his diſcharge. Cro. Eliz. 12. 440. Moor, 186. pl. 353. 4 Inſt. 165. S. P. *cont.*——But juſtices of the peace left out of the new commiſſion, muſt take notice thereof after publication of the new commiſſion at the next ſeſſions. Moor, 187. 4 Inſt. 165. S. P.

Crom. Jur. 125. H.P.C.161. 4 Inſt. 165. Dalſ. 24. Dyer, 205. Leon. 270.

If the juſtices hold a ſeſſion without adjourning it, and the commiſſion hath no time limited for its continuance, as where it is appointed *pro hâc vice* only, their authority is determined; but if the commiſſion be granted for a certain time, or *quamdiu nobis placuerit*, as it does not neceſſarily require any adjournment, if the court holden by virtue of ſuch commiſſion break up without any adjournment, or upon a void one, as being made without the conſent of the majority of the commiſſioners; yet it may be holden again on a new ſummons.

(*a*) Bro. Commiſſion, 4. 22. (*b*) But it hath been doubted, whether the dignity of a baronet, which has been created ſince that ſtatute, be within the equity of it. Cro. Car. 104. Lit. Rep. 81. (*c*) But now by the 1 Ma. c. 8. No perſon being ſheriff, ſhall exerciſe the office of juſtice of the peace.

It was (*a*) formerly holden, that by the juſtice's acceptance of any new name of dignity, the commiſſion was determined; but this is remedied by 1 *E.* 6. *cap.* 7. by which it is enacted, "That "if any perſon, being in any of the king's commiſſions whatſo-"ever, ſhall fortune to be made or created duke, archbiſhop, "marquis, earl, viſcount, baron, biſhop, (*b*) knight, juſtice of the "one bench or of the other, or ſerjeant at law, or (*c*) ſheriff, yet "that notwithſtanding he ſhall remain commiſſioner, *&c.*"

"By the 2 *&* 3 *Ph. & M. cap.* 18. a new commiſſion of the "peace, or gaol-delivery for the county, *&c.*, ſhall not ſuperſede "a former commiſſion for a city or town corporate being no "county."

(D) Of their Diviſion, and the Subordination of one Court to another: And herein,

1. In general, of the ſeveral Kinds of Courts which exerciſe a Juriſdiction.

Hale's An. 35.

THE moſt general diviſion of our courts is, into ſuch as are of record, or not; thoſe of record are again divided into ſuch as are ſupreme, ſuperior, or inferior.

Hale's An. 35.

The ſupreme court of this kingdom is the high court of parliament, conſiſting of the king, lords, and commons, who are inveſted with a kind of omnipotency in making new laws, repealing and reviving old ones; and it is on the right balance of theſe three depends the well-being, and indeed the very being, of our conſtitution.

Hale's An. 36.

Superior courts of record are again, thoſe that are more principal or leſs principal; the more principal ones are the Lords Houſe in Parliament, the Chancery, King's Bench, Common Pleas, and Exchequer; and by *Hale*, ſuch are the juſtices itinerant *ad communia placita & ad placita foreſtæ.*

Hale's An. 36.

The leſs principal ones are ſuch as are held by commiſſion of gaol-delivery, *oyer* and *terminer*, aſſiſe, *niſi prius*, *&c.*, by cuſtom or charter;

charter; as the courts of the counties palatine of *Lancaſter*, *Cheſter*, *Durham*; or by virtue of act of parliament, and the king's commiſſion, as the court of ſewers, juſtices of the peace, *&c.*

The inferior courts of record, as ordinarily ſo called, are corporation courts, courts leet, and ſheriffs torn, *&c.* Hale's An. 36.

Courts not of record are the courts baron, county courts, hundred courts, *&c.*

Alſo, the admiralty and eccleſiaſtical courts, which are not courts of record, but derive their authority from the crown, and are ſubject to the control of the king's temporal courts, when they exceed their juriſdiction. *Vide poſt* of the Admiralty and Eccleſiaſtical Courts.

All theſe are bounded and circumſcribed by certain laws and ſtated rules, to which, in all their proceedings and judicial determinations, they muſt ſquare themſelves. Hale's An. 35.

And here it may be proper to obſerve, that where a ſtatute prohibits a thing, and appoints that the offence ſhall be heard and determined in any of the king's courts of record, it can be proceeded againſt (*a*) only in one of the courts of *Weſtminſter-Hall*, becauſe thoſe being the higheſt courts of record, ſhall be intended only to be ſpoken of *ſecundum excellentiam*. Dyer, 236. 6 Co. 19. b. Cro. Jac. 538. Cro. Eliz. 737. Cro. Car. 146. Cromp. Jur. 132. Salk. 178.

(*a*) But that on a ſtatute ſo worded, the proſecution may be in any court of *oyer* and *terminer*. 4 Inſt. 164. H. P. C. 261.

2. Of ſuch as are of Record, or not.

Every court of record is the king's court, though the profits may be another's: if the judges of ſuch court err, a writ of error lies; the truth of its records ſhall be tried by the records themſelves, and there ſhall be no averment againſt the truth of the matter recorded. Co. Lit. 17. 8 Co. 38. b. 2 Lev. 92. 3 Lev. 205.

All ſuch courts are created (*b*) by act of parliament, letters patent, or preſcription, and (*c*) every court, by having power given it to fine and impriſon, is thereby (*d*) made a court of record; the proceedings of which can only be removed by writ of error or *certiorari*. (*b*) Co. Lit. 260. a. (*c*) Salk. 200. pl. 1. Ld. Raym. 213. 252. 454.

(*d*) The leets and torns are the king's courts, and of record. 2 Inſt. 143. 4 Inſt. 263. Hetl. 62; S. P.—But neither the admiralty nor eccleſiaſtical courts are of record. Roll. Abr. 527. *Vide poſt* of theſe courts.—Nor the *Engliſh* court in Chancery proceeding by *ſubpœna*. 37 H. 6. 14. 1 Roll. Abr. 527.—Nor the county court. Co. Lit. 117. b. 2 Inſt. 380. 4 Inſt. 264. Though plea held there by juſtices. 2 Inſt. 140. 312. 6 Co. 11. b.—Nor the hundred court. Co. Lit. 117. 2 Inſt. 143. 4 Inſt. 264.—Nor the court baron. Co. Lit. 117. 2 Inſt. 143. 4 Inſt. 264.——The proceedings thereof may be denied, and tried by a jury, and a writ of falſe judgment, not of error, lies on their judgments. Co. Lit. 117. b.

A court, that is not of record, cannot impoſe any fine on an offender, nor award a *capias* againſt him, nor hold plea of debt or treſpaſs, if the debt or damages amount to 40*s.* nor of a treſpaſs done *vi & armis*, though the damages are laid to be under 40*s.* Co. Lit. 117. b. 260. a. 2 Inſt. 311, 312. 14 H. 8. 15.

Alſo, by the ſtatute of (*e*) *Glouceſter*, the ſuperior courts ſhall not hold plea of any (*f*) treſpaſs under the value of 40*s.* (*e*) Made 6 E. 1. c. 8. (*f*) Treſpaſs is put but for an example for debt, detinue, covenant, and the like. 2 Inſt. 311. See further, tit. *Abatement*, (K.)

2 Inst. 311. But the superior courts may hold plea of trespass, &c. though under 40*s.* relating to the freehold, as detinue for charters, &c. or trespass *vi & armis*.

Carth. 108. Lambert and Thurston, 3 Mod. 275. S. C. As where in trespass by way of original, the plaintiff declared, that the defendant *vi & armis clausum suum apud H. fregit*, and concluded *ad damnum ipsius* 20*s.*, upon demurrer it was held well enough; for this being done *vi & armis*, if it could not be punished in the superior court, it could not be punished at all, for an inferior court cannot assess a fine.

3. How Inferior Courts must claim their Jurisdiction; and herein of pleading to the Jurisdiction, and demanding Conusance.

Carth. 11, 12. The courts of *Westminster* are the superior courts of the kingdom, and have a superintendency over all other courts by prohibition, if they exceed their jurisdiction, or writs of error, and false judgment of their proceedings; and every thing is supposed to be done within their jurisdiction, unless the contrary especially appears; on the other hand, nothing shall be intended within the jurisdiction of an inferior court, but what is expressly alleged.

12 Co. 114. Sid. 103. (*a*) But the defendant must plead it, and cannot take advantage of it in arrest of judgment. Carth. 11. —Nor can he take advantage of it by way of demurrer, but must plead to the jurisdiction of the court. Carth. 354, 355. In all transitory actions they have a jurisdiction, unless the plaintiff by his declaration (*a*) shews, that the action accrued within a county palatine; or if it be between the scholars of *Oxford* and *Cambridge*; in which case the university shall have conusance; because by their charter, confirmed by act of parliament, they have jurisdiction over the persons of their scholars; and though an inferior court might have determined it, yet the superior court, being once possessed of the action, cannot be (*b*) hindered from proceeding.

(*b*) It was moved for an attachment against the registrar and commissioner of the court of requests, called the court of conscience, confirmed by the act 3 Jac. 1. c. 15. because that where *J. S.* had brought debt upon an obligation of 10*l.* for payment of 5*l.* in *B. R.* against a freeman of *London*; who after cited the plaintiff in the court of Conscience, surmising that less than 40*s.* was due, and the plaintiff appeared there, and shewed the obligation; notwithstanding, the commissioners there, upon allegation of the defendant, that less than 40*s.* was due, ordered the plaintiff to accept it, and stay proceedings in *B. R.*, which he refusing, the commissioners ordered the registrar to keep the obligation, so that the plaintiff could not proceed; upon which matter the court granted an attachment against the commissioners and registrar; for that court cannot any way prohibit or stay the proceedings in a superior court. Mich. 27 Car. 2. in *B. R.* 3 Keb. 533. S. C. ill reported.

4 Inst. 224. (*c*) So, ancient demesne held of the king's manor may be pleaded. In local actions inferior courts have a jurisdiction, but here a difference must be observed as to the manner of claiming it; for as to the principal courts of this kind, and into which *brevia domini regis non currunt*, as the counties palatine, they may (*c*) plead their jurisdiction when intrenched upon by the superior courts.

Herne's Pleader 7. 351. Hans. 103. Tho. 2. Rast. 419. —So, may the jurisdiction of the *cinque ports* 4 Inst 224. But *vide* Carth. 109. & 2. For it is there said to be such a franchise as *Ely*; and there resolved, that *Ely* being no county palatine, but only a royal franchise, the defendant cannot plead to the jurisdiction of a superior court, but must demand conusance. —And *note*, that wherever the defendant can plead to the jurisdiction of the courts at *Westminster*, there the franchise may demand conusance; but not *vice versâ*.

Roll. Abr. 489, 490. But where a franchise, either by letters patent or prescription, hath a privilege of holding pleas within their jurisdiction, if the courts

courts at *Westminster* intrench on their privileges, they must demand (*a*) conusance, that is, desire that the cause may be determined before them; for the defendant cannot plead it to the jurisdiction; and the reason is, because when a defendant is arrested by the king's writ, within a jurisdiction where the king's writ doth not run, he is not legally convened, and therefore may pleatl it to the jurisdiction; but the creating of a new franchise does not hinder the writ from being made out as before, nor the courts above from having the same jurisdiction over the cause, but grants jurisdiction to the lord of the liberty; and whenever the king's courts intrench on his jurisdiction, he may make his claim, and demand that the cause be determined before him.

(*a*) There are three sorts of conusance, 1. *Tenere placita*, which does not oust another court of their jurisdiction, but only creates a concurrent one. 2. *Cognitio placitorum*, when the plea is commenced in one court, of which the conusance belongs to another. 3. A conusance with an exclusive jurisdiction; as that no other court shall hold plea, &c. Hard. 509, 510.

No court can demand it unless it be of record, and of a plea of record; because all courts of record are the king's, though another may have the profits of them; so that although the cause goes out of the king's courts at *Westminster*, yet it goes to another of the king's courts, to which he has granted the privilege of determining the causes arising within a limited juridiction; but it is below the dignity of the king's court to part with any cause to another's court, such as the county court, *&c.* 2 Inst. 140. Co. Lit. 117. b.

Also, where a franchise cannot give a remedy, and there would be failure of justice, they shall not have conusance, although the action accrued within their jurisdiction. Dalf. 12. Roll. Abr. 489.

As in (*b*) a *quare impedit*, because they cannot send a writ to the bishop, nor in (*c*) replevin, because if the plaintiff be nonsuited, a second deliverance shall be granted, which the franchise cannot do. (*b*) 44 E. 3. 29. b. Bro. Conusance, 12.

S. C. 26 E. 3. 73. Dalf. 12. Co. Lit, 134. b. S. P. (*c*) 38 E. 3. 31. conusance is not grantable, because the original writ of replevin is in nature of a *justicies*, and not returnable, and in a *justicies* no conusance can be demanded, because none can demand conusance but he that hath a court of record; but the county court, though the plea is holden by *justicies*, is no court of record, and if the sheriff should grant the conusance, he could not award a re-summons. 2 Inst. 140. Bro. Conusance, 4. 23.

Nor in waste, because by the statute the writ must issue out of the Chancery at *Westminster*, and those writs are returnable into the (*d*) king's courts there, and not into any inferior court. 1 H. 4. 5. Dalf. 12. (*d*) No conusance can be granted upon an attaint, beause all attaints, *per* 23 H. 8. c. 3., are to be taken before the king in his bench, or before justices of the Common Pleas, and in no other court. Co. Lit. 294. Dyer 202. Kelw. 210. N. Bendl. 99.

Nor in admeasurement of pasture, because the franchise cannot grant a writ *de secundâ superoneratione*. Dalf. 12.

So, if a fine be removed out of a franchise by writ of error in *B. R.* and a *scire facias* issue out to have execution, they shall not have conusance; because the king never parts with the records of his court, and without it they can do no right to the party. 50 Ass. 9. Bro. Conusance, 61. Roll. Abr. 492. S. C.

If a borough have an ancient charter, by which it was granted to them *quod nullus burgensis inhabitans infra burgum præd. placit. vel implacitetur de terris, tenementis, contractibus, &c.* within the borough, elsewhere out of, *&c.* and the mayor and burgesses of N. Bendl. 88. pl. 134.

the ſaid borough are empleaded *in Banco* for lands within their borough, they ſhall not have conuſance; for in this action (*a*) the whole body is empleaded.

(*a*) So, where conuſance is granted to the chancellor of the univerſity, to hold plea where ſcholars or privileged perſons are concerned, this ſhall not extend to an action againſt the preſident and ſcholars of a college. 1 Mod. 163. [This caſe is erroneouſly reported,—the claim was allowed.]

22 H. 7. Kelw. 88, 89, 90.

If the king grants *majori, ballivis, & juratis quinque portuum*, that they ſhall not be empleaded for land or other cauſe elſewhere, than within the ſaid ports, yet in a *quo warranto, &c.* where the king is directly a party, they ſhall not be empleaded there.

[The like determination, in the caſe of a viſitor, becauſe he cannot compel a ſpecifick performance. Cowp. 378. So, where a college are to act in a truſt. 1 Vez. 462.]

If a ſcholar of *Oxford* or *Cambridge* be ſued in Chancery for a ſpecifick performance of a contract to leaſe land in *Middleſex*, the univerſity ſhall not have conuſance, becauſe they cannot ſequeſter the lands.

Lit. Rep. 252. Cripps and Webb.

So, in (*b*) treſpaſs *quare clauſum fregit, et damnum, &c. intravit in Oxford*, conuſance was denied to the univerſity, becauſe the freehold might come in queſtion.

(*b*) So, for the ſame reaſon, it ſhall not be granted to them in ejectment, though nothing but a term for years be to be recovered. Lit. Rep. 252. Cro. Car. 87, 88. S. P. adjudged.

22 Aſſ. 83. Roll. Abr. 493.

If an action of (*c*) treſpaſs be brought for a treſpaſs done within a franchiſe, againſt a foreigner that hath nothing within the franchiſe, conuſance ſhall not be granted, (*d*) becauſe they cannot do right to the party, for they cannot ameſne a ſtranger to anſwer who hath nothing within the franchiſe.

(*c*) So, of debt. 22 Aſſ. 83. Roll. Abr. 493. (*d*) So, of a conſpiracy againſt two, for a conſpiracy within a franchiſe, of whom one is a foreigner, they cannot have conuſance, for the action is entire. 22 Aſſ. 83.——So, an heir cannot be ſued upon an obligation of his anceſtor, within a borough, where he hath not aſſets within the juriſdiction of the court. Roll. Abr. 494. Cro. Jac. 502. 2 Roll. Rep. 48. S. C.

Lit. Rep. 40. 304. [3 Leo. 149. But ſee Bendl. 233, 234. Whoper *alias* Hooper v. Harewood, an attorney of C. P. for battery, conuſance granted to the Biſhop of Bath and Wells.]

As they ſhall not have conuſance where there is a failure of juſtice, ſo ſhall they not likewiſe where the plaintiff is a privileged perſon in any of the ſuperior courts at *Weſtminſter*; for it would be inconvenient, and below the dignity of thoſe courts, that their officers ſhould be compelled to quit their attendance, to obtain juſtice in an inferior court.

(*e*) Bro. Conuſance, 50. *& vide* Carth. 12. (*f*) Hard. 505, 506. 2 Vent. 362. Hard. 189.

But the defendant being *in* (*e*) *cuſtod. mar.* in the King's Bench, or the plaintiff's commencing a ſuit in the Exchequer on (*f*) a *quo minus*, as debtor to the king, are not ſuch privileges as will ouſt an inferior juriſdiction; for they are now grown the common methods of ſuing in thoſe courts.

14 H. 4. 20. (*g*) But if an action of common law is given againſt a perſon by another name, as debt againſt an adminiſtrator, they ſhall have conuſance. 14 H. 4. 20. 22 E. 4. 23.

Nor can they have conuſance of ſuch actions as were not *in eſſe* at the time of their charter, but (*g*) created ſince by act of parliament.

As

As to the manner of demanding it, (*a*) if it be by attorney, the letter of attorney must be produced in court, and (*b*) if the conusance be demanded by virtue of a charter time out of mind, or by prescription, (*c*) there, an allowance must be pleaded before justices in *eyre*.

(*a*) Sid. 103. Lev. 87. S. C. and said, the warrant of attorney must be filed in court, & *vide* Dalf. 12. Palm. 446. N. Bendl. 233. pl. 262. Lane 81. 87. Sid. 283. (*b*) 9 Co. 27. b. 28. a. [Where cognisance of pleas is granted by act of parliament, it is unnecessary to shew that the charter hath at any time before been allowed by the king's writ, or any of his superior courts. 2 Wilf. 412.——(*c*) Cognisance of pleas cannot be claimed by prescription. Co. Lit. 114. b. 1 Salk. 184. But see 4 Inst. 220.]

If by charter, confirmed by act of parliament, conusance of pleas, &c. is granted to the chancellor of *Oxford*, or his commissary, the vice-chancellor, by his deputy, may demand it, though the vice-chancellor is but a deputy himself; for a (*d*) bailiff may properly demand conusance, and upon notice of the patent, the court ought to supersede.

Hard. 505. Castle and Litchfield, adjudged. (*d*) Bro. Conusance, 36. 50. S. P.

But (*e*) a plea to the jurisdiction must be put *in propriâ personâ*, for the defendant cannot plead by attorney without leave of the court first had, which leave acknowledges their jurisdiction; for the attorney is an officer of the court; and if they put in a plea by an officer of the court, that plea must be supposed to be put in by leave of the court.

(*e*) In such plea the defendant must make but half defence, for if he makes full defence, as *quando & ubi cur. consideraverit*, he submits to the jurisdiction. Co. Lit. 127. b.——Must be pleaded before any imparlance. 2 H. 6. 30. 22 H. 6. 7. Hard. 365. Lutw 46. [*Vide supra* tit. *Abatement* C. the authorities there cited.]——Except where antient demesne is pleaded. Dyer 210. in margine. Style 30. Latch 83.——So, conusance must be demanded before imparlance, and the same term the writ is returnable after the defendant appears; because until he appears there is no cause in court. Sid. 103. 6 H. 7. 9. 10.

4. Where it must appear that inferior Courts have a Jurisdiction.

Inferior courts are bounded, in their original creation, to causes arising within such limited jurisdiction: Hence it is necessary for them to (*f*) set forth their authority; for, as hath been already observed, (*g*) nothing shall be intended within the jurisdiction of an inferior court, but what is expresly alleged to be so.

Roll. Abr. 545, 546. (*f*) Where the style of the court must be set forth, and that they have power to hold plea by prescription, or by letters patent of the king. Roll. Abr. 795. Cro. Eliz. 489. Moor 422. Owen 50. Noy 35. S. C. Cro. Jac. 184. 493. Yelv. 46. Moor 601. [Where the stile of a court shall be helped by intendment, see Gibbons v. Roberts, 1 Salk. 265. Where a sheriff is empowered by a private act of parliament to take inquisition of the value of lands, giving notice to the owners, the notice must appear on the back of the inquisition, to shew that he hath a jurisdiction, else all the proceedings will be quashed. Rex v. Mayor, &c. of *Liverpool*, 4 Burr. 2244.]——But where the proceedings of an inferior court need not be set forth at large, but by way of *taliter processum fuit*. *Vide* 2 Lev. 81. 3 Lev. 403. Carth. 53. [2 Mod. 195. Lord Raym. 80. 1 Wilf. 316. 2 Wilf. 5. Cowp. 20.——Greater indulgence hath of late years been shewn to inferior courts, and the presumption hath rather been in favour of their jurisdiction. In a justification under the process of an inferior court it is sufficient to state that a plaint was levied for a cause of action arising within the jurisdiction, without setting it forth at length, or alleging that the defendant became indebted there. Cowp. 20. 3 Term Rep. 185.]——(*g*) Sand. 74. Sid. 331. Same rule—whether *Hull* bridge should be intended within the jurisdiction of the court of *Hull*. Lev. 289. Vent. 72. *dubitatur*, & *vide* Style 200. Lev. 154.

Therefore if an action is brought on a (*h*) promise in a court below, not only the *promise* but the *consideration* must be alleged to arise within the inferior jurisdiction; for a debtor, who has contracted a debt, does not, by coming into the limits of such

Roll. Abr. 545, 546. Several cases to this purpose. [See

too 1 Lev. 50. 96. 137. 156. 2 Lev. 87. 1 Saund. 73. Ld. Raym. 1310. 2 Wilf. 16. Cowp. 20. Freem. 321. 1 Term Rep. 151.]

jurisdiction, give such court authority to hold plea thereof; nor is it sufficient to allege the cause of action within the jurisdiction of the court; but it must be proved upon the trial; and if the plaintiff proves a consideration out of the jurisdiction, it cannot be given in evidence; and if it be, the defendant's counsel (*i*) may propose a bill of exceptions, and upon such bill of exceptions the judgment will appear to be erroneous.

(*b*) An inferior court cannot hold plea of an obligation, contract, battery, or other transitory action, if it was not made within the jurisdiction of the court. 2 Inst. 231. (*i*) Where he must plead to the jurisdiction, and if such plea be refused, an attachment lies. 2 Inst. 229, 230. 2 Lev. 230. Raym. 189. Mod. 81. But such plea must be put *in propria persona*, and whilst the court is sitting, and oath must be made of the truth thereof. 6 Mod. 146.—But *vide* Carth. 402. That a plea to the jurisdiction need not be on oath, as a foreign plea must. By 4 Ann. c. 16. § 11. no dilatory plea is to be received without affidavit of the truth, and the affidavit must state that the plea is true in substance.—Where upon the statute of *Westminster* 1. c. 35. a prohibition will be granted. Salk. 201. pl. 5. 202. and by F. N. B. 45, 46. 2 Roll. Abr. 317. Though the defendant by plea admits the jurisdiction, yet the superior court may grant a prohibition; but in 2 Mod. 271. Meudyke and Stint, it is adjudged, that after verdict and judgment, no prohibition lies; but there said, that if any matter appears in the declaration, which sheweth that the cause of action did not arise *infra jurisdictionem*, a prohibition may be granted at any time: so, if the subject matter in the declaration be not proper for the judgment and determination of such court; or if the defendant, who intended to plead to the jurisdiction, is prevented by an artifice, as by giving a short day, or by the attorney's refusing to plead it, &c., or if his plea be not accepted, or be over-ruled; in all these cases, a prohibition will lie at any time. 2 Mod. 273.—Where trover, trespass, or false imprisonment lies. 22 E. 4. 31. 10 H. 6. 13. As where in an action of false imprisonment, the defendant justified the apprehending of the plaintiff by virtue of a parol command, and the prescription being that it must be by precept, (which must be understood in writing,) the plaintiff had judgment. Hob. 63. But an officer may proceed on his duty, and execute a process, though there be no cause of action, or though it arose out of the jurisdiction, unless the contrary appears to him. Salk. 202.

Saund. 74. Peacock and Bell, adjudged. Sid. 331. S. C.

But here a distinction must be observed between counties palatine, and other inferior courts; for a county palatine is a general court for all the subjects of the palatinate, and not merely for the causes arising within that palatinate; for if a debtor goes from a foreign county into a palatinate, his obligations go along with him, as much as if he went from one kingdom into another; and if it were otherwise, a palatinate jurisdiction would be a shelter and *asylum* to debtors, for no process but the supreme prerogative process runs there; and therefore it is determined, that though the cause of action be out of the palatinate, yet if the party be a subject of that palatinate, as he is by coming into that dominion, that the action there may be brought against him.

Roll. Abr. 546. adjudged.

In an action upon the case in the court of *Launceston in Cornubia*, if the plaintiff declares, that whereas he was an attorney of the hundred court of *Stratton in Cornubia*, the defendant having communication with *J. S.* of the said office, of the plaintiff, said these scandalous words of him within the jurisdiction of the said court of *Launceston*, *Thou art a cheater*, *&c.* after verdict for the plaintiff, and damages given, the judgment was reversed upon a writ of error; for the jury could not inquire whether the plaintiff was an attorney of the hundred court or not, being out of their jurisdiction; and this was the principal cause of the action.

Lev. 50. Ramlay and Atkinson, adjudged, and the judgment in the Mar-

If in the marshal's court the plaintiff declares, that in consideration the plaintiff, at the request of the defendant, had taken pains to procure him a lease of an house in *Holborn*; the defendant *apud S. infra jur.*, *&c.* promised to pay him 10 *l.* *&c.* this is not sufficient to entitle the court to a jurisdiction; in as much

as

as it does not appear that *Holborn*, where the house stands, is within the jurisdiction, and the jury are not only to try the promise, (*a*) but the consideration also. Shalsea reversed. Sid. 65. S. C.

(*a*) Judgment upon an *assumpsit*, in consideration that the plaintiff would solicit a cause in Chancery, reversed for want of jurisdiction. Vent. 28. & *vide* Lev. 289. 1 Vent. 72.—Where in debt against an heir, if he pleads *riens per discent*, the plaintiff must reply assets within the jurisdiction. Roll. Abr. 494.

In an *indebitatus assumpsit* for money for a cow sold, it must appear that the sale was within the jurisdiction; for the being indebted there does not necessarily imply that the sale was there, for he that is indebted in one place is so in every place. Sid. 87. Raym. 75. Lev. 96. 105. 137. 208. S. P. Vent. 2. 243. 2 Lev. 87. Jones, 230. S. P.

In debt for rent, upon a lease made *infra jur.* of an inferior court it must appear also, that the lands lie within the jurisdiction; for if part of the cause arises within the inferior jurisdiction, and part without, the inferior court ought not to hold plea. Lev. 104. Sid. 101. Vent. 2. S. C. Drake and Beare.

In an action for calling the plaintiff *whore*, by which she lost her marriage, the loss of the marriage must be laid within the jurisdiction, because the words are not actionable without special damage. Sid. 85. 95, Raym. 63. Lev. 69. Salk. 404. pl. 1, 2. S. P. For the loss of marriage is the gift of the action, & *vide* Sid. 342. Lev. 153. Keb. 798. 837. March, 48.

But if in an action upon the case in the court of *Bath*, *in com. Somerset*, the plaintiff declares, that he was a *tailor*, and that he used the said art for several persons inhabiting *tam infra civitatem prædict.*, *quam alibi infra regnum Angliæ*, and the defendant, to scandalize him in his said art, said these words of him: *Thou hast stole as much cloth out of my suit and cloak which thou madest for me, as did make thy wife a waistcoat*; by which he lost his customers; the action lies in that court, notwithstanding the allegation *quam alibi infra regnum Angliæ*, for that is only matter in aggravation of damages. Roll. Abr. 546. Howel and Ireland, Cro. Car. 570. Jones, 450. S. C.

So, if in the court of *H.* the plaintiff declares, that he lent his horse at *H.* for the defendant to ride to *B.* and that the defendant assumed at *H.* to re-deliver him, this is well enough; for it is not the riding, but the re-delivery, which is the cause of the action. Sid. 151. 180. Vent. 72.

So, in a writ of error of a judgment in the Palace Court, in an action on the case, wherein the plaintiff declared, that such a day, in such a parish in the county of *Middlesex*, he delivered to the defendant (being an inn-keeper) a gelding, safely to be kept in his inn, and that he suffered him to be taken out of his stable, and rid so immoderately that the gelding was spoiled; it was objected as error, that the riding did not appear to be within the jurisdiction of the Marshal's Court; but *per cur.* in actions in inferior courts, it is necessary that every part of that, which is the gist of the action, should appear to be within their jurisdiction; otherwise of such matters as are inserted only for aggravation of damages, and might be omitted, and yet the action remains as in this case; and therefore the judgment was affirmed. Salk. 404. pl. 1. 2 Ld. Raym. 795, 796. Stannian and Davis, 6 Mod. 223. S. C. 11 Mod. 7. pl. 1.

(E) What is incidental to all Courts in general.

Roll. Abr. 526. (*a*) But they cannot make a bailiff to execute writs of

IF the king grants a court by letters patent, to a corporation of a town to hold pleas, *&c.* in this caſe, though there is not any clauſe in the patent to make a bailiff or ſerjeant to (*a*) execute the proceſs of the court, and to return juries, yet it is incident to their grant to do it; for otherways they cannot hold a court.

inquiry of damages, without a clauſe in the patent for that purpoſe. Roll. Abr. 526.

Vide each reſpective court, & 11 H. 6. 12. Roll. Abr. 219. 8 Co. 38. b. 11 Co. 43. b. Cro. Eliz. 581. Sid. 145.

Every court of record, as incident to it, may injoin the people to keep ſilence, under a pain, and impoſe reaſonable fines, not only on ſuch as ſhall be convicted before them of any crime on a formal proſecution, but alſo on all ſuch as ſhall be guilty of any contempt in the face of the court, as by giving (*b*) opprobrious language to the judge, or obſtinately refuſing to do their duty as officers of the court, and may immediately order them into cuſtody.

[For contempts in the face of the court, courts not of record may commit.] (*b*) As was the caſe of one Redding, who was convicted of tampering with Bedloe, one of the king's witneſſes, in the popiſh plot, and endeavouring to make Bedloe deny what before he had confirmed, concerning ſeveral great perſons engaged in the plot; for which he was adjudged to pay 1000 l., to ſtand in the pillory, and to be impriſoned for a year; and this conviction being before commiſſioners of *oyer* and *terminer*, of whom Sir Thomas Jones, and Sir William Dolben, judges of B. R. were two; he afterwards, being ſet at liberty, came into B. R. with an information againſt all the commiſſioners of *oyer* and *terminer*, and after having demanded the juſtice of the court, he ſaid, that Sir Thomas Jones, and Sir William Dolben, contrary to *Magna Charta*, the king's oath, and their oath, have ruined me; for which words (a record being preſently made of them) he was adjudged to be fined 500 *l.*, and impriſoned till payment of it; to find ſurety for his good behaviour for ſeven years; and, being a barriſter at law, his gown, by order of the court, was pulled over his ears by the tipſtaff.

Lamb. 403. Lev. 159. Brownl. 15. Raym. 100. Bro. Privilege, 35. Mod. 66. 10 Mod. 333. Keb. 845.

The courts of record, as incident to them, have a power of protecting from arreſts, not only the parties themſelves, but alſo all witneſſes *eundo & redeundo*; for ſince they are obliged to appear by the proceſs of the court, it will be unreaſonable that any one ſhould be moleſted whilſt he is paying obedience to ſuch proceſs.

Court of Parliament.

(A) Of the Original and Antiquity of Parliaments.

(B) Of the Perſons of whom it conſiſts.

(C) Of the Manner of their Summons and aſſembling.

(D) Of

(D) Of Elections: And herein,

1. Of the Electors, and their Qualifications.
2. Of the Elected, and their Qualifications.
3. Of the Duty of Returning Officers, and the Remedies againſt them, [and herein of the Mode of proceeding upon complaint of undue Elections.]

(E) Of the Method of paſſing Bills.

(F) Of the Continuance, Adjournment, Prorogation, and Diſſolution of the Parliament.

(G) Of the Juriſdiction of the Houſe of Lords.

Of the Privileges of Members, *vide* tit. *Privilege*.

(A) Of the Original and Antiquity of Parliaments.

TO trace out exactly the original and antiquity of the ſupreme court of parliament, whoſe tranſcendent juriſdiction, ſaith my Lord *Coke*, is ſuch, that it maketh, enlargeth, diminiſheth, abrogateth, repealeth, and reviveth laws, ſtatutes, acts, and ordinances concerning matters eccleſiaſtical, capital, criminal, common, civil, martial, maritime, *&c.*; and to point out the ſeveral alterations it met with, and how it came to be modelled into the ſhape we ſee it at this day, ſeems indeed, if not impoſſible, a work of the greateſt difficulty; but this difficulty is not to be attributed to any peculiar defect in our conſtitution, but only to time, the loſs and deſtruction of our records, eſpecially in the barons wars; nor have the prejudices and different views, which conducted the pens of thoſe who have written on this ſubject, helped a little to obſcure and perplex the matter. Co. Lit. 110. 4 Inſt. 36.

However, it appears by thoſe lights which we have ſtill remaining, and from the inquiries and reaſonings of our beſt antiquaries, that there hath always been ſomething of the nature of a parliamentary aſſembly, as ancient as any thing which we know of our conſtitution, in which the people ſhared with the prince in the legiſlative power: this aſſembly was ſometimes called *magnates regni*, *omnes regni nobiles*, *proceres & fideles regni*, *univerſitas regni*, *communitas regni*, *diſcretio totius regni*, *generale concilium regni*, *&c.* Spelm. Gloſſ. in verb. Parl. Prynn's Right of the Commons, 99.

In the *Saxon* times, the general court of the whole kingdom was the *Wittingham Mote* or *Witenagemote*, to which were ſummoned the earls of each county, and the lords of each leet; and likewiſe repreſent- Wilk. L. L. Saxon. 205. Lamb. Arch. 57. 239.

245. Mirror, c. 5. § 2.

(a) repreſentatives of towns, who were choſen by the burgeſſes of the towns, and appeared on the king's ſummons; this court met once a year at leaſt, and generally twice, about *Eaſter* and *Michaelmas*.

(a) Sir Robert Atkins ſays, that Spelman, Bede, Selden, and Camden, prove the commons to be part of this court; but they do not prove, ſays he, that they were elected, or that they conſiſted of knights, citizens, and burgeſſes. *Sir Robert Atkins of the Juriſdiction of Parliaments*, 25. —— In the preface to Forteſcue, *of abſolute and limited Monarchy*, 18, it is ſaid, that by reading the *Saxon* laws, and the prefaces and preambles to them, it will appear, that the commons of *England*, always in the *Saxon* times, made part of that auguſt aſſembly. ——Spelm. Gloſſ. *verb. ſubſidium*, the commons attended in extraordinary caſes, as in granting new aids and taxes, as Danegelt, &c. and Maddox, c. 7, 8, 9. agrees herein, and gives us a full account of thoſe aids and taxes, which he ſays were but ſeldom raiſed; the king, in thoſe days, being abundantly ſupplied by his antient demeſne lands, fines, forfeitures, &c.

See Wright's Tenures.

Upon the coming in of *William* the Conqueror, every perſon found in arms againſt him forfeited his whole eſtate, in which he placed his *Normans*; and he compelled all thoſe who were not in arms againſt him, to take out patents of their lands to hold of himſelf; and in order to this he made a general ſurvey of the whole kingdom, which was called *domeſday*, and changed the nature of the tenures, which in the *Saxon* times was *allodial*, into *feudal*, to be holden of himſelf by knights ſervice; and by this means made the property of their eſtates depend on their allegiance to him: and hence it is, that all lands are ſaid to be holden mediately or immediately from the crown.

(b) In Edward the Third's time, when the *modus texendi parliamentum* is ſuppoſed to have been written, they thought the uſual ſubſiſtence of a knight could not be

The baronies and earldoms were antiently created by granting ſo many knights fees, *viz.* if the grant conſiſted of 13⅓ (b) knights fees, the party was compellable to hold *per baroniam;* and he that had twenty knights fees, to hold as an earl (c); but when thoſe grants came to be loſt by time, they held both their honours and eſtates by the preſcriptive right of poſſeſſion; the earls and barons were wont to grant out lands to other vaſſals, to do certain duties, which depended on the bounty and agreement of the firſt grantor; and hence came all the fruit of the feudal tenure, as wardſhip, marriage, relief, *&c.*, but thoſe who held immediately from the crown, were called tenants *in capite*, and did ſuit only to the king.

leſs than 20 *l. per annum*, that of a baron 400 marks, and that of an earl 400 *l.* But Seld. tit. *Hon.* is of opinion, that there was no certain number of knights fees neceſſary to make a baron or earl, but that they conſiſted of ſo many knights fees as were contained in the charter. [(c) The feudal peerage was originally territorial; not attached to the perſon, but to the poſſeſſion of the feudal eſtate. "The firſt "form of the creation of an earl," according to the author of the Eſſays on *Britiſh Antiquities*, quoted by Sir *J. Dalrymple* in his Eſſay on Feudal Property, c. 8., "was that of a grant of an office over a "county. When by the multiplication of earls, the earldoms were become more numerous than the "counties, the form was to erect a particular eſtate into an earldom or county, which was all that was "neceſſary to beſtow upon the proprietor the territorial dignity. Afterwards, when the notion of perſonal honour crept in, certain ſolemnities were uſed at the creation of a peer, ſuch as girding him "with a ſword, covering his head with a cap of honour and circle of gold, all of them marks of perſonal reſpect. And now, both in *England* and *Scotland*, the notion of territorial dignity being quite "worn out, an earl's patent is ſo framed, as to import a mere perſonal dignity, without relation "either to office, or to land." The caſtle of *Arundel*, however, ſtill confers an earldom on its proprietor: the act of 3 Car. 1. c. 10., for annexing the caſtle and honour of *Arundel* unalienably to the title of Earl of *Arundel* in the heirs of *Thomas* then Earl of *Arundel*, in its preamble, ſpeaks of the title as real and local. The barony of *Berkeley* of *Berkeley-caſtle* is alſo ſaid to be territorial.]

Of the ſeveral officers, and the

Alſo, *William* the Conqueror erected a new court, called *curia* or *aula regis*, compoſed of his principal officers of ſtate; to theſe, when

when any matter of moment was in agitation, as levying a new war, raiſing an eſcuage, &c., were called moſt of the barons, and chief perſons who held *in capite*, and they tranſacted all buſineſs civil and criminal, and alſo that relating to the revenue, and were the great court-baron of the kingdom, where every thing done therein, was ſaid to be done *per concilium regni*; it was in the election of the king to ſummon which of his attendants he pleaſed to this court; and ſuch attendance being deemed a burthen in former days, the barons were ſeldom called, eſpecially when they roſe to that grandeur as to make ſuch a concourſe formidable to the king.

manner of judicature in this court, *vide* Maddox, c 2, 3.

In this great aſſembly of parliament, it ſeems plain, that in the firſt reigns after the conqueſt, the commons of *England* were no part, and therefore the tenants in antient demeſne, who uſed to maintain the king's table, and alſo thoſe who held by burgage tenure, as by certain rent, ſetting out ſhips in the navy, &c., according to the nature of their patents, were wont, upon any extraordinary expedition, beſides the duties of their tenure, to grant an aid to the king, which was demanded of them by the juſtices itinerant; and which, if they refuſed to pay, the king, at the end of the expedition, might, with the advice and conſent of his council, tallage them to a tenth of all their eſtate, but not to more; for none could be taxed at pleaſure but villeins, and thoſe who held by baſe tenure.

Maddox, 491. Where there is a notable record of the city of *London*'s being tallaged, and alſo decimated for non-payment; and upon ſuch decimation they were obliged to ſwear to the value of their goods. *Vide* Ryley, 516.

The great controverſy, with reſpect to the original and antiquity of parliaments, relates chiefly to the power and firſt formation of a houſe of commons after the conqueſt. (*a*) Some have aſſerted that they have been always part of the ancient conſtitution, and that the commons of *England*, by their repreſentatives, have always compoſed a part of that auguſt aſſembly; (*b*) others hold, that the houſe of commons was formed 49 *H.* 3. when the king had given a total overthrow, at the battle of *Eveſham* to *Symon Mountford*, Earl of *Leiceſter*, and the barons that adhered to him; and to derogate from the power of the commons, and to lay aſide parliaments, a notion was propagated in king *Charles* the Second's reign, that they firſt aroſe by the art and management of *Symon Mountford*, to be a balance to the crown and peerage; and that their firſt inſtitution was the invention of a rebel to ſerve a particular purpoſe.

(*a*) *Petit*, Sir Robert Atkins's Power and Juriſdiction of Parliaments, 14., and others. (*b*) Camden in his *Britannia*, 13., dates the original of the commons, as part of the parliament, and as now elected, from the 39 H. 3., and ſays, he has it *ex ſatis antiquo ſcriptore*, but does not name his author; and herein he is followed by Pryn, in his plea for the lords, 182. Dugdale, in his Orig. Jur. 18. Heylin's life of Laud, 01. Brady, in his anſwer to Petit, 133, &c., Sir Robert Filmer, in his Frecholder's Grand Inqueſt, 18., and others, who think themſelves ſufficiently ſupported in this opinion, becauſe the firſt writ of ſummons of any knights, citizens, and burgeſſes, now extant, is not ancienter than 49 H. 3.

But, as neither of theſe accounts ſeems to be the true one, the moſt probable opinion is, that the houſe of commons was inſtituted by the crown, as a balance to the barons, who were grown very opulent and numerous, and, as appears by their wars, very uneaſy to the crown; hence we find, that upon the eſcheat of any barony for want of iſſue, or by forfeiture, the crown parcelled it out into ſmaller

Spelm. Gloſſ. 69. Seld. tit. *Hon.* 692.

ſmaller diſtricts; and this begot the diſtinction between the *barones majores* and *barones minores*. Theſe *barones minores* held by knights ſervice, and, being too numerous to be all called to parliament, were allowed to (*a*) ſit by repreſentation. Hence we have the writ to chuſe *duos milites gladiis cinctos*; to theſe were added repreſentatives of cities and antient boroughs, who being equally concerned with the *barones minores* in all aids and taxes, it was reaſonable they ſhould ſhare with them in thoſe matters; and this policy was ſet on foot as a matter of the greateſt ſervice to the crown, both for the balancing of the peerage, and more conveniently taxing of the people.

(*a*) But at what time they firſt ſat, or were firſt digeſted into one houſe, with the repreſentatives of cities and boroughs, does not well appear. By ſome opinions, they at firſt ſat with the *barones majores*; and hence my Lord Coke ſays, that lords and commons at firſt ſat together, and made one houſe of parliament. 4 Inſt. 2. Selden does not determine the point, but ſays, that it was attempted, 17 John, to bring in the *barones minores*, as appears by the great charter granted by him at Runny Mead. Seld. tit. *Hon.* 704. But the more received opinion is, that it was accompliſhed in the victorious reign of Henry 3. who, inſtead of graſping at the liberties of his people upon his conqueſts, confirmed the great charter, and eſtabliſhed a houſe of commons, as a balance to the peerage, which they never would have permitted before he had vanquiſhed them. Camden Britt. 13. Dugd. Orig. Jur. 18. Brady's anſwer to Petit. 133. It is plain, that that wiſe prince E. 1. went into this policy, and that in his reign we find a parliamentary peerage, or houſe of lords eſtabliſhed, as alſo a houſe of commons, conſiſting of knights, citizens, and burgeſſes.

As one of the principal reaſons for eſtabliſhing a houſe of commons, was for the more convenient taxing of the people; hence we find the true reaſon why all taxations began in that houſe, and why the commons would never ſuffer it afterwards to be altered; and the reaſon is, that being at firſt inſtructed by their principals, whom they repreſented, to give what each man thought he could bear; to vary from theſe inſtructions, or to ſuffer the ſuperior peerage to alter it, would, as they rightly judged, be the higheſt breach of truſt in them.

Ryley Pla. Par. 74. 156. Hollis Jud. of the Peers, 84.

Hence alſo we find the true reaſon why the power of judicature was reſerved to the lord's houſe; for the *barones majores*, who conſtituted this houſe, were called to the antient *curia regis*, and ſat there in their own right, as *pares curtis* to the king; and as this court had a juriſdiction of (*b*) determining in the firſt inſtance, both in civil and criminal cauſes, eſpecially thoſe relating to great perſons, and the king's officers of ſtate, as alſo by way of appeal from the injuſtice of all other courts; ſo the lords continued to determine on petitions exhibited by private perſons, or thoſe exhibited by the houſe of commons, called impeachments, and were ſtill the *dernier reſort* to correct the errors of inferior judicatures.

(*b*) A nobleman was tried by his peers very anciently, as appears by the earl of Hereford's caſe, in the time of William the Conqueror. 2 Inſt. 50.——This turns on the principle of the feudal law, *ſi inter dominum & vaſſalum lis moveatur pares curiæ ſunt judices*; and therefore the peers, in the time of parliament were tried by the peers in the houſe of lords, and out of parliament by the juſticiar, and in his abſence by the ſteward of *England*, who ſummoned ſome of his peers upon the trial, and twelve at leaſt were obliged to appear. This ſummons is ſet forth 3 Inſt. 28. where my Lord Coke ſays, there muſt be twelve or more appear.

4 Inſt. 46.

At the firſt inſtituting of a houſe of commons, the repreſentatives of knights, citizens, and burgeſſes, were only looked upon as truſtees to manage the affairs of their principals; and therefore, in former days, it was held reaſonable, that they ſhould be recompenced by their principals, for the trouble and expence they were at in managing the truſt repoſed in them. Hence the fee of every knight of the ſhire was 4*s.* *per diem*, and that of a citizen or burgeſs 2*s.* *per diem*.

(B) Of the Perſons of whom it conſiſts.

THIS auguſt aſſembly conſiſts of the king ſitting there in his royal political capacity; of the lords ſpiritual, as archbiſhops and biſhops, who ſit there by ſucceſſion, in reſpect of their counties or (*a*) baronies, parcel of their biſhopricks; of the lords temporal, as dukes, marquiſſes, earls, viſcounts, and barons, who ſit there by reaſon of their dignities, which they hold by deſcent or creation; theſe compoſe one houſe; and when any parliament is holden, each of them is to have a writ of ſummons *ex debito juſtitiæ*, of the (*b*) knights, citizens, and burgeſſes, who are choſen by force of the king's writ, which iſſues *ex debito juſtitiæ*, none of which ought to be omitted; theſe compoſe the houſe of commons, and repreſent all the commons of the kingdom.

4 Inſt. 2. Right of Electing to Parliament, 106. 142. 181.

(*a*) Dyer, 60. [Lord Hale thinks that the biſhops ſit in the Houſe of Peers by cuſtom and uſage, and not from their baronial poſſeſſions, a notion which hath been ably controverted by Biſhop Warburton in his *Alliance between Church and State*, 4th edit. 149. but which receives conſiderable ſupport from the reaſoning and authority of the learned editor of Coke upon Littleton. Co. Litt. 13 Ed. 134. b. n. 1.] (*b*) Of theſe in Forteſcue's time, viz. H. 6. there were 300. *Forteſcue de Laud. Leg. Ang.* c. 18. ſ. 4. in my Lord Coke's time, 493. 4 Inſt. 1. At the time of the union, 513. And by the 5 Ann, c. 8. for uniting *England* and *Scotland*, 45 *Scotch* members were added, which makes the number at this day 558.

In the *Saxon* times, the lords ſpiritual held by *frankalmoigne*, but yet made great part of the grand council of the nation, being the moſt learned perſons, that in thoſe times of ignorance met to make laws and regulations; but *William* the conqueror turned the *frankalmoigne* tenures of the biſhops, and ſome of the great abbots into baronies; and from thence-forward they were obliged to ſend perſons to the wars, or were aſſeſſed to the eſcuage, and were obliged to attend in the king's court: this attendance they complained of as a burthen, and inſiſted, that the court took conuſance of treaſons and felonies, and that by the canon of *Toledo*, the clergy were forbid to give judgment in blood: to obviate this objection, the conſtitutions of *Clarendon* permitted them to withdraw in caſes of blood; but ſtill they were obliged to do ſuit, and ſuch ſuit confirmed their eſtates as baronies, and as barons they ſit in the houſe of lords at this day.

Pryn, of the Lord's Houſe, 221. 242.

When a parliamentary peerage was eſtabliſhed, which compoſed a houſe of lords, as alſo a houſe of commons, conſiſting of knights, citizens, and burgeſſes; *Ed.* 1. being under great difficulties through his wars in *Scotland*, and the kingdom being exhauſted by the barons civil wars, thought, from his ſucceſs in the holy war, that he had good pretenſions to bring the clergy, who held by *frankalmoigne*, to contribute to the taxes and public charges of the kingdom; and accordingly projected a ſcheme, to make them a third eſtate dependant on himſelf; for which purpoſe was the *præmunientes* writ framed: this the clergy ſtrenuouſly oppoſed; for though thereby they were to have a power of making canons, yet they foreſaw, that the principal deſign of it was to make them contribute to the public charges; and therefore they inſiſted that their power was totally derived from Heaven, and that they would not ſubmit to any temporal power; but upon the king's

Wake's Authority of Chriſtian Princes, 364. Stilling. Biſhop's Juriſdiction, 367. &c.

perſevering they came to this mind and temper, that the king might ſend his writ to the archbiſhop, and if he allowed the king's writ to be a good motive, the archbiſhop, by virtue of his ſpiritual juriſdiction, might ſummon them, and then they were convened by by a ſpiritual juriſdiction. From henceforward, inſtead of making one eſtate of the kingdom, as the king deſigned, they compoſed two eccleſiaſtical ſynods, under the ſummons of each of the archbiſhops; and being forced into this regulation, they ſat and made canons, by which each reſpective province was bound, and gave aids and taxes to the king; but the archbiſhop of *Canterbury*'s clergy, and thoſe of *York*, aſſembled each in their own province, and the king gratified the archbiſhop's vanity, by ſuffering this new body of convocation to be formed in the nature of a parliament; for the archbiſhop aſſumed the ſtate of a king, and his ſuffragans ſat in the upper houſe, as his peers; the deans, archdeacons, a proctor for the chapter, repreſented the burgeſſes, and the two proctors for the clergy the knights of the ſhire; and ſo this body, inſtead of being one of the eſtates, as by (*a*) ſome it has been improperly called, became an eccleſiaſtical parliament to make laws, and to tax the poſſeſſions of the church.

(*a*) *Vide* 4 Inſt. 1. Vent. 324.

25 H. 8. c. 19. 2 Salk. 412. pl. 2.

At the reformation, by the act of ſubmiſſion of the clergy, theſe convocations were to be aſſembled only by the king's writ; whereas, before, they often met on a ſummons from the archbiſhop, without his receiving any writ from the king, becauſe they looked upon him as having authority from Heaven; and by this act they could not make any canon without the king's licence, or put it in execution without it.

During the time of *Cromwell*'s adminiſtration, the method of taxing was by way of land-tax and poll-tax; and though the clergy gave a ſubſidy the 13 *Car.* 2. yet it being moſt adviſable to continue the method uſed in *Cromwell*'s time, from henceforwards it paſſed, that they ſhould have a vote for members in parliament, and they were taxed as the laity were.

4 Inſt. 4.

Although the judges and maſters in Chancery are ſummoned to attend the parliament, yet they have no voices; and therefore they ſit round the table in order to aſſiſt the ſpeaker, or the king, when preſent, in matters of law.

4 Inſt. 266.

Nor has the chancellor a voice, unleſs he is a peer; for antiently he was none of the peers, unleſs he held *per baroniam*, and now he is none unleſs created by patent or ſummons.

[By the twenty ſecond and twenty-third articles of the union, ratified by the act of union, the peerage of *Scotland* are to elect ſixteen of their number to ſit in the *Britiſh* houſe of lords; and other not elected peers of *Scotland* are to become peers of the united kingdom, and to have all the privileges of ſuch, except a ſeat in that aſſembly.

Lords Journ. 20th Dec. 1711.

It was reſolved by the houſe, ſoon after the union in the caſe of the Duke of *Hamilton* and *Brandon*, "that no patent of honour "granted to any peer of *Great Britain*, who was a peer of *Scot*- "*land*, at the time of the union, ſhould entitle him to ſit and vote "in parliament, or upon the trial of peers." And the ſame doc-

trine

trine was adhered to in the following caſe: the Duke of *Queenſberry*'s ſecond ſon was created Earl of *Solway* in *Scotland*, when an infant; and afterwards the duke was created Duke of *Dover*, with remainder to ſuch ſecond ſon, and ſat in two parliaments under this creation. But upon his death it was objected, and ſo reſolved by the lords, that the *Scotch* earldom of *Solway* incapacitated the then claimant from taking the dukedom of *Dover* by virtue of ſuch remainder. But theſe reſolutions have been lately over-ruled. The peerage of *Brandon* hath been again claimed, when it was urged, that even ſuppoſing the former deciſions to ſtand, ſtill the patent was not void; that the incapacity to ſit in parliament was only perſonal in the then duke, and his heirs in tail-male were entitled to the peerage of *Brandon*, with all its rights. The matter, however, was taken up in a more general view. For the entry in the lords journals in as follows: "After hearing counſel, as well "yeſterday as this day, upon the petition of *Douglas* Duke of "*Hamilton* and *Brandon* to his majeſty, praying a writ of ſum- "mons to parliament by the title of duke of *Brandon*, the follow- "ing queſtion was put to the judges: Whether by the twenty- "third article of the act of union, which declares all peers of "*Scotland* to be peers of *Great Britain*, with all the privileges "enjoyed by the peers of *England*, except the right and privilege "of ſitting in the houſe of lords, and the privileges depending "thereon, the peers of *Scotland* be diſabled from receiving ſubſe- "quently to the union, a patent of peerage of *Great Britain*, with "all the privileges uſually incident thereto? the lord chief baron "of the court of Exchequer delivered the unanimous opinion of "the judges preſent upon the ſaid queſtion, that the peers of "*Scotland* are not diſabled from receiving, ſubſequently to the "union, a patent of peerage of *Great Britain*, with all the privi- "leges uſually incident thereto:" whereupon a report was ordered to be preſented to his majeſty, certifying that the ſaid Duke of *Brandon* is entitled to his writ of ſummons.

Lords Journ. 14th Jan. 1719-20.

Printed Caſes of the Lords.

Lords Journ. 6th June 1782.

It was moved to put a ſimilar queſtion to the judges in the year 1711, but the motion was negatived.

In conſequence of this deciſion ſeveral *Scotch* peers were ſoon afterwards created peers of *Great Britain*. But in the year 1708-9 the houſe had come to the following reſolution; "That a peer of "*Scotland*, claiming to ſit in the houſe of peers by virtue of a "patent paſſed under the great ſeal of *Great Britain* after the "union, and who now ſits in the parliament of *Great Britain*, "had no right to vote in the election of the ſixteen peers, who "are to repreſent the peers of *Scotland* in parliament." And this reſolution ſtanding upon the journals unimpeached, it ſeemed to follow as a conſequence of it, that the ſeat of one of the ſixteen peers as a repreſentative peer, became vacant upon his accepting, or ſucceeding to an *inelective* ſeat: And therefore, upon the Earl of *Abercorn*'s being created a peer of *Great Britain* in the year 1787, the houſe reſolved, "That the Earl of *Abercorn* who "was choſen to be of the number of ſixteen peers, who by the "treaty of union are to repreſent the peerage of *Scotland* in "parliament, having been created Viſcount *Hamilton*, by letters "patent under the great ſeal of *Great Britain*, doth thereby ceaſe "to ſit in this houſe as a repreſentative of the peerage of *Scot-*

Lords Journ. 21ſt Jan. 1708-9.

Lords Journ. 14th Feb. 1787. The ſame reſolution was come to at the ſame time re-

ſpecting the Duke of Queenſberry, who was created Baron Douglas. Lords Journ. 18th May 1787. 21ſt April 1788.

"*land.*" And about this time the houſe ſhewed a ſtrong diſpoſition to adhere to theſe reſolutions. For in the May following it was ordered, "That a copy of the reſolution of *Jan.* 21, 1708-9; "be tranſmitted by the clerk of the parliaments to the lord clerk "regiſtrar of *Scotland*, with injunction to him to conform thereto." And again in the next year it was reſolved "That it is the opinion "of this houſe, that the lord clerk regiſtrar and his deputies, "acting at the election of the *Scots* peers, ought to conform to the "reſolutions of this houſe, of which they have had notice by "order of the houſe." In conſequence of theſe orders, the deputies of the lord clerk regiſtrar refuſed to admit the votes of the Duke of *Queenſbury*, Lord *Abercorn*, and other lords in a ſimilar ſituation at the following general election in the year 1790. This refuſal occaſioned an application to the houſe on behalf of the two noble peers above-mentioned, when after a long inveſtigation and conſiderable debate, the houſe was pleaſed to over-rule its former reſolutions, and to reſolve, "That the votes of the

Lords Journ. 23d May 1793.

"Duke of *Queenſberry* and the Earl of *Abercorn*, if duly tendered "at the laſt election for electing ſixteen peers of *Scotland*, ought

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"to be counted." And it was afterwards reſolved, "That the "tender of the votes of the Duke of *Queenſberry* and the Earl of "*Abercorn*, by ſending to the lord chief regiſtrar or his deputies "ſigned liſts, together with proper documents of their having "qualified themſelves as by law required to vote, was a due and "ſufficient tender of their votes at the ſaid election." In purſuance of which reſolutions the votes of theſe noble lords were added to the liſts. Theſe reſolutions were followed by two proteſts, the one of which was ſigned by the Duke of *Leeds* and the Earl of *Kinnoul*, the other, by the Earl of *Lauderdale*.——The above reſolution of 23d *May* having eſtabliſhed, that the accepting or ſucceeding to an inelective ſeat, poſterior to the union, did not incapacitate a peer of *Scotland* from voting in the election of the repreſentatives of the *Scottiſh* peerage, the inference which followed from the contrary doctrine was neceſſarily done away, and the ſucceſſion to ſuch a ſeat was determined not to vacate

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the ſeat of a repreſentative peer. A motion, therefore, of Earl *Stanhope*, "That an humble addreſs be preſented to his majeſty, "humbly to requeſt that his majeſty will be graciouſly pleaſed to "iſſue his royal proclamation for the election of a peer to repre"ſent the peerage of *Scotland* in the room of the Lord Viſcount "*Stormont*, who ſince his election has become Earl of *Mansfield* "of *Middleſex*, and has taken his ſeat in the houſe accordingly;" was, after debate, negatived.

At the above election in 1790, Sir *James Sinclair* voted by proxy as Earl of *Caithneſs*, his claim to that dignity not having been allowed, but being then pending. His vote was objected to by the Earls of *Selkirk* and *Hopetown*, who inſiſted, that he had no right to the title he aſſumed; or, ſuppoſing his claim ſhould be admitted, yet as it was not actually allowed at the time of the election, he

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was not then in a capacity to vote. But the houſe reſolved, "That "Sir *James Sinclair* had made out his claim to the title of Earl of

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"*Caithneſs*." And that reſolution was followed by another, "That "the

" the votes given by the Earl of *Moray*, as proxy for the Earl of " *Caithneſs*, were good."

By 6 *Ann. c.* 23. § 3. the peers actually preſent at the aſſembly of the peers in *Holyrood Houſe* in *Edinburgh*, are required before they vote, to qualify themſelves by taking the oaths of allegiance, ſupremacy, and abjuration, and making and ſubſcribing the declaration againſt popery. Thoſe who live in *Scotland* and wiſh not to vote in perſon, may qualify in any ſheriff's court in *Scotland*, and the ſheriff or his deputy is to return the original ſubſcription of the oath and declaration, ſigned by the peer who took the ſame, and make a return to the peers ſo aſſembled of ſuch peers taking the ſaid oath, and making and ſubſcribing the ſaid oath and declaration: and thoſe peers who reſide in *England* at the time of iſſuing the proclamation for election, may take and ſubſcribe the oaths, and make and ſubſcribe the declaration in the court of Chancery, King's Bench, Common Pleas, or Exchequer in *England*, which is to be certified by writ (*a*) to the peers in *Scotland* at their meeting under the ſeal of the court where the ſame were taken and ſubſcribed; and peers who have ſo qualified may make a proxy, or ſend a ſigned liſt containing the names of ſixteen peers of *Scotland* for whom they give their votes. And in caſe any peer of *Scotland*, who at any time before the iſſuing of the proclamation for election, hath taken the oaths, and ſubſcribed the declaration in *England* or *Scotland*, to be certified as aforeſaid, and, if taken in parliament, to be certified under the great ſeal of *Great Britain*, ſhall at the time of iſſuing ſuch proclamation be abſent in the ſervice of the crown, ſuch peer may make his proxy, or ſend a ſigned liſt.

(*a*) The following inſtrument was determined by the houſe, after reference to the judges, to be a writ ſufficient in law to certify, according to this ſtatute, that *Francis* Viſcount *Dumblan* on the day and year therein ſpecified, appeared in Chancery, in open court, and took and ſubſcribed the oaths and declarations therein mentioned.

Lords Journ. 5th Feb. 1792.—" George the Third by the grace of God, &c. To our moſt dear couſins " the peers of *Scotland* to be aſſembled and met at *Holyrood Houſe* in *Edinburgh*, on *Saturday* the 24th " day of *July* next enſuing, by virtue of our proclamation under our great ſeal of *Great Britain* lately " iſſued, for the election of the ſixteen peers of *Scotland* to ſit and vote in the houſe of peers in the parlia- " ment of *Great Britain*, to be holden at *Weſtminſter*, on *Tueſday* the 10th day of *Auguſt* next enſuing, " greeting:—We have inſpected a certain record and regiſter in our court of Chancery in *England*, made " and filed and there remaining, by which it is manifeſt, that on this fourteenth day of *June* 1790, " *Francis* Viſcount *Dumblane* perſonally appeared in open court in Chancery aforeſaid, and then and there " took and ſubſcribed the oath of ſupremacy, and repeated and ſubſcribed the declaration contained and " ſpecified in a certain act of parliament, made in the ſixth year of the reign of queen Anne, late queen " of *Great Britain*, intituled " An act to make further proviſion for electing ſixteen peers of *Scotland* to " ſit in the houſe of peers, &c." and alſo took and ſubſcribed the oath of allegiance contained and ſpe- " cified in a certain act of parliament made in the firſt year of our late great grandfather, George the firſt " late king of *Great Britain*, intituled " An act for the further ſecurity of his majeſty's perſon and go- " vernment, &c." and alſo took and ſubſcribed the oath of abjuration contained and ſpecified in a cer- " tain act of parliament made in the ſixth year of our reign, intituled " An act for altering the oath of " abjuration and the aſſurance, &c." according to the form, direction, and appointment of the acts " aforeſaid. Witneſs ourſelf the 12th day of *June* in the thirtieth year of our reign."

The above act provides, that ſuch peers of *Scotland* as are alſo peers of *England*, ſhall ſign their proxies and liſts by the title of their peerages in *Scotland*; and that no peer ſhall be capable of having more than two proxies at one time. It alſo enacts, that no peer ſhall come to the meeting with more attendants than he is allowed by the acts then in force in *Scotland*, to take with him to the courts of juſtice; and that any peer who ſhall preſume to propoſe, debate, or treat of any other matter, except the election, ſhall incur the penalties of a *premunire*.]

(C) Of the Manner of their Summons and aſſembling.

THE parliament commences by the king's writ or ſummons, agreeably to that rule which was eſtabliſhed before the conqueſt, *viz.* that all judicature proceeded from the king. *William* the conqueror ſeems to have been more jealous of this part of his prerogative, than of any other, and from his time this rule has been regularly obſerved; anciently (*a*) ſome of the peers only were ſummoned, but when a parliamentary peerage was eſtabliſhed, they ſummoned them all. Hence my Lord *Coke* (*b*) ſays, that every lord ſpiritual and temporal of full age, ought to have a writ of ſummons *ex debito juſtitiæ*.

(*a*) For, according to Spelm. Gloſſ. 67., Seld. tit. *Hon.* 692., it would have been difficult and inconvenient to have ſummoned them all, being ſo numerous, as to be at one time about 3000. (*b*) 4 Inſt. 1.——For the form of ſuch ſummons, *vide* Cotton's Records, 3, 4.

Co. Lit. 9. b. 16. b. *Vide* Pryn's Plea for the Lords Houſe, 147. where this matter is much controverted.

Anciently, the tenure firſt created the honour, and ſuch as held *per baroniam* were ſummoned to do ſuit or ſervice in parliament; and as ſuch ſummons was an evidence of ſuch tenure, ſo it has been ſince ſettled, that the ſummons and ſitting in parliament makes the (*c*) baron, becauſe when the charters of *William* the Firſt were loſt and deſtroyed by time, the feudal baronies had no evidence of their baronage, but their doing ſuit and ſervice as barons at the king's court.

(*c*) But in all degrees of quality above a baron, a ſummons is not ſufficient, becauſe there are other ceremonies requiſite, which muſt be performed, unleſs diſpenſed with by letters patent; and theſe being matters of record muſt be produced. Seld. tit. *Hon.* 495. 530. Show. P. C. 5. Spelm. Gloſſ. 142.

Co Lit. 16. [(*d*) And therefore, till he takes his ſeat, the blood is not ennobled, and if iſſue be joined whether he

The firſt ſummons of a peer to parliament differs from an ordinary ſummons, becauſe in the firſt ſummons he is called up by his proper chriſtian and ſurname, not having the name and title of dignity in him till he has ſat (*d*); but after he has ſat, the name of dignity becomes part of this name; but the writ of creation, in all other things, is the ſame with the ordinary writ that calls him.

were a baron or no, it ſhall not be tried by a jury, but by record of parliament, which could not appear unleſs he were of the parliament. *Ibid.* But in the caſe of nobility by letters patent, the creation is perfect, and the blood is ennobled without ſitting: and therefore in Lord Banbury's caſe, the court of King's Bench held, that a peerage, claimed under letters patent, is not triable by the record of parliament, but muſt be queſtioned by pleading *non conceſſit*. Rex v. Knollys, 1 Ld. Raym. 10. A writ of ſummons directed to any temporal perſon who ſits in purſuance of it, gives a barony in fee, without words of limitation. 12 Co. 70. Co. Lit. 9. b. Seld. tit. *Hon.* 746. But letters patent, in which there are no words of limitation, give the grantee a dignity for life only. If the eldeſt ſon of a peer, created by letters patent, limiting the ſucceſſion to the heirs male of his body, be called up by writ of ſummons to the houſe of lords by his father's baronial title, the effect of the writ in that caſe is not to enlarge the courſe of ſucceſſion, ſo as to make a female capable of inheriting, but merely to accelerate the ſucceſſion of the ſon to the barony; for the extent of the inheritance ſtill depends on the nature of the father's title to the barony. Caſe of the claim to the barony of Sidney of Penhurſt diſallowed. Printed caſes of the Lords, June 17, 1782.]

4 Inſt. 4. (*e*) Of the manner of ſummoning

The writ of ſummons iſſues out of Chancery, and recites, that the king, *de aviſamento concilii*, reſolving to have a parliament, deſires *quod interſitis cum*, &c. each (*e*) lord of parliament is to have a diſtinct

a diſtinct ſummons, and ſuch ſummons is to iſſue at leaſt (*a*) forty days before the parliament begins.

the judges, barons of the Exchequer, king's counſel, and civilians, maſters in Chancery, who have no voices; and how the writ differs from that to a lord of parliament; *vide* Reg. 261. F. N. B. 229. 4 Inſt. 4. (*a*) *Vide* the 7 & 8 W. & M. c. 25.

Alſo, a writ of ſummons muſt be directed to every ſheriff of every county in *England* and *Wales*, for the choice and election of knights, citizens, and burgeſſes, within each of their reſpective counties.

4 Inſt. 6. 10. Co. Lit. 109. b. [Upon a general election, the writ of ſummons iſſues in conſequence of a warrant from the lord chancellor to the clerk of the crown in Chancery; but if a vacancy happens during the ſitting of parliament, or, by the death of a member, or his becoming a peer, in the time of a receſs, then, in conſequence of a warrant from the ſpeaker; in the former of which caſes, the ſpeaker acts by order of the houſe; in the latter, under the regulations and reſtrictions of ſtat. 24 Geo. 3. c. 26.]

So, a writ of ſummons muſt iſſue out to the lord warden of the *Cinque Ports*, for the election of the barons for the ſame, who in law are burgeſſes.

4 Inſt. 6.

The ſubſtance of thoſe writs ought to continue in their original eſſence, without any alteration or addition, unleſs it be by act of parliament; for, if original writs at the common law can receive no alteration or addition, but by act of parliament, *a fortiori* the writs for the ſummons of the high court of parliament can receive no addition or alteration, but by act of parliament.

4 Inſt. 10. [See the form of the writ, 1 Dougl. 448. Heywood on Elect. 1.]

At the (*b*) return of the writ, the parliament cannot begin but by the royal preſence of the king, either in perſon or by repreſentation; by repreſentation two ways; either by a guardian of *England*, by letters patent under the great ſeal, when the king is *in remotis* out of the realm; or by commiſſion under the great ſeal of *England*, to certain lords of parliament, repreſenting the perſon of the king, he being within the realm, in reſpect of ſome infirmity *.

4 Inſt. 6. (*b*) May be prorogued at the day of the return for certain urgent cauſes. 4 Inſt. 7. [After the general election in the year 1790, the parliament was prorogued twice before it met. Com. Journ. 26th *Nov.* 1790; and the firſt parliament in this reign was prorogued by four writs of prorogation. *Id.* 3d *Nov.* 1761.] * Or, his being engaged in other urgent affairs.

Every lord ſpiritual and temporal, and every knight, citizen, and burgeſs, ſhall upon ſummons come to the parliament, except he can reaſonably and honeſtly excuſe himſelf; or he ſhall be amerced, *&c.* that is reſpectively a lord by the lords, and one of the commons by the commons.

4 Inſt. 43. & *vide* 6 H. 8. c. 16. That for departing without licence, every knight, citizen, and burgeſs, ſhall loſe his wages: alſo, it is ſuch an offence, that the lords may fine one of their body; ſo, of the houſe of commons. 4 Inſt. 44.

By the 30 *Car.* 2. *ſt.* 2. *cap.* 1. it has been enacted, "That if "any member of the houſe of commons ſhall vote in the houſe "of commons, or ſit there during any debate after the ſpeaker "is (*c*) choſen, without having firſt taken the oaths of alle-"giance and ſupremacy, *&c.* between the hours of nine and "four, in full houſe, he ſhall be adjuged a popiſh recuſant "convict, be incapable of any office, *&c.* and ſhall forfeit "500*l.* *&c.*"

Vide 1 W. & M. Seſſ. 1. c. 1. § 3., by which the form of the oath is altered; and 13 W. 3. c. 6. § 10., which enjoins the abjuration oath with like penalties, which is alſo altered in its form by 6 Ann. c. 7. § 20. (*c*) Of the manner of chuſing a ſpeaker, *vide* 4 Inſt. 8. 9.

(D) Of Elections: And herein,

1. Of the Electors, and their Qualifications.

AS the right and qualifications of electors depend for the moſt part on ſeveral acts of parliament, it will be neceſſary to point out thoſe ſtatutes, as the ſureſt rule to direct us in our inquiries herein; but here it may be proper to obſerve, (*a*) that the right and qualification of voters in cities, towns, and boroughs, depend on their charters, and ſuch cuſtoms as have prevailed in them time immemorial.

(*a*) Hob. 14. 12 Co. 120.

Alſo it may be neceſſary to obſerve, that for the better aſcertaining in general the right of voting, and for the greater ſecurity of returning officers, by the 2 *Geo.* 2. *cap.* 24. it is enacted, "That ſuch votes ſhall be deemed legal, which have been ſo "declared by the laſt determination in the houſe of commons; "which laſt determination concerning any county, ſhire, city, "borough, *cinque port*, or place, ſhall be final to all intents and "purpoſes."

[This act is repealed by 28 Geo. 3. c. 52. § 31., ſo far as relates to determinations ſubſequent to that act.]

As the chief excellency of our conſtitution conſiſts in our being (*b*) bound only by thoſe laws to which we ourſelves conſent; and as ſuch conſent cannot be given by every individual in perſon, but muſt be by repreſentation; it therefore highly concerns the whole community, that elections be (*c*) free, and that (*d*) every perſon claiming a right to vote, be duly qualified, free from corruption, or any undue influence whatſoever.

(*b*) That it is one of the greateſt privileges which a *Britiſh* ſubject hath; and therefore if he be hindered from voting, an action on the caſe will lie at common law. Salk. 19. pl. 10. 6 Mod. 45. Ld. Raym. 938. 3 Salk. 17. 8 State Tri. 89. Holt. 524. *per* Holt Ch. Juſt. And accordingly adjudged in the houſe of lords, in the caſe of Aſhby and White. (*c*) By the common law all elections ought to be free; and by ſeveral ſtatutes it is declared, that elections of members of parliament ought to be free, particularly by the 1 W. & M. ſeſſ. 2. c. 2. (*d*) In many caſes multitudes are bound by acts of parliament, who are not parties to the elections of knights, citizens, and burgeſſes; as all thoſe that have no freehold, or have freehold in antient demeſne; and all women having freehold or no freehold, and men within age of twenty-one years, &c. 4 Inſt. 4, 5.

10 H. 6. c. 2. [In *Scotland*, by an act of *James* 6. A. D. 1587. c. 114. none were entitled to vote in counties,

By the 10 *H.* 6. *cap.* 2. it is ordained, "That the knights of "all counties within the realm, to be choſen to come to parliaments hereafter to be holden, ſhall be choſen in every county "by people dwelling and (*e*) reſiant in the ſame, whereof every "man ſhall have freehold to the value of (*f*) 40 *s.* by the year at "the leaſt, above all charges, within the ſame county where any "ſuch chuſer ſhall meddle of any ſuch election."

who had not a 40 *s.* land of old extent, holding of the king. By an act of Car. 2. A. D. 1661. c. 25. thoſe voting on church lands were obliged to have 1000 *l. Scots* of preſent rent. By another act in that reign, A. D. 1681. c. 21. voters were obliged to have either a 40 *s.* land of old extent, or 400 *l. Scots* of valued rent. And by later ſtatutes, ſtill greater attention is required to the purity of the rolls.] (*e*) By 1 H. 5. c. 1. chooſers of knights of the ſhire ſhall be reſident within the ſame ſhires the day of the date of the writ of ſummons of parliament; & *vide* Crom. Juriſ. 3. [The ſtat. 14 Geo. 3. c. 58. repeals ſo much of this and the act in the text and other old acts therein ſpecified, as relates to the reſidence either of the elected, or electors.] (*f*) By the ſtatute 8 H. 6. c. 7. he who cannot expend 40*s.* by the year as aforeſaid, ſhall in no wiſe be chooſer of the knights for the parliament. [By ſubſequent ſtatutes of 7 & 8 W. 3. c. 25. 10 Ann. c. 23. and 18 Geo. 2. c. 18. § 5. this qualification of a freehold eſtate of the clear yearly value of 40 *s.* muſt be *over and above all rents and charges payable out of or in reſpect of the ſame*, and the voter is required to ſwear that he is a freeholder, and has an eſtate of ſuch value. Two committees have determined, that the intereſt of a mortgage is a charge, which, if it reduces the value under 40 *s.*, takes away the vote; though there is an intermediate deciſion of a committee,

tee, wherein the contrary was holden. 2 Luders 467. The caſe of Wetherell v. Hall, B. R. M. 23 Geo. 3. which aroſe on a qualification under the game act of 23 Car. 2. c. 25. § 3. turned on a ſimilar point, and received a determination agreeably to thoſe of the two committees.]

[No perſon ſhall vote in right of any freehold granted to him fraudulently to qualify him to vote. Fraudulent grants are ſuch as contain an agreement to re-convey, or to defeat the eſtate granted; which agreements are made void, and the eſtate is abſolutely veſted in the perſon to whom it is ſo granted. And every perſon who ſhall prepare or execute ſuch conveyance, or who ſhall give his vote under it, ſhall forfeit 40 *l.* 10 Ann. c. 23. The ſt. 13 G. 2. c. 20. extends the regulations for the prevention of fraudulent conveyances for election purpoſes to cities and towns which are counties of themſelves.

Every voter muſt have been in the actual poſſeſſion or receipt of the profits of his freehold, or been entitled thereto to his own uſe for one year before the election; except it came to him by deſcent, marriage, marriage-ſettlement, deviſe, or promotion to a benefice or office. § 2. Two or more votes may be given ſucceſſively for the ſame eſtate or intereſt at the ſame election; as, when a freeholder votes and dies, his heir or deviſee may afterwards vote at the ſame election. And it ſeems to be generally true, that where no length of poſſeſſion is required by any act of parliament, the elector may be admitted to vote, though his right accrued ſince the commencement of the election. 1 Dougl. 272. 2 Lud. 427.

No perſon ſhall vote in reſpect of an annuity or rent-charge, unleſs regiſtered with the clerk of the peace twelve calendar months before the election. 2 Geo. 3. c. 24.

In mortgaged or truſt eſtates, the perſon in poſſeſſion, under the above mentioned reſtrictions, ſhall have the vote. 7 & 8 W. 3. c. 25. § 7.

Only one perſon ſhall be admitted to vote for any one houſe or tenement, in order to prevent the ſplitting of freeholds, and conveyances for that purpoſe ſhall be void. *Ibid.* But a huſband may vote for his wife's right of dower, without an actual aſſignment of it by metes and bounds. 20 Geo. 3. c. 17. § 12.

No eſtate ſhall qualify a voter, unleſs it hath been aſſeſſed to the land-tax ſix months before the election, either in the name of the voter or of his tenant; but if he has acquired it by marriage, deſcent, or other operation of law, in that caſe, it muſt have been aſſeſſed to the land-tax within two years before the election, either in the name of the predeceſſor, or perſon through whom the voter derives his title, or in the name of the tenant of ſuch perſon. 20 Geo. 3. c. 17.

No tenant by copy of court-roll ſhall be permitted to vote as a freeholder. 31 Geo. 2. c. 14.

No freeman of any city or borough (other than ſuch as claim by birth, marriage, or ſervitude) ſhall be entitled to vote therein, unleſs he hath been admitted to his freedom twelve calendar months before. 3 Geo. 3. c. 15. This act, which is called the *Durham* act, was occaſioned by, and ſeems confined to, the admiſſion of *honorary* freemen only.

In boroughs where the houſeholders or inhabitants of any deſcription claim to elect, no perſon ſhall have a right to vote as ſuch inhabitant, unleſs he hath actually been reſident in the borough ſix months previous to the day on which he tenders his vote. 26 Geo. 3. c. 100. In burgage-tenure boroughs, no length of poſſeſſion is required from the voters. 1 Dougl. 224.

Perſons

(a) 7 & 8 W. 3. c. 25. § 8. (b) 2 G. 2. c. 24. § 6. (c) 22 G. 3. c. 41. But this laſt act does not extend to freehold offices granted by letters patent, nor to commiſſioners of the land-tax, or perſons acting under them.

Perſons under twenty-one years of age (*a*), or perſons convicted of perjury or ſubornation of perjury (*b*), or employed in managing and collecting the duties of exciſe, cuſtoms, ſtamps, ſalt, windows, or houſes, or the revenue of the poſt-office, are incapable of voting at any election (*c*).

2 Geo. 2. c. 24. § 7. 9 Geo. 2. c. 3. § 8. By § 8. of the act of 2 Geo. 2. if the offender diſcover any other perſon offending againſt the act, ſo that ſuch perſon be thereupon convicted, he thereby procures an indemnification for himſelf. But the diſcovery of an offender already indemnified, it hath been adjudged, will not avail him. Lord Portcheſter v. Petrie, E. 23 Geo. 3. B. R.

Perſons lawfully convicted of voting or with-holding their votes in conſequence of a bribe, provided they are ſerved with proceſs within two years after the commiſſion of the offence, are for ever diſqualified to vote.

In general, it ſeems, that perſons receiving alms are diſqualified to vote. But by 18 *Geo.* 3. *c.* 29. § 25. pariſh relief given to the family of any militia-man, during the time of actual ſervice, will not deprive him of his right to vote.

R. *Nem. Con.* 14. Dec. 1699. R. *Nem. Con.* Feb. 1700. R. 24 Oct. 1702.

No peer hath a right to vote at any election, nor ſhall any lord lieutenant of a county concern himſelf therein. And by ſtatute 2 *W. & M. ſeſſ.* 1. *c.* 7. the lord warden of the *cinque ports* ſhall not recommend any members there.

5 & 6 W. & M. c. 20. 12 & 13 W. 3. c. 10.

If any officer of the exciſe, cuſtoms, ſtamps, or certain other branches of the revenue, preſume to intermeddle in elections by perſuading any voter or diſſuading him, he forfeits 100 *l.* and is diſabled to hold any office.

For the qualifications of electors in *Scotland*, ſee 6 *Ann. c.* 6. 9 *Ann. c.* 5. 12 *Ann. ſt.* 1. *c.* 5. 7 *Geo.* 2. *c.* 16. 16 *Geo.* 2. *c.* 11. For elections for *Cheſter*, ſee 34 & 35 *H.* 8. *c.* 13. *Wales*, 35 *H.* 8. *c.* 11. *Durham*, 25 *Car.* 2. *c.* 9. *London*, 11 *Geo.* 1. *c.* 18. *New Shoreham*, 11 *Geo.* 3. *c.* 55. *Coventry*, 21 *Geo.* 3. *c.* 54. *Cricklade*, 28 *Geo.* 3. *c.* 36. § 41.]

2. Of the Elected, and their Qualifications.

4 Inſt. 46, 47.

A knight banneret, or any other under the degree of a baron, may be elected knight, citizen, or burgeſs.

Molloy, 382. 4 Inſt. 47. [According to Lord Coke, an alien naturalized is eligible. 4 Inſt. 47. But now by 1 Geo. 1. ſtat. 2. c. 24. no perſon can be naturalized, unleſs there be a clauſe in the bill, expreſsly declaring him to be incapable of ſitting in either houſe of parliament.]

An alien, though made a denizen, cannot ſit in parliament; for to have a power of making laws, it is neceſſary that he ſhould be totally received into the ſociety, which he cannot be without the conſent of parliament.

A ſheriff is not eligible, Hale of Parl. 114. but this muſt mean for the county of which he is ſheriff, for a ſheriff of one county may be elected in another. Com. Dig. tit. Parliament. (D. 9.) cites 4 Inſt. 48. [This doctrine has been ſanctioned by two deciſions of committees of the houſe of commons. In the firſt, it was determined, that the ſheriff of *Berks* could not be elected for *Abingdon*, a borough within that county, 1 Dougl. 419: in the other, that the ſheriff of *Hants* could be elected for the

the town of *Southampton* within that county, becauſe *Southampton* is a county of itſelf, and is as independent on *Hampſhire*, as on any other county. 4 Dougl. 87.]

One under the age of twenty-one years is not (*a*) eligible; neither can any lord of parliament ſit there until he be of the full age of twenty-one years. 4 Inſt. 47.

(*a*) By the 7 & 8 W. 3. c. 25. § 8. No perſon hereafter ſhall be capable of being elected a member to ſerve in parliament, who is not of the age of twenty-one years; and every election or return of any perſon under that age, is hereby declared to be null and void; and if any ſuch minor, hereafter choſen, ſhall preſume to ſit or vote in parliament, he ſhall incur ſuch penalties and forfeitures, as if he had preſumed to ſit and vote in parliament without being choſen and returned. [This law may be thought to be rather defective, for it remains to be inquired, what penalty is here aſcertained, and what tribunal is to judge and pronounce ſentence. 1 Wooddeſ. 46.]

None of the (*b*) judges of the King's Bench, Common Pleas, or barons of the (*c*) Exchequer, that have judicial places, can be choſen knight, citizen, or burgeſs of parliament; but any that have judicial places in the court of wards, court of dutchy, or other courts eccleſiaſtical or civil, are eligible. 4 Inſt. 47. Whitel on Gov. 370.

(*b*) Becauſe they ſit in the lords houſe. 1 Bl. Com. 169. [(*c*) So, by 7 Geo. 2. c. 16. § 16. none of the judges in *Scotland* can be elected. Thorp, a baron of the Exchequer, was ſpeaker to the commons, Ann. 31 H. 6. 3 Com. Dig. tit. *Parliament.* (D. 9.) 4 Inſt. 47.]

None of the (*d*) clergy can be elected knight, citizen, or burgeſs of parliament, becauſe they are of another body, *viz.* the convocation. 4 Inſt. 37. Moor, 783. pl. 2083. Bl. Com. 169.

(*d*) Though of the inferior order. Com. Dig. tit. *Parliament.* (D. 9.) cites 4 Inſt. 47. [But of late years, it hath been determined, that *deacons* are eligible to parliament, leaving the queſtion undecided as to prieſts. Newport caſe, 2 Luders on Elect. 269. &c. The authorities to prove that the clergy are ineligible are books prior to the reſtoration, 4 Inſt. 27. Moor 783. about which time the clergy, that is, the beneficed clergy, gave up the right of taxing themſelves, 2 Burn's E. L. 27. (which tax always required the ſupplemental confirmation of parliament, *Id.* 22.) and received (that is, the beneficed clergy) as a compenſation, though a very inadequate one, the privilege of voting at county elections: ſo, that it ſeemeth difficult to aſſign any reaſon for their excluſion at preſent. See further on this point, 1 Wooddeſ. 47-8. Whether a clergyman be eligible in *Scotland* is ſtill matter of doubt, though it ſeems ſettled by practice, that he may be enrolled upon the roll of freeholders.]

A perſon attainted of treaſon, or felony, *&c.* is not eligible; for he ought, according to the writ, to be *magis idoneus, diſcretus & ſufficiens.* 4 Inſt. 48. Whitel on Gov. 370.

[So, *temp. H.* 7. Perſons outlawed for treaſon could not come into parliament, till their attainders were reverſed. Bac. H. 7. 13. Com. Dig. tit. *Parliament.* (D. 9.)

Nor perſons outlawed after, or before judgment, in a civil action. Ruled by all the juſtices. 1 And. 293. Com. Dig. *ubi ſupr.*

Nor perſons taken in execution upon a judgment.] Moor, 57. Com. Dig. *ubi ſupr.*

The king cannot grant a charter of exemption to any man, to be freed from election of (*e*) knight, citizen, or burgeſs of the parliament, becauſe the elections of them ought to be (*f*) free, and his attendance is for the ſervice of the whole realm, and for the benefit of the king and his people, and the whole commonwealth hath an intereſt therein. 4 Inſt. 49.

(*e*) Nor can the king grant a charter of exemption to a lord of parliament, to diſcharge him from his attendance in the lords houſe. 4 Inſt. 49. (*f*) For the incapacities of ſheriffs, mayors of towns, &c. and the reaſons why they may or may not be elected knights, citizens, or burgeſſes, *vide* 4 Inſt. 48. Bro. Abr. tit. *Parliament* 7. Cromp. Jur. 3. 16. Sir Simon D'ewes, Jour. 38. 436. 624. Ruſh. Coll. Vol. 1. 684. Townſ. Coll. 185.

By

8 H. 6. c. 7. By the 8 *H.* 6. *cap.* 7. it is enacted, "That they who have "the greateſt number of voices that may expend 40*s.* by the "year, and above, ſhall be returned (*a*) knights of the ſhire, *&c.* "and that they which ſhall be choſen, ſhall be dwelling and "(*b*) reſident within the ſame counties."

(*a*) As the writ for election of knights, &c. was *duos milites gladiis cinctos, &c.*, it required an act of parliament, viz. 23 H. 6. c. 15., That ſuch *notable* eſquires, gentlemen of birth, as are able to be knights might be eligible. 4 Inſt. 10. (*b*) The like is enacted by 1 H. 5. c. 1. as to knights, citizens, and burgeſſes; but theſe regulations being grown obſolete, are repealed by 14 G. 3. c. 58.

9 Ann. c. 5. [But now every knight of a ſhire ſhall have a clear eſtate of freehold or copyhold to the value of 600 *l. per annum*, and every citizen and burgeſs to the value of 300 *l.* (*c*); except the eldeſt ſons of peers, and of perſons qualified to be knights of ſhires, and except the members for the two univerſities. Of this qualification the member muſt make oath, and give in the particulars in writing at the time of taking his ſeat (*d*); or, upon refuſal, the return is void.

(*c*) Or mortgage, if the mortgagee has been in poſſeſſion ſeven years before his election.

(*d*) 33 G. 2. c. 20.

(*e*) 5 & 6 W. & M. c. 7. (*f*) 11 & 12 W. 3. c. 2. 12 & 13 W. 3. c. 10. 6 Ann. c. 7. 15 Geo. 2. c. 22. No perſons concerned in the management of any duties or taxes created ſince 1692, except the commiſſioners of the treaſury (*e*), nor any of the officers following (*f*), *viz.* commiſſioners of prizes, tranſports, ſick and wounded, wine licences, navy, and victualling; commiſſioners of the revenue in *Ireland*; ſecretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of *Minorca* or *Gibraltar*; officers of the exciſe and cuſtoms; clerks or deputies in the ſeveral offices of the treaſury, exchequer, navy, victualling, admiralty, pay of the army or navy, ſecretaries of ſtate, ſalt, ſtamps, appeals, wine licences, hawkers and pedlars, nor any perſons that hold any new office under the crown created ſince 1705 (*g*), are capable of being elected or ſitting as members. Nor ſhall any contractor (*h*) with the officers of government, or with any other perſon for the ſervice of the publick, be capable of being elected, or of ſitting in the houſe, as long as he holds any ſuch contract, or derives any benefit from it.

(*g*) 6 Ann. c. 7.

(*h*) 22 G. 3. c. 45.

6 Ann. c. 7. 1 Geo. 1. c. 56. No perſon having a penſion under the crown during pleaſure, or for any term of years, is capable of being elected.

6 Ann. c. 7. If any member accepts an office of profit from the crown, except an officer in the army or navy accepting a new commiſſion, his ſeat is void; but ſuch member, provided the office were prior to 1705, is capable of being re-elected.

2 & 3 Ann. c. 4. § 22. 6 Ann. c. 35. § 32. No regiſtrar (for regiſtering memorials of deeds, *&c.*) within the weſt or eaſt riding in the county of *York*, or his deputy, is capable of being elected.

7 & 8 W. 3. c. 4. The treating vacates that election only; but the candidate is not No candidate ſhall, after the *teſte* of the writ or ſummons to parliament, or after the *teſte*, or the iſſuing out, or ordering of the writ of election upon the calling or ſummoning of any parliament, or after the vacancy, give any money or entertainment to his electors, or promiſe to give any, either to particular perſons or to the place in general, in order to his being elected; upon

upon pain of being incapable, upon ſuch election, of ſerving for that place in parliament. diſqualified from being re-elected,

and ſitting upon a ſecond return. 3 Lud. 455. but *contr. Id.* 162.

The eldeſt ſons of peers of *Scotland* are incapable of electing or being elected to repreſent any ſhire or burgh in *Scotland.*] Comm. Journ. 3d Dec. 1708.

This point hath lately been diſcuſſed with conſiderable ingenuity and ability in the houſe of lords on an appeal from a decree of the court of ſeſſions. The queſtion aroſe upon the claim of Lord Daer, eldeſt ſon of the Earl of Selkirk, to be enrolled a freeholder of the ſtewarty of *Kirkcudbright*, at the Michaelmas court in 1791. It was objected, (and it was the ſole objection, for his lordſhip was admitted to be in every other reſpect qualified,) that his lordſhip being the eldeſt ſon of a peer of the realm, was incapable of being enrolled. The freeholders, however, admitted his claim; but upon an appeal to the court of ſeſſion, the objection was ſuſtained, and his lordſhip's name was directed to be expunged from the roll; and this decree was affirmed in the houſe of lords. Lord Daer v. Johnſtone and others, printed caſes of the lords, 26th March 1793.

3. Of the Duty of Returning Officers, and the Remedies againſt them; [and herein of the Mode of Proceeding upon Complaint of undue Elections.]

[We have ſeen above, that the writ of ſummons iſſues from the clerk of the crown in Chancery in conſequence of a warrant from the lord chancellor, or ſpeaker of the houſe of commons, according as the election is general, or not. Within three days (*a*) after the receipt of this writ, the ſheriff is to ſend his precept, under his ſeal, to the proper returning officers of the cities and boroughs within his county, commanding them to elect their members: and theſe officers are to proceed to election within eight days (*b*) from the receipt of the precept, giving four days notice of the ſame; and to return the perſons choſen, together with the precept, to the (*c*) ſheriff. 23 H. 6. c. 14. 7 & 8 W. 3. c. 25. 12 Ann. Seſſ. 1. c. 15.

(*a*) The officer of the Cinque Ports has ſix days, by 10 & 11 W. 3. c. 7. (*b*) In *New Shoreham*, the election muſt be within *twelve* days, with eight days notice thereof. (*c*) The notice muſt be given within the hours of 8 o'clock in the forenoon, and 4 in the afternoon from the 25th *October* to the 25th of *March* inclusive, and within the hours of 8 in the forenoon, and 6 in the afternoon from the 25th of *March* to the 25th *October* inclusive, and not otherwiſe. St. 33 Geo. 3. c. 64.

With reſpect to county elections, the ſheriff, having indorſed on the writ the day on which he received it, ſhall, within two days after the receipt thereof, cauſe proclamation to be made at the place (*d*) where the enſuing election ought by law to be holden, of a ſpecial county court to be there holden for the purpoſe of ſuch election only, on any day, *Sunday* excepted, not later from the day of making ſuch proclamation than the ſixteenth day, nor ſooner than the tenth day. 25 Geo. 3. c. 84. § 4.

(*d*) The ſheriff cannot alter the place without the conſent of all the candidates. See an expreſs act of parliament 20 Geo. 3. c. 1. for holding the election for *Hampſhire* at *New Alresford*. So, for adjourning the poll from Wincheſter to Newport in the *Iſle of Wight*. 7 & 8 W. 3. c. 25. 25 Geo. 3. c. 84. § 16.

Upon the day fixed for the election, the returning officer is firſt to take an oath againſt bribery, and for the due execution of his office. The candidates muſt, if required by each other, or by two electors, ſwear to their qualification; and the electors both in counties and boroughs to theirs; and the latter are alſo compellable to take the oaths of allegiance, ſupremacy,

ſupremacy, and abjuration, and the oath againſt bribery and corruption.

34 Geo. 3. c. 73. And to prevent delays, the returning officer is required, at the requeſt of any of the candidates, made in writing under his hand, to appoint commiſſioners to adminiſter the oaths of allegiance, ſupremacy, and abjuration, who are to deliver a certificate to the party to whom the oaths have been adminiſtered, of his having taken them, upon the production of which he is permitted to poll in like manner as if he had taken the oaths before the returning officer.

25 Geo. 3. c. 84. §5. All electors for cities and boroughs are likewiſe to ſwear to their name, addition, or profeſſion, and place of abode; and alſo, like freeholders in counties, that they believe they are of the age of twenty-one, and that they have not been polled before at the election.

§ 1. If a poll is demanded at any election for any county or place in *England* or *Wales*, it ſhall commence either on that day, or at the fartheſt upon the next, and ſhall be continued from day to

§ 3. day (*Sundays* excepted) till it be finiſhed; and it ſhall be kept open ſeven hours at the leaſt each day, between eight in the morning, and eight at night; but if it ſhould be continued till the fifteenth day, then the returning officer ſhall cloſe the poll at or before three in the afternoon, and ſhall immediately, or on the next day, publickly declare the names of the perſons who have a majority of voices; and he ſhall forthwith make a return accordingly, unleſs a ſcrutiny is demanded by any candidate, or by two or more of the electors, and he ſhall deem it neceſſary to grant the ſame, in which caſe he is to proceed thereupon; but ſo as that, in all caſes of a general election, if he has the return of the writ, he ſhall cauſe a return of the members to be filed in the crown-office on or before the day on which the writ is returnable. If he is a returning officer acting under a precept, he ſhall make a return of the precept at leaſt ſix days before the day of the return of the writ; but if it is not a general election, then, in caſe of a ſcrutity, a return of the member ſhall be made within thirty

§ 6. days after the cloſe of the poll. Upon a ſcrutiny, the returning officer cannot compel any witneſs to be ſworn, though the ſtatute gives him a power of adminiſtering an oath to thoſe who *conſent*

§ 3. to take it. And where there are objections to votes on each ſide, he ſhall decide alternately on them.

7 & 8 W. 3. c. 7. 12 Ann. 1 Seſſ. c. 15. 25 Geo. 3. c. 84. § 14. Double damages may be recovered for any falſe return, tho' there have been no determination of the houſe

The ſcrutiny being finiſhed, the ſheriff muſt make a return of the perſons who have a majority on the reviſed poll within the time limited by law. And the perſons ſo returned are the ſitting members until the houſe of commons, upon petition, ſhall adjudge the return to be falſe and illegal. For a falſe return, the ſheriff, by the old ſtatutes of *H.* 6. forfeits 100 *l.* and the returning officer in boroughs 40 *l.* and they are beſides liable to an action at the ſuit of the party grieved, in which double damages ſhall be recovered. And they are alſo liable to ſuch an action for wilfully neglecting, delaying, or refuſing to return the perſon, whom the houſe of commons ſhall adjudge to be the legal repreſentative.

ſentative. And for any offences againſt the act of 25 *Geo.* 3. *c.* 84. they are puniſhable by information or indictment. of commons relative to the right of

of election for the place in queſtion. Wynne v. Middleton, 1 Wilſ. 125.——By ſtat. 7 & 8 W. 3. c. 7. the ſheriff was liable to a penalty of 500*l.* for not making a return, at the return of the writ, if it were a general election, or within fourteen days, if an occaſional vacancy. Any perſon bribing the returning officer forfeits 300*l.* 7 & 8 W. 3. c. 7.

When the election is over, the returning officer is bound, under a penalty of 500*l.* to deliver forthwith a copy of the poll to any perſon deſiring it, and paying a reaſonable charge for writing it. And the ſheriff muſt within twenty days after a county election deliver upon oath to the clerk of the peace all the poll books of ſuch election without any embezzlement or alteration; and where there are more than one clerk of the peace, the original poll books to one of the clerks, and atteſted copies to the reſt to be kept among the records of the county. 7 & 8 W. 3. c. 25. § 6. 10 Ann. c. 23. § 5. The check polls as well as the original books, muſt be lodged with the clerk of the peace. Rex v. Davies, 2 Str. 1048.

If a perſon having a right to vote is hindered by the preſiding officer, an action on the caſe lies at common law. Aſhby v. White, 2 Ld. Raym. 938. 1 Salk. 19. 6 Mod. 45. 8 State Tr. 89. 1 Br. P. C. 45. But the obſtruction muſt be wilful and malicious. Drewe v. Colton, Lent aſſizes for Cornwall, *cor.* Wilſon J. 2 Lud 245. Sargent v. Millward, 2 Lud. 248.

Whether it lies at common law for a falſe, or double return. 2 Lev. 114. 2 Ventr. 370. 3 Lev. 29. 2 Salk. 502. 1 Wilſ. 127.

The returning officer, it ſeems, is not to judge of the diſability of candidates. 1 Comm. Journ. 511. 513. 515. 880. 11 Comm. Journ. 201.

If the freedom of election is violated by any riotous and tumultuous proceedings, the ſheriff may take the offenders into cuſtody. But whether he may commit, where the election is not obſtructed in any manner amounting to a breach of the peace, may admit of ſome doubt. 1 Comm. Journ. 826. 834. 837.

By the ſtatutes of 10 *Geo.* 3. *cap.* 16. explained and amended by 11 *Geo.* 3. *c.* 42.; both of which are made perpetual by 14 *Geo.* 3. *c.* 15. and ſtill farther improved by 25 *Geo.* 3. *c.* 84. 28 *Geo.* 3. *c.* 52. and 32 *Geo.* 3. *c.* 1. a tribunal is erected and regulated for determining the merits of conteſted elections. By theſe ſtatutes, any perſon may preſent a petition complaining of an undue election; but one ſubſcriber of the petition muſt enter into a recogniſance, himſelf in 200*l.* with two ſureties in 100*l.* each, to appear and ſupport his petition; and then the houſe appoint ſome day beyond the days after the commencement of the ſeſſion, or the return of the writ, and give notice to the petitioners and the ſitting members to attend the bar of the houſe on that day by themſelves, their counſel, or agents; which day may be altered; but notice muſt be given of the new appointed day. On the day fixed, if 100 members do not attend, the houſe ſhall adjourn from day to day, except over *Sundays*, and for any number of days over *Chriſtmas-day*, *Whitſunday*, and *Good Friday*; and when two or more members are preſent, the houſe ſhall proceed to no other buſineſs, except ſwearing in members, receiving re-

ports from committees, amending returns, attending his majeſty or commiſſioners in the houſe of lords, receiving meſſages from the lords, or on days appointed for the trial of any articles of impeachment exhibited by the commons in parliament, the buſineſs neceſſary for that purpoſe. Then the names of all the members belonging to the houſe are put into ſix boxes or glaſſes in equal numbers, and the clerk draws a name from each of the glaſſes in rotation, which name is read by the ſpeaker, and if the perſon is preſent, and not diſqualified, it is put down, and in this manner they proceed till forty-nine ſuch names are collected. But beſides theſe forty-nine, each party ſelect, out of the whole number preſent, one perſon, who is to be the nominee of that party. Members who have voted at that election, or who are petitioners, or are petitioned againſt, cannot ſerve; and perſons who are ſixty years of age, or who have ſerved before, are excuſed if they require it; and others who can ſhew any material reaſon, may alſo be excuſed by the indulgence of the houſe. After forty-nine names are ſo drawn, liſts of them are given to the reſpective parties, who withdraw, and alternately ſtrike off one (the petitioners beginning) till they are reduced to thirteen; and theſe thirteen, with the two nominees, conſtitute the ſelect committee. If there are three parties, they alternately ſtrike off one; and in that caſe, the thirteen chooſe the two nominees. The members of the committee thus formed are then ordered by the houſe to meet within twenty-four hours; and they cannot adjourn for more than twenty-four hours, except over *Sunday*, *Chriſtmas-day*, and *Good Friday*, without leave of the houſe; and no member of the committee can abſent himſelf without the like leave, upon ſpecial cauſe, verified upon oath. The committee cannot proceed to buſineſs with fewer than thirteen members (*a*); and they are diſſolved, if for three ſucceſſive days of ſitting, their number is leſs than that: they continue to ſit notwithſtanding a prorogation of parliament. They are all ſworn at the table of the houſe, that they will give a true judgment according to the evidence, and every queſtion is determined by a majority. They may ſend for witneſſes, and examine them upon oath. When the whole evidence is heard, they report to the houſe, whether the election be a due election or void, and alſo whether the petition or defence be frivolous and vexatious, in which caſe the party aggrieved ſhall recover coſts: and the houſe, on being informed of ſuch report by the chairman of ſuch committee, order the ſame to be entered in their journals, and give the neceſſary directions for altering or confirming the return, or for iſſuing a new writ, or for carrying ſuch determination into execution, as the caſe may require.

(*a*) If a committee have ſat 14 days, 12 members, and if 25 days, 11 members, may proceed to buſineſs.

But when the committee are of opinion that the merits of a petition depend upon a queſtion reſpecting the right of election, or the appointment of a returning officer, they require the counſel of the reſpective parties to deliver a ſtatement of the right for which they contend, and the committee then report to the houſe thoſe ſtatements with their judgments thereupon; and if no perſon petition within a twelvemonth, or within fourteen days after the commence-

But a renewed petition muſt be

commencement of the next ſeſſion, to oppoſe ſuch judgment, it is final and concluſive for ever. But if ſuch a petition be preſented, then, before the day appointed for the conſideration of it, any other perſon, upon his petition, may be admitted to defend the judgment; and a ſecond committee are appointed exactly in the ſame manner with the firſt, the deciſion of which committee puts an end to all further litigation on the point in queſtion.]

preſented within 14 days after the commencement of any ſubſequent ſeſſion, and upon its being preſent-

ed, a day and hour, not leſs than 14 days diſtance, muſt be appointed by the houſe for taking it into conſideration. If petitions are not renewed within this time, the judgment of the committee upon the point in queſtion ſhall be final and concluſive.

(E) Of the Method of paſſing Bills.

AN act of parliament muſt have the conſent of the lords, commons, and the royal (*a*) aſſent of the king; and (*b*) whatſoever paſſeth in parliament by this threefold conſent, hath the force of an act of parliament.

4 Inſt. 25. Hob. 111. Forteſc. Laud. c. 18. Dyer, 92.

(*a*) By the 33 H. 8. c. 21., The king's royal aſſent by his letters patent under his great ſeal, and ſigned with his hand, and declared and notified in his abſence to the lords ſpiritual and temporal, and to the commons, aſſembled together in the high houſe, is as effectual as if the king were perſonally preſent. (*b*) Difference between an ordinance and an act of parliament is, that an ordinance wanteth the threefold conſent, and is only ordained by one or two of them. 4 Inſt. 25. [See Co. Lit. 159. b. n. 2. 13th ed.]

Anciently, the manner of proceeding in bills, was much different from what it is at this day; for, formerly, the bill was in nature of a petition, and theſe petitions were entered upon the lords rolls, and upon theſe rolls the royal aſſent was likewiſe entered; and upon this, as a ground-work, the judges uſed, at the end of the parliament, to draw up the act of parliament into the form of the ſtatute, which was afterwards entered upon the rolls called the *ſtatute rolls*; which were different from thoſe called the *lords rolls*, or the *rolls of parliament*: upon theſe *ſtatute rolls*, neither the bill, nor petition from the commons, nor the anſwer of the lords, nor the royal aſſent, were entered, but only the ſtatute, as it was drawn up and penned by the judges; and this was the method till about *Henry* the Fifth's time: in his time it was deſired, that the acts of parliament might be drawn up and penned by the judges before the end of parliament; and this was by reaſon of a complaint then made, that the ſtatutes were not equally and fairly drawn up and worded. After the parliament was diſſolved or prorogued, in *Henry* the Sixth's time, the former method was altered, and then bills *continentes formam actûs parliamenti* were firſt uſed to be brought into the houſe; the bills (before they were brought into the houſe) were ready drawn, in the form of an act of parliament, and not in the form of a petition, as before; upon which bills it was written by the commons, *Soit baile al ſeigneurs*; and by the lords, *Soit bayle al roye*; and by the king, *Le roy le veut* (*b*); all this was written upon the bill; and the bill, thus indorſed, was to remain with the clerk of the parliament, and he was to enter the bill thus drawn at firſt, in the form of

4 Inſt. 25, 26. Goodal, 286. Dyer, 131. 8 Co. 1.

(*c*) See Obſervations on Stat. 35. Note (*i*).

of an act of parliament, or ſtatute, upon the ſtatute rolls, without entering the anſwer of the king, lords, or commons, upon the ſtatute rolls, and then iſſued out writs to the ſheriffs, with tranſcripts of the ſtatute rolls, *viz.* of the bill drawn at firſt in the form of a ſtatute, and without the anſwer of the king, lords, and commons, to the bill, to (*a*) proclaim the ſtatute.

(*a*) They were anciently proclaimed by the ſheriff, but upon the invention of printing this method was diſcontinued; ſo that at this time every body is obliged to take notice of an act of parliament at his peril. 4 Inſt. 26.

4 Inſt. 34. In the lords houſe, the lords give their voices from the *puiſne* lord *ſeriatim*, by the word of *content*, or *non content*.

4 Inſt. 35. The commons give their voices upon the queſtion by *yea*, or *no*; and if it be doubtful, and neither party yield, two are appointed to number them; one for the *yeas*, another for the *noes*; the *yeas* going out, and the *noes* ſitting; and thereof report is made to the houſe. At a committee, though it be of the whole houſe, the *yeas* go on one ſide of the houſe, and the *noes* on the other, whereby it will eaſily appear which is the greater number.

4 Inſt. 12. To the paſſing of a bill, the aſſent of the knights, citizens, and burgeſſes muſt be in perſon, but the lords may give their votes by proxy (*b*); and the reaſon hereof is, that the barons did always ſit in parliament in their own right, as part of the *pares curtis* of the king; and therefore, as they were allowed to ſerve by proxy in the wars, ſo they had leave to make their proxies in parliament (*c*); but the commons coming only as repreſenting the *barones minores*, and the ſocage tenants in the county, and the citizens and burgeſſes, as repreſenting the men of their cities and boroughs, they could not conſtitute proxies, becauſe they themſelves were but proxies and repreſentatives of others, and therefore could not conſtitute a proxy in their place; according to that maxim of law, *delegata poteſtas non poteſt delegari*.

[(*b*) But not when they ſit to exerciſe judgment. Stand. Ord. Houſe of Lords, 11th June 1689, and 15th March 1697. 8vo. edit. 1748.

(*c*) They are now made by the king's licence. Elſ. c. 5.]

1 Wooddeſ. 41. Elſ. c. 5. Ord. 25 Feb. 1625. *ibid.* [Proxies from a ſpiritual lord are to be made to a ſpiritual lord; and from a temporal lord to a temporal lord; and no lord can receive more than two proxies: and a lord voting in a queſtion muſt vote as proxy, if proxies are called for (*d*).

(*d*) Ord. 11th Feb. 1694. *ibid.*

Elſ. c. 5. A lord ſhall not have above two proxies. By order 2 Car. Ruſhw. 269. 4 Inſt. 12, 13. It hath been made a queſtion, if a proxy be given to two or more lords, and they differ, whoſe voice ſhall ſtand; which is ſaid to have been reſolved by the Earl of *Mancheſter*, lord preſident of the council, in favour of him who is firſt named in the delegation, and preſent. But according to Lord *Coke*, if three are proxies of the ſame lord, and all preſent, and one is content that a bill paſs, and the other two are not content, this is no voice.

4 Inſt. 13. The mere preſence of the lord in the houſe, though he neither argue, conſent, nor ſpeak any thing, ſeemeth to be a revocation of his proxy.

Seld. 3 Vol. 2 P. 1476. A lord may be ſummoned with a clauſe that he do not make a proxy.]

(F) Of the Continuance, Adjournment, Prorogation, and Diſſolution of the Parliament.

THE parliament can neither begin nor end without the king's preſence, either in perſon, or by (*a*) repreſentation. 4 Inſt. 48. (*a*) *Vide* 33 H. 8. c. 25.

The paſſing of any bill or bills, by giving the royal aſſent thereunto, or the giving of any judgment in parliament, doth not (*b*) make a ſeſſion, but the ſeſſion doth continue until that ſeſſion be prorogued or diſſolved. 4 Inſt. 27. (*b*) That the courts of juſtice are to take notice of the commencement of parliaments, and alſo of prorogations and ſeſſions. Lev. 296. Raym. 191. Hetl. 119. Dyer, 203.

The diverſity between a prorogation and an adjournment, or continuance of the parliament, is, that by the prorogation in open court there is a ſeſſion, and then ſuch bills as paſſed in either houſe, or by both houſes, and had no royal aſſent to them, muſt at the next aſſembly begin again, *&c.* for every ſeveral ſeſſion of parliament is, in law, a ſeveral parliament; but if it be only adjourned or continued, then there is no ſeſſion, and conſequently all things continue ſtill in the ſame ſtate they were in before the adjournment or continuance. 4 Inſt. 27. Raym. 120.

When a parliament is called, and doth ſit, and is diſſolved without any act of parliament paſſed, or judgment given, it is (*c*) no ſeſſion of parliament, but a convention. 4 Inſt. 38. (*c*) The ſtatute of *jeofails*, made in *Oxford*, 16 & 17 Car. 2. c. 8., was to continue and be in force for three years, and from thence to the end of the next ſeſſion of parliament; but becauſe the parliament convened next after the expiration of the three years, was prorogued without paſſing any act, the court held it no ſeſſion, at leaſt not ſuch a ſeſſion as was intended to determine the aforeſaid act. Raym. 187. Lev. 442. 2 Keb. 529.

The houſe of commons is, to many purpoſes, a (*d*) diſtinct court, and therefore is not prorogued or adjourned by the prorogation or adjournment of the lords houſe; but the ſpeaker, upon ſignification of the king's pleaſure, by the aſſent of the houſe of commons, doth ſay, this court doth prorogue, or adjourn itſelf; and then it is prorogued or adjourned, and not before; but when it is diſſolved, the houſe of commons are ſent for up to the higher houſe; and there the lord keeper, by the king's commandment, diſſolved the parliament; and then it is diſſolved, and not before. 4 Inſt. 28. (*d*) Both houſes muſt be prorogued together, and diſſolved together, for one cannot ſubſiſt without the other. Sir Robert Atkins's Argument, 51. [It is not a prorogation of the houſe of lords or commons, but of the parliament. 1 Bl. Comm. 187.]

By the ſtatute 4 *E.* 3. *cap.* 14. "Parliaments ought to be holden "once a year, and oftner, if need be." *Vide* 36 E. 3. c. 10. to the ſame purpoſe.

By the 16 *Car.* 2. *cap.* 1. it is enacted, "That the holding of "parliaments ſhall not be diſcontinued above three years at the "moſt."

By the 6 *W.* & *M. cap.* 2. it was enacted, "That the parlia- "ment ſhould have continuance longer than for three years at "the fartheſt, to be accounted from the day on which, by the "writs of ſummons, the parliament ſhould be appointed to meet." 6 W. & M. c. 2.

1 Geo. 1. ſt. 2. c. 38.

But now by the 1 *Geo.* 1. *ſt.* 2. *cap.* 38. it is enacted, "That "the then preſent parliament, and all parliaments that ſhall at "any time thereafter be called, aſſembled, or held, ſhall and may "reſpectively have continuance for ſeven years, and no longer, "to be accounted from the day on which, by the writ of ſum-"mons, the parliament ſhall be appointed to meet, unleſs ſooner "diſſolved by his majeſty, his heirs or ſucceſſors."

(G) Of the Juriſdiction of the Houſe of Lords.

THE lords houſe is the higheſt court of juſtice in this kingdom, and the juriſdiction it exerciſes at this day, with reſpect to impeachments, the trial of its own members, writs of error, and appeals, is deduced chiefly from the juriſdiction and power of the king's antient court, or *aula regis*, eſtabliſhed at the conqueſt.

This court, eſtabliſhed by the conqueror, conſiſted not only of the principal officers of ſtate, but alſo of ſuch as held *per baroniam*, whom the king had a right to ſummon, as holding immediately from himſelf, to do ſuit in his court, and to hear cauſes; theſe were the *pares curtis* to the king. And hence this court was conſidered as the great court-baron of the kingdom, where all petitions againſt great perſons, and the prince's officers, were heard.

Ryley, Pl. Par. 156.

This court had not only an original juriſdiction of determining cauſes brought before them by petition, but was alſo the *dernier reſort* to correct the errors of inferior judicatures; but as petitions began to multiply, there are ſeveral inſtances where original cauſes have been referred to inferior courts.

Every ſuit commenced by petition, containing the grievances certainly and particularly; and proceſs was ſent out to bring the defendant in to anſwer; when theſe petitions increaſed, receivers and triers of petitions, who determined what petitions were proper to be received or rejected, were appointed; and afterwards, upon the aſſembling of the knights, citizens, and burgeſſes, and their conſtituting a houſe of commons, the commons in matters of great moment, and as they were the grand inquiſitors of the whole kingdom, preſented their petitions; and as thoſe petitions came ſtronger from them than from any particular perſon, ſo they were never rejected by the lords: and hence the original of impeachments by the houſe of commons.

[See a clearer account of parliamentary impeachments, 2 Wooddeſ. 596. 620.]

The great officers that conſtituted this court, were tried by their (*a*) peers, when this grand aſſembly or parliament were ſitting; but out of parliament by the *juſticiar*, and in his abſence by the ſteward of *England*, who ſummoned ſome of his peers, and twelve*, at leaſt, were obliged to appear.

(*a*) This turns upon a principle of the feudal law, *ſi inter dominum & vaſſalum lis moveatur pares curiæ ſunt judices*; and this, as to treaſon and felony, is confirmed by the clauſe in *Magna Charta*, c. 29. *nec ſuper eum ibimus, nec ſuper eum mittemus niſi per legale judicium parium ſuorum vel per legem terræ*; but for all other crimes out of parliament, as a *præmunire*, riot, ſeducing a young lady from her parents in order to debauch her, &c., a peer at this day ſhall be tried by a jury. 2 Hawk. P. C. c. 44. § 13.

* Now, by ſtat. 7 W. 3. c. 3. § 11., on the trial of a peer, all the peers are to be ſummoned.

As

As this court was the *dernier reſort* to correct the errors of inferior judicatures, ſo at this day there lies a writ of error of a judgment given in the King's Bench, before this court, which begins by petition to the king; whereto when the king hath anſwered *fiat juſtitia*, then goes out a writ directed to the chief juſtice of the King's Bench, for removing the record *in* (*a*) *præſens parliamentum*; and thereupon the roll itſelf, and a tranſcript in parchment, is to be brought by the chief juſtice of the King's Bench into the lords houſe in parliament; and after the tranſcript is examined by the court with the record, the chief juſtice carrieth back the record itſelf into the King's Bench, and then the plaintiff is to aſſign the errors, and thereupon to have *ſcire facias* againſt the adverſe party, returnable either in that parliament or the next, and the proceedings thereupon ſhall be *ſuper tenorem recordi & non ſuper recordum*. [And that theſe, as well as appeals and impeachments by the commons, do not abate by the prorogation or diſſolution of the parliament. Sir T. Raym. 483. 2 Lev. 93. Comm. Journ. 23 Dec. 1790. Lords Journ. 16 May 1791.]

4 Inſt. 21. *Vide* tit. *Error*.

(*a*) That writ of error may be returnable *ad proximam ſeſſionem parliamenti, vide* Dyer, 375. And ſo of a *ſcire fac. vide* Fitz. tit. *Error*, 58. Raſt. Ent. 805.

Towards the latter end of the reign of king *Charles* the Firſt, the houſe of lords aſſerted their juriſdiction of hearing appeals from the Chancery, which they do upon a paper petition, without any writ directed from the king; and for this their foundation is, that they are the great court of the king, and that, therefore, as the Chancery is derived out of it, a petition will bring the cauſe and the record before them. This was much controverted by the commons in the reign of *Charles* the ſecond, but is now pretty well ſubmitted to; becauſe it has been thought too much that the chancellor ſhould bind the whole property of the kingdom without appeal.

Gilb. Hiſt. Ch. 190.

Court of Chancery.

TOWARDS the *Norman* period, upon the breaking of the courts into diſtinct juriſdictions, the chancellor, or keeper of the great ſeal, retained part of that juriſdiction which he exerciſed in the great court of the kingdom, called *aula regis*: but for the better underſtanding hereof, and of its juriſdiction at this day, we ſhall conſider this court,

(A) As an *Officina Brevium*, out of which all original Writs flow.

(B) As an ordinary and limited Court, proceeding according to Law, commonly called the Petty-Bag.

(C) As an extraordinary Court, proceeding according to Equity: And herein,

1. Of its original Juriſdiction.
2. What Juriſdiction it exerciſes at this Day.

(A) As an *Officina Brevium*, out of which all original Writs flow.

(*a*) 4 Inſt. 80. Of ſuperſeding ſuch writs, *vide* Abr. Eq. 416. and tit. *Writs*.

BEfore the diviſion of the courts, the chancellor put the ſeal to all patents, commiſſions, and writs: and hence this court is conſidered at this day, as the great ſhop of juſtice, out of which (*a*) all original writs, which give other courts a juriſdiction, iſſue, and are made returnable into ſuch courts on a common return-day, and may be ſued out at any time, as well in vacation as in term-time, from whence this court is ſaid to be always open.

The reaſons of the inſtitution of this *officina brevium* were many.

1ſt, That it may appear that all power of judicature whatſoever flowed from the king, and therefore there was a ſummons even to the peers in parliament, that ſat *in proprio jure*; ſo likewiſe for the lower houſe of commons; the baſis of the ſame were made by writs that iſſued out of this court, and were returned into the ſame office; and ſo in judicature, there were particular patents that ſhewed the extent of the commiſſion, and that their power was derived from the crown.

2dly, That the crown might have its proper fines: theſe were antiently paid to purchaſe juſtice from the crown; for perſons were not ſuffered to come into the king's courts, and engage the power of the king to do right to private individuals, without firſt giving ſomething towards the charges of the court, and the expence of the judicature; inaſmuch as in antient times the king uſed to ſummon ſeveral of the barons to attend the hearing of ſuch cauſes; but afterwards by *magna charta*, by reaſon of the exorbitancy of officers, and that the crown might not be cheated, theſe were reduced to fines certain.

3dly, The writs were taken out of the court of Chancery, returnable in the other courts, that one court might be a check upon the other.

4thly, To keep an uniformity in the law; for whether theſe writs went out to the ſheriff in the nature of a *juſticies*, or whether they were returnable before the juſtices in *eyre*, or juſtices of the common bench, or of aſſiſe, they were ſtill made in one form, according to the nature of the complaint, which was both a direction to the judge, and limitation of his authority.

The court of Chancery being thus erected to iſſue proceſs, the chancellor, or lord keeper, who had the government of that court, had the great ſeal, by authority of which all proceſs was to iſſue; and from hence maſters were appointed in that court, who made out the forms of the writs, and entered them in a book kept for that purpoſe, thence called the *regiſter*; and ſuch writs were precedents for the future, in like caſes; and exceptions were taken to writs in the courts to which they were directed, for not agreeing with the *regiſter*, and divers other informalities.

After the maſters in Chancery had ſettled proper writs and commiſſions, and thoſe things began to be of courſe, they had proper under-officers, who made out their writs of courſe, and they only attended on the making out of new writs in extraordinary caſes, the ordinary writs being made out by the proper officers: hence it came to paſs that the officer, called the clerk of the crown, made out commiſſions after the forms of them were ſettled, as commiſſions for juſtices errant, and of aſſiſes, general gaol-delivery, *oyer* and *terminer*, and of the peace, writ of aſſociation, *dedimus poteſtatem* for the taking of oaths, and all general and ſpecial pardons; alſo, writs of execution upon a ſtatute-ſtaple, which were annexed to this office in the time of Queen *Mary*, for their continual and chargeable attendance: other writs that were ſettled were made out by the *curſitors*, who were formerly clerks to the maſters, but afterwards ſettled in a diſtinct office, to make the *brevia de curſu*.

At the firſt diviſion of the courts, the Chancery was tender in making out writs in caſes where there had been formerly no precedents in the antient *curia regis*, which now are called *actiones nominatæ*, becauſe they thought the antient footſteps which were in the former courts of juſtice, were the bounds of their juriſdiction, and indeed of the law; therefore, wherever there was a new caſe that ſeemed to require remedy, the original juriſdiction referred them to petition the next parliament: but becauſe this multiplied petitions to parliament, therefore there was a particular law made, which gave the court power in a new caſe to invent a writ, and this was by the ſtatute of (*a*) *Weſtm.* 2. *cap.* 24. *Et quotieſcunque de cætero evenerit in cancellat. quod in uno caſu reperitur breve, & in conſimili caſu cadente ſub eodem jure & ſimili indigente remedio, non reperitur, concordent clerici de cancellaria in brevi faciendo, vel atterminent querentes in proximum parliamentum, & ſcribantur caſus in quibus concordare non poſſunt, & referant eos ad proximum parliamentum, & de conſenſu juriſperitorum fiat breve, ne contingat de cætero quod curia domini regis deficiat conquerentibus in juſtitiâ perquirendâ.*

which caſes there were not found any writs in the *regiſter*.

Gilb. Hiſt. Chanc. 16. Dalrymp. Feud. Law, 304. 8vo. edition.

(*a*) Upon this ſtatute (which *vide* explained 2 Inſt. 405. &c.) was formed the writ of entry *in conſimili caſu*, relating to land; alſo, upon this ſtatute were founded actions upon the caſe upon ſeveral treſpaſſes, in 2 Inſt. 407.

(B) Of the ordinary and limited Court, proceeding according to Law, commonly called the Petty-Bag.

TO underſtand the nature of this court, we muſt obſerve, that in antient times the chancellor was likewiſe chaplain to the king, and it was his buſineſs, in the time of the *juſticiar*, to write the *diplomata*, that is, all charters and commiſſions from the king; therefore, when the power of the *juſticiar* was broken, he obtained the *officina brevium & chartarum regiarum*; from whence all the extraordinary juriſdictions touching the granting of charters, as likewiſe all inqueſts of office to entitle the crown, were returned into this office; and the Exchequer, in which theſe things were antiently tranſacted, became only an ordinary court of revenue, to (*a*) ſet leaſes to the king's farmers, and to get in the king's debts; and therefore the office in the Exchequer was only an office of inſtruction, of what lands were in the king in particular counties; but, to veſt lands in the crown *de novo*, it was neceſſary to have an office under the great ſeal; and ſo, to grant lands from the crown, unleſs it were merely farms that were granted for years.

(*a*) *Vide* 2 Co. 16. Plow. 320. 4 Co. 93.

From hence, at this day, this court has a juriſdiction to hold plea upon a *ſcire facias*, to repeal the king's letters patent upon petitions, *monſtrans de droit*, traverſes of offices, *ſcire facias* upon recognizances, executions upon ſtatutes, *&c.* which being regiſtered in this court, the proceſs thereupon iſſued out of the ſame, and were returnable there, and entered in the office called the (*b*) petty-bag; whereas the writs, which were the foundation of the buſineſs of the other courts, were put together in the hamper, which gave the diſtinction to thoſe names, and begat diſtinct officers in the court.

4 Inſt. 80. (*b*) The proceedings in this court were heretofore in *Latin*, but were not enrolled in rolls, but remained only *in filaciis*. 4 Inſt. 80.

If in this court the parties deſcend to iſſue, the chancellor cannot try it, but is to deliver the record, with his proper hand, into the King's Bench, where (*c*) judgment is to be given, and the reaſon hereof ſeems to be, that the Chancery being *officina brevium*, if it could both make writs returnable here, and alſo try iſſues, it would incroach too much on other juriſdictions; beſides, there was no jury proceſs in the antient *aula regis*. But upon (*d*) a demurrer the chancellor ſhall give judgment.

4 Inſt. 80. (*c*) That the judgment is to be given in B. R., and that for this purpoſe both courts are but one. *Vide* All. 16, 17.

Cro. Jac. 12. 2 Roll. Abr. 349. —— So, if there be a demurrer for part, and iſſue for part, the whole record may be tranſmitted into B. R., and the judgment given there. 2 Sand. 23. Lev. 283. Mod. 29. (*d*) So, if the iſſue is to be tried otherwiſe than by a jury, as by the ſheriff's certificate, &c. judgment ſhall be given in Chancery. Jones, 80. Latch. 3.

Abr. Eq. 128. pl. 8. The King and Warden of the Fleet.

An inquiſition was taken, and a forfeiture of the office of warden of the *Fleet* found, and the defendant pleaded to iſſue, and after iſſue joined, ſeveral other perſons came in by way of *monſtrans de droit*, and pleaded, and a demurrer to them, and the record was carried into *B. R.* by the clerk of the petty-bag, without any order of the court, in order to have the iſſue tried; and it was reſolved,

1ſt, That

1ſt, That though the clerk had committed a fault to the court of Chancery, in carrying the record without any order, yet that it was well removed; for that which is done by the proper officer, is done by my lord chancellor, and may be ſaid to be done *propriâ manu*. 2dly, That though there were an iſſue and demurrer both, yet the removing of the whole record was proper and well enough, on the (*a*) authorities cited in the margin, by which it appears, that judgment is moſt properly to be given in *B. R.* both on the iſſue and the demurrer; otherwiſe there might be two diſtinct judgments, and conſequently, diſtinct executions taken out.

Alſo, all (*b*) perſonal actions, by or againſt any officer or miniſter, in reſpect of his ſervice or attendance, may be determined in this court; but in theſe no jury proceſs can iſſue, but the record is to be removed *ut ſupra*.

(*a*) 8 Co. the Prince's caſe. 2 Sand. 6. 23. 157. 2 Keb. 621. Lev. 283. Sid. 436. Mod. 29. S. C. 4 Inſt. 80.

(*b*) But cannot hold plea of land. 2 H. 6. 32.

(C) Of the extraordinary Court, proceeding according to Equity: And herein,

1. Of its original Juriſdiction.

THIS court was (*c*) newly erected after the diviſion of the courts, and from a very ſmall and inconſiderable beginning, hath (though (*d*) impugned even from its creation) grown up to that degree, as to ſwallow up moſt of the other buſineſs of the common law.

(*c*) That like the other courts of *Weſtminſter*, it was time out of mind. 9 E. 4. 53. b.

12 Co. 113. Dr. & Stud. c. 7.——By Lamb. Archaion. 62. When the king's courts ceaſed to be ambulatory, and became ſettled in a certain place, then the king committed to his chancellor, together with his great ſeal, his only legal, abſolute, and extraordinary pre-eminence of juriſdiction, &c. And in Lev. 242. it is ſaid to be eſtabliſhed by an act of parliament. 36 E. 3. But Q. (*d*) For which *vide* the petitions of the commons againſt this new invented juriſdiction. 3 H. 4. No. 69. 4 H. 4. No. 78. 3 H. 5. No. 46. Roll. Abr. 327.

That there were ſome footſteps in the ancient *curia regis*, the foundation of this juriſdiction, appears from the *Engliſh* juriſdiction exerciſed in the court of Exchequer, where, on informations on the king's behalf, articles are adminiſtered, to which the party is to anſwer upon oath; as likewiſe by impeachments in the houſe of lords, where articles are exhibited in *Engliſh* for the party to anſwer to. Reg. 25.

But notwithſtanding this, the eſtabliſhment of this juriſdiction ſeems to be owing to the ſtatute of *Weſtm.* 2. *cap.* 24. above-mentioned, by which a power was given, in new and extraordinary caſes, to invent a new writ: Hence it was, that *John Waltham*, then biſhop of *Saliſbury*, and chancellor, as the commons mention in their petition, out of his ſubtlety, found out and began a novelty againſt the form of the common law, and that was the invention of the writ of (*e*) *ſubpœna*; which writ ſummoned the party to appear under a pain, to anſwer to ſuch things as ſhould be objected againſt him, and a petition was lodged in Chancery,

(*e*) The *ſubpœna* ſeems to have been taken by the court of Chancery, in order to oblige a man to anſwer upon oath as to the truth of the plaintiff's allega-

tions, because it came neareſt the common

Chancery, containing the articles to which he was obliged to anſwer; and upon ſuch articles this new invented writ iſſued.

law proceſs, called alſo a *ſubpœna*, which iſſues to bring in witneſſes to atteſt the truth.

By this conſtruction not only a new writ was framed, but a new juriſdiction erected, and this was towards the time of *R.* 2. occaſioned chiefly by the ſtatute of *Mortmain*; for when that ſtatute had reſtrained the growing riches of the clergy, they found out this invention to avoid it, by giving away lands to truſtees for pious uſes, and the feoffees of ſuch truſt did the duties of ſuch tenure in behalf of the truſt; but if they perverted the truſt, the ordinary juriſdiction not reaching a thing that was againſt the ſtatute of *Mortmain*, the chancellor exerted this extraordinary juriſdiction, and examined them as to the ſeveral facts alleged againſt them.

After the eſtabliſhment of this court, it was thought reaſonable to give damages to ſuch perſons as were drawn into it by falſe ſuggeſtions, and therefore by the 7 *R.* 2. *cap.* 6. reciting,

For the conſtruction of this ſtatute, *vide* 4 Inſt. 83.

" For as much as people be compelled to come before the king's " council, or in the Chancery, by writs grounded upon untrue " ſuggeſtions, *it is enacted*, That the chancellor for the time be- " ing, preſently after that ſuch ſuggeſtions be duly found and " proved untrue, ſhall have power to ordain and award damages " according to his diſcretion, to him who is ſo troubled un- " duly."

Cro. Eliz. 651. Brograve and Watts, 4 Inſt. 84. Roll. Rep. 86. 190. Lit. Rep. 166. 27 H. 8. 15. * 2 Ch. Caſ. 43.

The juriſdiction of this court was not only impugned almoſt at its original creation, but even in the reign of Queen *Elizabeth* it was ſtrongly holden by the judges of the common law courts, that the chancellor could not by his decree ſequeſter the party's lands, that is, could only *agere in perſonam*, but not *in rem*; and agreeably hereto it was reſolved 19 *Eliz.* in the caſe of * *Coleſton* and *Gardner*, that if a man killed a ſequeſtrator in the execution of ſuch proceſs, it was no murder.

But theſe were ſuch bloody and deſperate reſolutions, and ſo much againſt common juſtice and honeſty, which requires, that the decrees of this court, which preſerved men from deceit, ſhould not be rendered illuſory, that they could not long ſtand. But this proceſs got the better of thoſe reſolutions, on theſe grounds: 1ſt, That the extraordinary juriſdiction might puniſh contempts by the loſs of eſtate, as well as impriſonment of the perſon, becauſe that liberty being a greater benefit than property, if they had power to commit the perſon, they might take from him his eſtate till he had anſwered his contempt. 2dly, To ſay that a court ſhould have power to decree about a thing, and yet ſhould have no juriſdiction *in rem*, is a perfect ſoleciſm in the conſtitution of the court itſelf.

(*a*) As where a perſon committed to the Fleet for not per-

Alſo, in the reigns of Queen *Elizabeth* and King *James* the Firſt, there are (*a*) ſeveral ſtrong opinions, that a court of equity could not examine or give any redreſs in a cauſe after judgment at law, and that ſuits in equity, to relieve againſt a judgment at law,

law, are within the ſtatutes, which make it a *præmunire* to appeal to any foreign court, eſpecially if the end thereof be to controvert the very point determined at law, or to ſeek relief after judgment in a caſe wherein the law may relieve, as againſt exceſſive damages, *&c.*

forming a decree made ſubſequent, and contrary to a judgment at law, was, by *habeas corpus* out of the King's Bench, admitted to bail, and afterwards diſcharged. Cro Jac. 341. And to this purpoſe, *vide* 4 Inſt. 36. 91. 3 Inſt. 123. Dalſ. 81. Moor, 836. pl. 1129. 916. pl. 1300. Leon. 241. 2 Leon. 115. 3 Leon. 11. 2 Brownl. 97. Godb. 244. Roll. Rep. 71, 72. 252. 3 Bulſt. 118. 120. Lit. Rep. 37. Cro. Jac. 335. 344. March, 54. 83.

But as theſe opinions tended to render the juſtice of this court illuſory, whoſe peculiar province is to give remedies in caſes not remedial by the ordinary juriſdiction, and to relax and mitigate the rigour of the common law; they ſeem now to be wholly exploded; and this ſeems highly reaſonable, when it is conſidered how uncertain and doubtful the law in many caſes is before it is determined; and conſequently that before ſuch determination it would be impoſſible to relax and mitigate the rigour thereof.

Hard. 125. Mod. 59. 3 Keb. 221. Lev. 241. 2 Ch. Ca. 97. Abr. Eq. 130.

2. What Juriſdiction it exerciſes at this Day.

The ancient (*a*) rule for the juriſdiction of the extraordinary court of Chancery, was confined to frauds, accidents, and truſts; and though at this day, by its power in granting injunctions, it curbs the juriſdiction of other courts, and thereby has ſwallowed up the greateſt part of the buſineſs of the common law; yet it is ſtill under ſome of theſe notions that it exerciſes a juriſdiction in relieving againſt forfeitures, penalties, where a compenſation can be made, in preventing multiplicity of ſuits, decreeing a ſpecifick execution of agreements, aſſiſting defective conveyances, *&c.* but in no caſe will relieve againſt an act of parliament, directly againſt (*b*) a fundamental rule or maxim of the common law, nor retain a ſuit where the party appears to have a plain and adequate remedy at law.

(*a*) Three things, ſays my Lord Coke, are to be adjudged in a court of equity: 1. All covins, frauds, and deceits, for which there is no remedy by the ordinary courſe of law. 2. Accidents, as when a ſervant, obligor, or mortgagor, is to pay money on a certain day, and they happen to be robbed in going to pay it. 3. Breaches of truſt and confidence. 4 Inſt. 84. 10 Mod. 1. See Caſes temp. Talb. 40.

(*b*) Therefore, if tenant for life or years levy a fine, or ſuffer recovery, equity will not relieve againſt the forfeiture. Preced. Chan. 570.——Alſo, upon this foundation, that a court of equity could not relieve againſt a maxim of the common law; it was formerly holden, that one executor could not compel the other to account. Roll. Rep. 263.——That one jointenant could not ſue his companion. Roll. Abr. 376.——That if an obligee loſt his bond, he was without remedy.——Roll. Abr. 375.——So, where the leſſor entered upon his leſſee, and ſuſpended his rent, it was held, that he had no remedy. Latch. 149.——So, where the party became remedileſs by his own act, as by paying money without an acquittance. Roll. Abr. 374.——So, where one on valuable conſideration promiſed to make a leaſe, it was held, that the party could not ſue on this promiſe in equity, becauſe he might have an action on the caſe. Roll. Abr. 380. But theſe laſt opinions are now of no weight or authority, as appears by daily experience.

All matters of truſt are peculiarly within the juriſdiction of the court of Chancery; but if a truſtee does by fraud and combination with the *ceſtui que truſt* endeavour to evade any penal law, under pretence that a truſt is only cognizable in equity, and that equity ſhould not aſſiſt a (*c*) penalty, or (*d*) forfeiture, yet Chancery will aid remedial laws, and not ſuffer its own notions to be made uſe of to elude any beneficial law.

Abr. Eq. 131. *Vide* tit. *Uſes and Truſts.*

(*c*) That a penalty cannot be demanded in equity. 2 Chan. Ca. 81.

(*d*) That all forfeitures muſt be waived, as in waſte, ſo in a bill for the recovery of tithes. Vern.

Vern. 60. 2 Vern. 127. *Vide* Abr. Eq. 40. 127., &c. For the authority of the Chancery of *Great Britain*, ſee Stra. 149.

[Upon this head the Editor takes leave to refer the Student to the laſt chapter of the third volume of the *Commentaries*, and to Mr. *Fonblanque*'s Notes upon the *Treatiſe of Equity*, where the principles upon which the court of Chancery exerciſes its equitable juriſdiction are traced in a moſt maſterly manner. A clear and ſuccinct account of the origin of the court of Equity in Chancery will be found in the third volume of Mr. *Reeves's Hiſtory of the Law.*]

Court of King's Bench.

Maddox, c. 19. Bract. lib. 3. c. 7. f. 105. 4 Inſt. 70. 2 Inſt. 24. Co. Lit. 71. Dyer, 187. Cromp. of Courts, 78. Roll. Abr. 94.

TOWARDS the latter end of the *Norman* period, the *aula regis*, which was before one great court, where the *juſticiar* preſided, was divided into four diſtinct courts, *i. e.* the court of Chancery, King's Bench, Common Pleas, and Exchequer.

The court of King's Bench retained the greateſt ſimilitude with the ancient *curia*, or *aula regis*, and was always ambulatory, and removed with the king wherever he went: Hence the writs returnable into this court are *coram nobis ubicunque fuerimus in Angliâ;* and all records there are ſtiled *coram rege*, as it is ſtill ſuppoſed to have always the king himſelf in perſon ſitting in it; from whence it obtained the name of the court of King's Bench, and hath always retained a ſupreme original juriſdiction in all criminal matters; for in theſe the proceſs both iſſued, and was returnable into this court; but in treſpaſs it might be made returnable into either the King's Bench or Common Pleas, becauſe the plea was criminal as well as civil.

(A) Of the Juriſdiction of the Court of King's Bench: And herein,

1. Of its Juriſdiction in Criminal Matters.
2. Of its Juriſdiction in Civil Cauſes.
3. Of its Juriſdiction in reforming and keeping Inferior Juriſdictions within their proper Bounds.

(B) How far its Preſence ſuſpends the Power of all other Courts.

(C) Of the Form of its Proceedings.

(A) Of the Juriſdiction of the Court of King's Bench: And herein,

1. Of its Juriſdiction in Criminal Matters.

THIS court is termed the *cuſtos morum* of all the realm, and by the plenitude of its power, wherever it meets with an offence contrary to the firſt principles of juſtice, and of dangerous conſequence if not reſtrained, adapts a proper puniſhment to it. Sid. 168. 2 Hawk. P. C. c. 3.

It has a peculiar juriſdiction, not only over all capital offences, but alſo over (*a*) all other miſdemeſnors of a publick nature, tending either to a breach of the peace, or to oppreſſion or faction, or any manner of miſgovernment; and it is not material whether ſuch offences, being manifeſtly againſt the publick good, directly injure any particular perſon or not. 4 Inſt. 71. 11 Co. 98. 2 Hawk. P. C. *ubi ſupr.*

(*a*) Nor is it neceſſary to ſhew a precedent of the like nature formerly puniſhed here, agreeing in all circumſtances with the preſent. 2 Hawk. P. C. *ubi ſupr.*

And for the better reſtraining of ſuch offences, it has a diſcretionary power of inflicting exemplary puniſhment on offenders, either by fine, impriſonment, or other infamous puniſhment, as the nature of the crime, conſidered in all its circumſtances, ſhall require; and it may make uſe of any priſon which ſhall ſeem moſt proper; and it is ſaid, that no other court can remove or bail perſons condemned to impriſonment by this court. 2 Hawk. P. C. *ubi ſupr.*

Alſo, it hath ſo ſovereign a juriſdiction in all criminal matters, that an act of parliament, appointing that all crimes of a certain denomination ſhall be tried before certain judges, doth not exclude the juriſdiction of this court, without expreſs negative words; and therefore it hath been reſolved, that 33 *H.* 8. *cap.* 12. which enacts, that all treaſons, *&c.* within the king's houſe, ſhall be determined before the lord ſteward of the king's houſe, *&c.* doth not reſtrain this court from proceeding againſt ſuch offences. 4 Inſt. 549. 2 Jones, 53. 2 Hawk. P. C. *ubi ſupr.*

But where a ſtatute creates a new offence, which was not taken notice of by the common law, and erects a new juriſdiction for the puniſhment of it, and preſcribes a certain method of proceeding, it ſeems queſtionable how far this court has an implied juriſdiction in ſuch a caſe. Sid. 296. 2 Hawk. P. C. *ubi ſupr.*

Alſo, this court, by the plenitude of its power, may as well proceed on indictments removed by *certiorari* out of inferior courts, as on thoſe originally commenced here, whether the court below be determined, or ſtill *in eſſe*, and whether the proceedings be grounded on the common law, or on (*b*) a ſtatute making a new law concerning an old offence. Dalſ. 25. 44 E. 3. 31. b. Cromp. Juriſdiction, 131.

(*b*) As the ſtatutes of forcible entries. 9 Co. 118. *vide* tit. *Forcible Entry and Detainer.*——And the ſtatute of Ph. & Ma. againſt perſons taking away females under the age of ſixteen years, from their guardians. Cro. Car. 465. 2 Inſt. 549. 2 Lev. 179. 2 Mod. 128. 2 Jones, 53. 3 Keb. 75. 94. 106. 273.

But the court of King's Bench will not give judgment on a conviction in the inferior court, where the proceedings are removed Carth 6. adjudged in the caſe of

one Baker, who was convicted at *Kingſton* upon *Hull*, for ſpeaking ſeditious words.

moved by *certiorari*, but will allow the party to waive the iſſue below, and to plead *de novo*, and go to a trial upon an iſſue joined in *B. R.*

2 Hawk. P. C. *ubi ſupr.* and ſeveral authorities there cited.

Nor can a record, removed into the King's Bench from an inferior court, regularly be remanded after the term in which it came in; yet if the court perceives any practice in endeavouring to remove ſuch record, or that it is intended for delay, they may in diſcretion refuſe to receive it, and remand it back before it is filed.

4 Inſt. 74. Raym. 364.

Alſo, by the conſtruction of the ſtatutes, which gave a trial by *niſi prius*, the King's Bench may grant ſuch a trial in caſes of treaſon or felony, as well as in common caſes, becauſe for ſuch trial, not the record, but only a tranſcript is ſet down.

(*a*) Extends not to high treaſon. Raym. 367.

And by the 6 *H.* 8. *cap.* 6. it is enacted, "That the King's "Bench have full authority, by diſcretion, to remand as well "the bodies of all (*a*) felons removed thither, as their indict-"ments, into the counties where the felonies were done; and to "command all juſtices of gaol-delivery, juſtices of the peace, "and all other juſtices, to proceed thereon after the courſe of "the common law, as the ſaid juſtices might have done, if the "ſaid indictments and priſoners had not been brought into the "ſaid King's Bench."

(*b*) 4 Inſt. 73. 9 Co. 118. b. (*c*) 4 Inſt. 73. (*d*) 4 Inſt. 74. Vaugh. 157. *Vide* tit. *Bail.*

The judges of this court, are the (*b*) ſovereign juſtices of *oyer* and *terminer*, gaol-delivery, conſervators of the peace, *&c.* as alſo the (*c*) ſovereign coroners; and therefore, where the ſheriff and coroners may receive appeals by bill, *a fortiori* they may; alſo, this court may (*d*) admit perſons to bail in all caſes according to their diſcretion.

2. Of its Juriſdiction in Civil Cauſes.

17 E. 3. 50. Roll. Abr. 536, 537. (*e*) For the expoſition of this ſtatute, and what ſhall be ſaid a common plea, *vide* 2 Inſt. 21, 22. Roll. Abr. 536, 537. (*f*) But theſe general words bind not the king, for he may bring an action there for a common plea. 2 Inſt. 23. 2 Roll. Rep. 290. (*g*) This extends both to the King's Bench and court of Exchequer. 2 Inſt. 23. 550. But *vide* 4 Inſt. 113.

At the firſt diviſion of the courts, the original intention appears plainly to have been to confine the juriſdiction of the court of King's Bench to matters merely criminal; and accordingly ſoon afterwards it was thus enacted by (*e*) *Magna Charta, cap.* 11. (*f*) *That common pleas ſhall not follow* (*g*) *our court, but be holden in a certain place:* Hence it is, that at this day this court cannot determine a mere real action.

2 Inſt. 23. 4 Inſt. 72. 113 & *vide* 2 Sand. 256. Show. P. C. 57.

But notwithſtanding common pleas cannot be immediately holden *in Banco Regis*, yet where there is a defect in the court, where by law they may be holden originally, they may be holden in *B. R.* As if a record come out of the Common Pleas by writ of error, there they may hold plea to the end; ſo, where the plea in a writ of right is removed out of the county by a *pone* in *B. R.* ſo, on a writ of meſne, replevin, *&c.*

So,

So, any action *vi & armis*, where the king is to have a fine, as ejectment, treſpaſs, forcible entry, &c. being of a mixed nature, may be commenced in *B. R.* 2 Inſt. 23.

Alſo, any officer or miniſter of the court, entitled to the privilege thereof, may be there ſued by bill in debt, covenant, or other perſonal action; for the act takes not away the privilege of the court. 2 Inſt. 23. 4 Inſt. 71. 2 Bulſt. 123.

And this begat the notion, that if a man was taken up as a treſpaſſer in the King's Bench, and there in cuſtody, they might declare againſt him, in debt, covenant, or account; for this likewiſe was a caſe of privilege, ſince the Common Pleas could not procure the priſoners of the King's Bench to appear in their court; and therefore, it was an exception out of the ſtatute of *Magna Charta*. 4 Inſt. 71. Cro. Car. 330.

(*a*) By the ſtatute of *Glouceſter*, *cap.* 8., None ſhall have writs of treſpaſs before juſtices, unleſs he ſwear by his faith that the goods taken away were worth forty ſhillings. (*a*) It was a maxim of the common law *quod placita de catallis, debitis, &c. quæ ſummam* 40 *s. attingunt, vel eam excedunt, ſecundum legem & conſuetudinem Angliæ ſine brevi regis placitari non debent.* 2 Inſt. 312. 6 E. 1. For expoſition whereof, *vide* 2 Inſt. 310., &c. put but for example; for ſo it is in debt, detinue, covenant, &c. 2 Inſt. 391. *Secùs*, in treſpaſs *vi & armis*, where the king is to have a fine, for a fine cannot be aſſeſſed but by a court of record. 2 Inſt. 391. F. N. B, 47. 3 Mod. 276.——So, in treſpaſs for taking charters concerning a freehold; for it is a maxim in law, that ſuch pleas ſhall not be in any court but of record. 2 Inſt. 391. F. N. B. 47. Raym. 293. This courſe of making an affidavit, by experience, was ſo dangerous and troubleſome, that it was forborne; and the defendant left to take ſuch exceptions as the common law gave him. 2 Inſt. 391. If upon nonſuit in an inferior court, 16 *s.* is given for coſts, by 23 H. 8. c. 15. debt lies for it in B. R., becauſe given by a ſubſequent ſtatute. Cro. Eliz. 96. Leon. 319. For as the inferior courts, which are not of record, regularly, cannot hold plea of debt, &c. or damage, unleſs under 40 *s.*; ſo the ſuperior, which are of record, cannot unleſs above 40 *s.* 2 Inſt. 391. [And though the demand, upon the face of the record exceed 40 *s.*, yet now, (for the law formerly was different. Oulton v. Perry, 3 Burr. 1592.) the court will, upon motion, ſtay the proceedings. Steane v. Holmes, 2 Bl. Rep. 754. Kennard v. Jones, 4 Term Rep. 495. Wellington v. Arters, 5 Term Rep. 64.]

3. Of its Juriſdiction, in reforming and keeping inferior Juriſdictions within their proper Bounds.

The court of King's Bench, as it is the higheſt court of common law, hath not only power to reverſe erroneous judgments for ſuch errors as appear the defect of the underſtanding, but alſo to puniſh all inferior magiſtrates, and all officers of juſtice, for wilful and corrupt abuſes of their authority againſt the obvious principles of natural juſtice; the inſtances of which are ſo numerous, and ſo (*b*) various in their kinds, that it ſeems needleſs to attempt to inſert them. 2 Hawk. P. C. c. 3. Vaugh. 157. Salk. 201. pl. 3. (*b*) Where the court of King's Bench called the ſheriff of *Middleſex*, and appointed that watches ſhould be ſtrictly kept in the ſuburbs, and about the new building, as a thing belonging to the care of this court. Sid. 218.

Judgment was given in an action in the Sheriff's Court of *London*, and afterwards it was removed to the Mayor's Court by a *levata querela*, within which court there are four attornies, and by excluſive cuſtom no other can be attorney there; and one of the attornies there was aſſigned to the plaintiff by the recorder; but becauſe the preſent mayor was concerned in the cauſe, the ſaid attorney, and all others refuſed to act for him: And by *Maynard*, no Buxton v. Singleton, Hil. 26 Car. 2. 3 Keb. 432. S. C.

no perſon can withdraw himſelf out of the juriſdiction of this court, which hath ſuperintendant power, if an officer refuſes to do his duty; and he mentioned a caſe cited by *Noy*, where the Biſhop of *Exon* refuſed to allow chriſm, or baptiſmal oil to the pariſhioners of *D.* and a *mandamus* was directed to him out of this court: So, in all caſes, as where the ordinary refuſes to grant probate of wills, *&c.* *Wild* was of the ſame opinion, that if any court refuſes to do juſtice, this court may command it; and in this caſe it will be in the power of the attornies to delay juſtice; and therefore the court ſent for the recorder and informed him of the matter, and declared, that this was good cauſe to forejudge the attorney, and that it was a dangerous matter to deny juſtice in ſuch a manner; and mentioned the Abbot of *Crowland's* caſe, 20 *E.* 4. where the liberties were ſeized becauſe he had not officers.

(B) How far its Preſence ſuſpends the Power of all other Courts.

H. P. C. 156. 9 Co. 118. 27 Aſſ. pl. 1. 3 Inſt. 27. 2 Hawk. P. C. c. 3.

THIS court being the ſupreme court of *oyer* and *terminer*, gaol-delivery and *eyre*, its preſence ſuſpends the power and avoids the proceedings of all other courts of the ſame nature in the county wherein it ſits, during its ſitting there, (*a*) eſpecially if the juſtices of ſuch courts have notice of its ſitting.

(*a*) Or without notice. *Per* 4 Inſt. 73. *Vide ſupr.*

4 Inſt. 73.

But if an indictment in a foreign county be removed before commiſſioners of *oyer* and *terminer* into the county where the King's Bench ſits, they may proceed; for that the King's Bench not having the indictment before them cannot proceed for this offence.

4 Inſt. 73. (*b*) That it is beſt if ſuch commiſſion bear teſte in term-time.

But if an indictment is found in the vacation-time in the ſame county in which the King's Bench ſits, and in term-time the King's Bench is adjourned, there may be (*b*) a ſpecial commiſſion to hear and determine it.

3 Inſt. 27. *& vide* Keilw. 152. Dyer, 286. pl. 45. 2 Hawk. P. C. c. 3.

(C) Of the Form of its Proceedings.

Vide head of *Proceſs*.

THE civil ſide in the King's Bench commences on a ſuppoſition of a treſpaſs committed by the defendant in the county where it reſides, and that he is taken up by proceſs of that court, as the ſovereign *eyre*, and committed to the marſhal, in which caſe he may be declared againſt in any civil action whatſoever.

The firſt proceſs therefore is a bill either real or feigned, and ſo called, becauſe its foundation was the Bill of Complaint in court touching the treſpaſs: on this is founded the *latitat*, which ſuppoſes that the defendant had eſcaped, and therefore iſſues in the

king's name, to apprehend the party wherever he may be found; for the king has an univerſal juriſdiction over all his ſubjects, and, conſequently, may call any of them that fled from the juſtice of his own court.

All proceſs or writs of appeal, and all proceſs on indictments removed hither by *certiorari* from a (*a*) foreign county, ought to be returnable *coram nobis ubicunque fuerimus* *.

2 Hawk. P. C. c. 3.

(*a*) But all proceſs upon bills of appeal againſt one in *cuſtodiâ mareſchalli*, ought to be returnable *coram nobis apud Weſtmonaſterium*. 2 Hawk. P. C. c. 3. Of indictments commenced in the King's Bench. 2 Hawk. P. C. c. 3. &——* And ſo are proceedings in civil ſuits, in this court, by original.

Alſo it hath been reſolved, That where the court proceeds on an offence committed in the ſame county wherein it ſits, the proceſs may be made returnable immediately; but that where it proceeds on an offence removed by *certiorari* from another, there muſt be fifteen days between the *teſte* and return of every proceſs.

9 Co. 118. Co. Lit. 134. Lev. 61. Sid. 72. 2 Roll. Abr. 626. 2 Inſt. 550.

Court of Common Pleas.

TOWARDS the *Norman* period, the power of the *juſticiar* was broken, and the *aula regis*, which was one great court, divided into four diſtinct courts, as we have them at this day in *Weſtminſter-Hall*; the Common Pleas was eſtabliſhed for the determination of (*b*) pleas merely civil, and was at firſt ambulatory, and removed with the king wherever he went; but by (*c*) *Magna Charta*, *cap.* 11. *Communia placita non ſequantur* (*d*) *curiam noſtram, ſed teneantur in aliquo certo loco.*

Maddox, c. 9.

(*b*) Becauſe the cauſes between ſubject and ſubject were to be there determined, therefore the ſtile of this court was *placita coram, &c.* or *Comm:n Pleas*; the word *pleas*, anciently ſignifying the convention of the ſtates *in campis, viz. germanice in* plaets; and becauſe in thoſe conventions of the ſtates all cauſes were heard, debated, and determined, therefore, by corruption they got the name of *pleas* from the court where they were decided: Hence the court that was particularly erected to hear and determine ſuch and ſuch cauſes, was called the Court of Pleas. Dufr. 395. (*c*) That this court was not created by or ſoon after the making of *Magna Charta*, *vide* Co. Lit. 71. b. 2 Inſt. 22. And for my Lord Coke's opinion of the antiquity of it, ſee the prefaces to the 8 & 9 Rep. and 8 Co. 145. [See alſo note 2. 13th edit. Co. Lit. 71. b. and Mad. Hiſt. Exchеq. fol. edit. 63. 539.] (*d*) Before this act, common pleas might have been held in B. R., and all original writs were returnable there. 2 Inſt. 21.

The juriſdiction of this court is founded on (*e*) original writs iſſuing out of the Chancery, which are the king's mandates for them to proceed on, to determine ſuch and ſuch cauſes; theſe writs iſſue out of Chancery, becauſe, when the King's Court was but one, the chancellor had the ſeal; and therefore, when they were divided, he ſealed all original writs. By this method the ſeal was a check on the other courts, to know what cauſe was there,

4 Inſt. 99.

(*e*) Bracton, lib. 3. f. 105. b. pl. 2. ſays, *ſine warranto juriſdictionem non habent*; and to the

ſame purpoſe is Fleta, lib. 2. c. 34. f. 85.

there, and likewiſe, that the (*a*) fines for having juſtice in the King's Court ſhould be anſwered incontinently before there were any proceedings.

Britton, 2. b. ſays, On the eſtabliſhment of this court, that they ſhall plead ſuch common pleas as we ſhall command them by our writ, ſo that the proceedings on our writs may be recorded. (*a*) In Maddox, 293 to 314., there are variety of inſtances of fines recorded for having juſtices in king's courts. See Anc. Dial. of Excheq. 56.

4 Inſt. 99.

But this is to be underſtood when the cauſe is between common perſons; for when an attorney, or any perſon belonging to the court, is plaintiff, he ſues by writ of privilege, and is ſued by bill, which is in nature of a petition; both which originally commence in the Common Pleas, and have no foundation in the Chancery.

4 Inſt. 99. (*b*) But the juriſdiction of each court is ſo well eſtabliſhed, that as at this day the court of King's Bench cannot be authoriſed to determine a mere real action; ſo neither can the court of Common Pleas, to inquire of felony or treaſon. 2 Hawk. P. C. 2. *Vide* tit. *Court of King's Bench.*

This court, my Lord *Coke* ſays, is the lock and key of the common law in common pleas; for herein are real actions, whereupon fines and recoveries paſs; as alſo all other real actions by original writs: alſo, common pleas mixt or perſonal, in divers of which the *King's Bench* has a (*b*) concurrent juriſdiction with this court.

4 Inſt. 99. Said to be adjudged by all the judges of *England*, Mich. 7 Jac. 1., and that there were ſeveral precedents to this purpoſe.

This court, without any writ, may upon a ſuggeſtion grant prohibitions, to keep as well temporal as eccleſiaſtical courts within their (*c*) bounds and juriſdiction, without any original or plea depending; for the common law, which in theſe caſes is a prohibition of itſelf, ſtands inſtead of an original.

(*c*) All prohibitions for encroaching juriſdiction iſſue as well out of the Common Pleas as King's Bench. Vaugh. 157. *per* Vaughan, Ch. Juſt.

Vaugh. 154. &c. *& vide* 2 Jones, 14. * So it may by the *habeas corpus* act, 31 Car. 2. c. 2.

This court, in term-time, may award a *habeas corpus* by the common law, * for any perſon committed for any cauſe under treaſon or felony, and thereupon diſcharge him, if it clearly appear by the return, that the commitment was againſt law, as being made by one who had no juriſdiction of the cauſe, or for a matter for which, by law, no man ought to be puniſhed.

So, by the ſame ſtatute, any judge of this court, may in the vacation award an *habeas corpus*.

4 Inſt. 100.

This court, upon an adjournment, upon a foreign voucher may hold plea likewiſe upon other foreign pleas, and upon general baſtardy, *ne unques accouple in loiale matrimony*, &c. for none but the king's courts, and no inferior court, ſhall write to the biſhop; ſo likewiſe upon ancient demeſne pleaded.

Court of Exchequer.

(A) Of the Nature and Antiquity of this Court.
(B) In what Caſes it has a Juriſdiction.
(C) Of the Manner of its Proceedings.

(A) Of the Nature and Antiquity of this Court.

THE court of (*a*) Exchequer is an (*b*) ancient court of record, for all matters relating to the revenue of the crown. 4 Inſt. 103.

(*a*) The common derivation of the word is from the old *French* word *eſchequier*, which ſignifies a *cheſs-board*, or *chequer-work*; and becauſe a cloth of that kind was laid upon the table upon which the accountants told out the king's money, and ſet forth their accounts, in the ſame artificial manner as is done in the cofferer's account at this day, it was called the Court of Exchequer. Maddox, 109. Spelm. Gloſſ. tit. *Scacc. Forteſc. on Monarchy*, the notes there, 117, 118. (*b*) It was formed from the Exchequer in *Normandy*, which was a court of ſovereign juriſdiction, and ſuperintended all manner of complaints, by and againſt the ſheriffs and bailiffs who exerciſed an ordinary juriſdiction, and whoſe duty it was to gather the duke's rents in each bailiwick, and to account for the ſame in this great court; and as in the court of *Normandy* the great officers of ſtate ſat as judges; ſo with us, before the diviſion of the courts, the great miniſters, as the juſticiar, conſtable, ſeneſchal, chantellor, and treaſurers, ſat in this court; but the treaſurer uſually preſided, as beſt acquainted with all matters relating to the revenue. Maddox, 109. *Vide* alſo for the antiquity of this court, and of its ſeveral officers, and their duty. 4 Inſt. 103. Sav. 48. 2 Inſt. 104, 105. 551.

In the (*c*) Exchequer there are ſeven courts, 1. The court of Pleas. 2. The court of Accounts. 3. The court of (*d*) Receipt. 4. The court of Exchequer (*e*) Chamber, being the (*f*) aſſembly of all the judges of *England*, for matters of law. 5. (*g*) The court of Exchequer-chamber, for errors in the court of Exchequer. 6. (*h*) The court of Exchequer-chamber, for errors in the King's Bench. 7. (*i*) The court of Equity in the Exchequer-chamber.

(*c*) The court of firſt fruits and tenths, erected *tempore* H. 8. was diſſolved by Qu. Mary, Parl. 1. ſeſſ. 2. c. 10., and the clergy diſcharged thereof by 2 & 3 Ph. & Ma. c. 4. But by the firſt of Eliz. c. 4., the firſt-fruits and tenths are re-united to the crown, but no court is revived, but the ſame to be within the rule, ſurvey, and government of the Exchequer, &c. 4 Inſt. 120.——The court of augmentations was erected by 33 H. 8. c. 39.; but Queen Mary, according to the power given her by the ſtatute 1 Ma. c. 10., by letters patent dated 23 January in the ſame year, diſſolved the ſame court: and the next day, by other letters patent, united the ſame to the Exchequer, which was utterly void, becauſe ſhe had diſſolved the ſame before. 4 Inſt. 118. Moor, 289. But *vide* Plow. 377. 542., and the Banker's caſe, where, by the opinion of Lord Sommers, the uniting of the court of Augmentations to the court of Exchequer was not abſurd, nor an impracticable thing. (*d*) This is the true centre, into which all the king's revenue and profit ought to fall. 2 Inſt. 197. (*e*) What cauſes are to be adjourned thither, and the method there, as to the arguing of them by the judges. 2 Bulſt. 146. Lev. 7. (*f*) 4 Inſt. 68. 110. (*g*) Erected by 31 Ed. 3. c. 12. (*h*) Erected by 27 Eliz. c. 8. (*i*) The lord treaſurer, chancellor, and barons of the Exchequer, are the judges of this court; and their juriſdiction is as large, for matters of equity, as that of the barons in the court of Exchequer, for the benefit of the king, by the common law. 4 Inſt. 118.

(B) In what Caſes it has a Juriſdiction.

BY the (a) ſtatute of *Rutland*, made 10 *E.* 1. (b) "No plea ſhall "be held in the Exchequer, unleſs it ſpecially concern the "king or his miniſters."

(a) It hath been doubted, whether this is an act of parliament, or an ordinance only, made by the king, for the better order of this court. Plow. 209. 4 Inſt. 113. ——But 2 Inſt. 551., it is ſaid, there is a writ in the *regiſter*, under title *Brevia de Statut.*, which recites the words of this ſtatute; and in the margent of the writ, *Statut. de Rutland* is quoted; ſo that without queſtion this ſtatute was made by authority of parliament. And 4 Inſt. 113. it is ſaid, it is entered in the parliament rolls, *& vide* 8 Co. 20. ——But 4 Inſt. 114. it is ſaid, the writ is founded upon the common law and cuſtom of the realm. (b) This is only in affirmance of the common law.

38 Aſſ. 20. Roll. Abr. 538.

The king's (c) farmer may ſue one that detains from him part of the poſſeſſions that he hath from the king, out of which the farm is to be paid, by which he cannot pay his farm to the king.

(c) So, of his debtor *. 2 Inſt. 551. ——* And by this fiction, the court of Pleas hath a concurrent juriſdiction with the Common Pleas and King's Bench in civil ſuits, (except *real actions* and *quare impedit.*)

4 Inſt. 112.

The debtor (d) of the king's debtor may ſue here by *quo minus.*

(d) That the leſſee of the king's leſſee is not entitled to the privilege of the Court of Exchequer. Owen, 38. —[But ſee the preceding note, and the ſame fiction is uſed on the equity ſide.]

Sav. 134. Agard and Cavendiſh, adjudged. Cro. Eliz. 326. S. C. *adjornatur.* Moor, 564. S. C. upon a writ of error *in Cam. Scacc.* reverſed as to the informer; for the penalty was given to him only that informed in the courts ſpecially named. 2 And. 127. S. C. reverſed accordingly.

An information for the queen and party, upon the ſtatute of liveries, 8 *E.* 4. *cap.* 2. was brought in the Exchequer; though by the expreſs words of the ſtatute it ought to be in the King's Bench, or Common Pleas, before juſtices of the peace, *&c.* and the Exchequer is not mentioned; yet it was adjudged it lay in this court, becauſe the queen was party, and there were no negative words; without which, (e) this, being a ſuperior court, ſhall have juriſdiction.

(e) Plow. Com. 208.

38 Aſſ. 20. Roll. Abr. 538.

If the king's farmer ſues in the Exchequer againſt a perſon for detaining tithes, parcel of the poſſeſſions to him leaſed in farm by the king, though the right of tithes comes in debate between them, yet the court ſhall not be ouſted of juriſdiction.

Lane, 100. Roll. Abr. 538. S. C.

If *J. S.* be parſon impropriate of *D.* and *B.* vicar there, and the king patron of the vicarage, and there be a debate between the parſon and vicar for tithes, the ſuit for theſe tithes ought to be in the Exchequer.

Lane, 39. Roll. Abr. 539. S. C.

If (f) a copyholder of the king's manor be ſued in the eccleſiaſtical courts for tithes, upon a ſuggeſtion *in Scaccario*, that he preſcribed to pay a certain *modus decimandi*, he ſhall have a prohibition there, and this *modus* ſhall be tried there.

(f) So, of the king's farmer. Lit. Rep. 525.

Lane, 55. Roll. Abr. 539. S. C.

If a man be amerced in the king's leet, and upon proceſs out of the Exchequer the bailiff diſtrain him for the amercement, and he bring treſpaſs, he ought to bring this action of treſpaſs in the office of pleas of the Exchequer; for the bailiff levied it as an officer of this court.

If

If an erroneous judgment be given in a *formedon* in a copyhold court, in the county where the king is lord, the party againſt whom the judgment is given may ſue, by petition or bill to the king, in the *Exchequer-chamber*, in the nature of a writ of falſe judgment, for the reverſal of this judgment; for as in the court of a common perſon, the proper ſuit for reverſal thereof is to the lord, by petition; ſo it is here to the king; and the Exchequer-chamber is the more proper to ſue to the king by petition than the Chancery, becauſe it concerns the king's manor. Roll. Abr. 539. Lane, 98. S. S. *adjornatur.*

An action of falſe impriſonment, or other action, may be brought againſt the under-ſheriff, in the Exchequer, though the ſheriff be the officer of the court, for the court takes notice of the under-ſheriff alſo. Roll. Abr. 539. Lane, 53. S. C. *Vide* tit. *Sheriff.*

If *A.* holds lands of the king by fealty and rent, and makes a leaſe thereof for years to *B.* and *C.* pretends a prior leaſe to him by *A.* though there is a rent iſſuing out of thoſe lands to the king, yet neither *B.* nor *C.* can ſue in this court by any privilege, in reſpect of the rent; for that the king can have no prejudice or benefit thereby; for, whether *B.* or *C.* prevails, the rent muſt be paid *. 4 Inſt. 118. * *Sed qu.* If he may not ſue here, by uſing the common fiction?

But if the king extends lands, as the lands of *A.* for the debt of *A.*, and leaſes the ſame to *B.* for years, reſerving rent, and *C.* pretends that *A.* had nothing in the land, but that he was ſeiſed thereof, *&c.* this is within the privilege of the court; (*a*) for if *C.* prevails the king loſes his rent. 4 Inſt. 118. (*a*) The king brought debt againſt a prior alien, and the prior had proceſs againſt *A.* who detained goods from him, without which he could not anſwer the king; and *A.* came and claimed the goods as his tithe as parſon of *B.*, and thereupon iſſue was taken for the king triable in the Exchequer. 4 Inſt. 111.

If the king leaſe to *A.* for years, rendering rent, the king may diſtrain in all other the lands of *A.* for his rent, yet *A.* hath no privilege for his other lands, to bring them within the juriſdiction of this court. 4 Inſt. 119.

If a man file a croſs bill in this court, he need not entitle himſelf to the juriſdiction of the court, becauſe the croſs bill is grounded upon another bill in court. Hard. 160.

So, if a man be ſued in the office of pleas, he may have an *Engliſh* bill to be relieved againſt that ſuit, without ſetting forth matters of juriſdiction. Hard. 160.

If *A.* is outlawed at the ſuit of *B.* and lands in the poſſeſſion of *A.* are extended, and *C.* claims title to them, and pleads to the inquiſition, if *C.* will bring an ejectment for them, it muſt be in this court, becauſe the king's revenue is concerned. Hard. 176. [And if an action be commenced in another court, and it appear from the pleadings, that the revenue is concerned in the event of it, the cauſe will be removed by ſuch court into the office of pleas of this court. Lamb v. Gunman, Parker, 143.]

[There cannot be an information upon a ſeizure to condemn goods by proclamation, but only in the court of Exchequer; and the reaſon is, becauſe, upon all ſuch ſeizures, every perſon concerned may have and know a certain place to reſort unto for his remedy in this kind. *Per* Parker, C. B. Park. Rep. 69.

Bercholt v. Candy, Bunb. 34, 5.

And the court of Exchequer will remove an action brought in another court for the ſeizure of a ſhip, though no information is filed in it; but after the information has been tried in it, and a verdict for the defendant, they will not remove an action brought in another for the ſeizure.

Penny v. Bailey, *id.* 309.

So, an action of trover againſt an officer for goods ſeized and condemned, and alſo a great coat, ſaddle, &c. was removed upon an affidavit that the goods, &c. were actually condemned, and that the great coat, &c. were thrown in only to give colour.

Berkley v. Walters, *id.* 306.

But this court would not remove an action for taking ropes and cordage againſt an officer who had ſeized two cables, one of which only was foreign, and actually condemned.]

Hard. 193. (*a*) Where not allowed to proſecute in Chancery. 2 Vern. 146. & *vide* Vern. 220. 469.

If *A.* hath title to lands under an extent out of the Exchequer, for debts in aid, he muſt bring his ejectment for them in this court, and having brought his ejectment for them in the (*a*) Common Pleas, upon motion, he was ordered to proſecute here.

Sav. 22. Hard. 334. [(*b*) By the privy ſeal, 1 Geo. 2., which empowers the barons to compound or diſcharge

By the 33 *H.* 8. *cap.* 39. § 57. the court of Exchequer has power to diſcharge all debts and duties due to the king, upon any equity diſcloſed; and it is by virtue of this act that they diſcharge recognizances; and it ſeems by the ſaid act, they may diſcharge penal laws made before this ſtatute; but all penal laws made after the ſtatute cannot be diſcharged, but muſt be compounded (*b*).

all forfeitures of recognizances, penalties, fines, iſſues, amerciaments, and other ſums of the nature of recognizances, fines, iſſues, and amerciaments, whereby the ſubjects are chargeable to his Majeſty, the court diſcharged a penalty fixed by ſtatute, Rex v. Dibbens, Parker, 165. So, fines judicially ſet have been compounded. Nov. 21ſt, 6 W. & M. cited *ibid.* And now by ſtat. 4 Geo. 3. c. 10., the barons are empowered to diſcharge without any *quietus*, recognizances eſtreated into the Exchequer for neglecting to attend as parties or witneſſes, or to proſecute indictments in any court of record, or at the aſſizes, &c. upon petition and affidavit on behalf of the perſons who may be impriſoned, or be liable to be impriſoned on the forfeiture of ſuch recognizances: but the act expreſsly provides that no diſcharge ſhall be given on ſuch petitions where any debt is due to the crown, other than by the recognizances ſo prayed to be diſcharged; nor in any caſes of defrauding the revenue by contraband trade, or aſſaulting the officers of the cuſtoms or exciſe in the execution of their duty, or any perſon lawfully aſſiſting them therein.]

(C) Of the Manner of its Proceedings.

Sav. 10. (*c*) By 13 & 14 Car. 2. c. 11., no writ of delivery ſhall

IF prohibited goods are ſeiſed, and proclamation made according to the courſe of the court, the owner ſhall not have them (*c*) delivered unto him upon ſecurity, without putting in (*d*) a plea, ſhewing cauſe why he ſhould have them.

be granted but upon good ſecurity, and for goods periſhable, or where the informer ſhall delay the trial. [And even for periſhable goods, it is diſcretionary in the court whether they will grant it or not. Parker v. Aſhton, Bunb. 21. Vincent v. De Laar, Parker, 196. What ſhall be ſuch a delay as ſhall authorize the awarding of a writ of delivery cannot be certainly ſtated: indeed, it ſeems to be generally agreed, that if a ſeiſure be in the vacation, and there be no information filed the term following, if it could have been tried in that term, that this would be a delay to ground a writ of delivery upon. Johnſon v. Sowers, Bunb. 30. Where it appeared in an information, that goods ſeized by the officer of commiſſioners of exciſe, were removed from one port to another without a permit, the court granted a writ of delivery, upon giving ſecurity, this being an unlawful importation, and therefore not within their juriſdiction. Warwick v. White, *id.* 106.] (*d*) Upon a bill in equity to diſcover the value of cordage ſeized to the king's uſe, the defendant, in his anſwer, made title to it as his own; and upon giving

giving ſecurity had a writ of delivery, though the king claimed the property as his own goods, and not as goods forfeited. Hard. 191. But it was ſaid, it would have been otherwiſe if the king's title had appeared by inquiſition or other record.

Before the 5 *R.* 2. ſo great care was taken of the king's revenue, that no man might ſue or plead for the diſcharge of any debt, account, or demand, in this court, without expreſs command, or letter of the great ſeal. 4 Inſt. 110.

But by 5 *R.* 2. *cap.* 9. this practice was declared illegal, and ordained, that the barons ſhould have power to hear every anſwer of every demand in this court; ſo that every perſon, *&c.* may plead, ſue, *&c.* without ſuing any writ or other commandment. 4 Inſt. 110.

In caſe of an outlawry, it is the courſe of the Exchequer to prefer an information, in nature of a trover and converſion, againſt him that hath the goods of the party outlawed. Mod. 90. *Per* Hale, Ch. Juſt.

Court of the Conſtable and Earl Marſhal.

IN the king's own court, eſtabliſhed by *William* the Conqueror, there were high officers, called the (*a*) Conſtable and (*b*) Marſhal, to whom chiefly belonged the conuzance of matters of honour, war, and peace; and therefore all foreign facts committed by the king's ſubjects were referred to them to determine, according to the law of nations and of arms. Maddox, 27. Fleta, lib. 2. c. 31. Spelm. Gloſſ.

(*a*) The name is of *Norman* extraction, and came from their *Comes Stabuli*; there was the like officer in *France*, called *Le Conſtable de Franc*, who was the great general of the army, whoſe power was confined to matters of war only: But it ſeems the conſtable of *England* had a civil as well as a military juriſdiction, eſpecially as to matters tranſacted in foreign parts: This office was created in *William* the Conqueror's time, and was anciently hereditary, and went to females: but, being an office of ſuch high power and dignity, it became formidable to the crown; and therefore H. 8. got rid of it, ſince which there has been no ſuch officer for a conſtancy, but only one created *pro hâc vice*. *Vide* the notes to Forteſ. on Monarchy, 130. 4^8 E. 3. 3. 13 H. 4. 4, 5. 4 Inſt. 127. Dyer, 285. (*b*) Of the ſeveral kinds of marſhals that were attendants on the king's court, and the nature of their offices, *vide* Maddox, 31, 32, 33. And that the marſhal who was joined with the conſtable, ſat as judge with him, and was called the earl marſhal, or marſhal of *England*, *vide* Fleta, lib. 2. c. 3. Maddox, 33. Show. P. C. 60. Co. Lit. 74. 4 Inſt. 123.

But to underſtand the nature and juriſdiction of this court, at preſent I ſhall conſider,

(A) Of the Manner of holding this Court: And herein, whether it can be holden by Commiſſion,

by the Earl Marſhal only; and whether it may be prohibited if it exceeds its Juriſdiction.

(B) In what Caſes it has a Juriſdiction.

(C) Of the Form and Manner of its Proceedings.

(A) Of the Manner of holding this Court: And herein, whether it can be holden by Commiſſion, by the Earl Marſhal only; and whether it may be prohibited if it exceeds its Juriſdiction.

IT ſeems (*a*) agreed, that during the lunacy of the earl marſhal, this court may be holden before commiſſioners deputed to exerciſe his office.

(*a*) So, reſolved in Parker's caſe, Lev. 230., and Sid. 353. S. C. *cont.* Twiſden, who held ſuch commiſſion illegal, and againſt the petition of right. 3 Car. 1. But *per* 2 Hawk. P. C. c. 4., ſuch commiſſions, founded on the plain neceſſity of the caſe, and intended to prevent a failure of juſtice, as to caſes of which no other court hath conuſance, ſeem not againſt the purview of the petition, which complains, that commiſſions had been granted for the trial of certain capital offences, and other outrages, by the martial law, &c.

It has been a matter greatly debated, whether this court can be holden before the lord marſhal only, without a conſtable; and thoſe who are for the negative, ground their opinions chiefly on the ſtatutes, (*b*) ancient law books, and records, which ſeem to mention the conſtable as the only, or at leaſt as the principal judge of this court.

(*b*) To this purpoſe are 13 H. 4. 46. 37 H. 3. 5. a. 48 E. 3. 3. 37 H. 6. 20. 30 H. 6. 6. 13 H. 4. 5. Ruſhworth's Coll. vol. 1. 107. S. P. C. 65. 2 Inſt. 51. 3 Inſt. 123. Co. Lit. 74. b. Cromp. Jur. 82.

But notwithſtanding this, the conſtant practice, eſpecially ſince the extinguiſhment of the hereditary office of conſtable in *Henry* the Eighth's time, of holding this court by the earl marſhal only, and the general notions of our (*c*) judges and lawyers, of the legality of ſuch court, ſeem in a great meaſure to eſtabliſh a contrary opinion, and that at this day it may be holden before the earl marſhal only.

Hob. 121. Roll. Rep. 87. 2 Lev. 134. Show. 153. Sid. 353. Lev. 20. Show. P. C. 60, 61.

(*c*) That in the reigns of Queen *Elizabeth* and *James* the Firſt, the judges aſſiſted in this court, when holden before the earl marſhal only. Show. P. C. 60. 4 Inſt. 126.—*& vide* 2 Hawk. P. C. c. 4. That according to the common uſage of other courts, which generally may be holden before one judge, in the abſence of the reſt, it ſeems a reaſonable conſtruction to allow this court to be ſo holden. [See upon this point a letter written ſoon after the Revolution by Dr. *Plott* to Lord *Sommers*, then attorney-general. Hearn's Diſc. of Eminent Antiq. 2d ed. vol. 2. p. 250. Co. Lit. 72. b. note 1. 13th edit.]

But it is agreed, that appeals of capital matters cannot be brought before the marſhal alone, becauſe 1 *H.* 4. *cap.* 14. which ſhews how ſuch appeals ſhall be brought, is expreſs, that they ſhall be tried and determined before the conſtable and marſhal of *England*.

2 Hawk. P. C. c. 4.

If

If this court, holden before the earl marſhal (*a*) only, exceeds its juriſdiction, it has been (*b*) reſolved, that it may be prohibited by the common law courts.

(*a*) But if before the conſtable and marſhal, Q.

& vide Show. P. C. 60, 61. (*b*) In Oldis's caſe, Show. P. C. 61. 65. 2 Hawk. P. C. c. 4.

(B) In what Caſes it has a Juriſdiction.

THE juriſdiction of this court is declared by the 13 *R.* 2. *cap.* 2. by which it is recited, "That the commons made "grievous complaints that the court of the conſtable and mar- "ſhal daily incroached contracts and treſpaſſes, and many other "actions at the common law; *and thereupon it is declared*, That "to the conſtable it appertaineth to have conuſance of contracts "touching deeds of arms, and of war out of the realm, and alſo "of things which touch war within the realm, which cannot be "determined nor diſcuſſed by the common law; with other "uſages to the ſame matters appertaining, which other con- "ſtables before have reaſonably uſed; joining to the ſame, that "every plaintiff ſhall declare plainly his matter in his petition, "before that any man be ſent to anſwer thereto; and if any will "complain that any plea is commenced before the conſtable and "marſhal, that might be tried by the common law, he ſhall have "a privy ſeal to the ſaid conſtable and marſhal, to ſurceaſe till "it be diſcuſſed by the king's counſel, if the matter of right per- "tain to that court, *&c.*"

Vide 8 R. 2. c. 5. 2 Hawk. P. C. c. 4.

And it is further enacted by 1 *H.* 4. *cap.* 14. "That all appeals "of things done within the realm ſhall be tried and determined "by the good laws of the realm; and that appeals of things "done out of the realm ſhall be tried and determined before the "conſtable and marſhal, and that no appeal be made or purſued "in parliament."

Vide the ſeveral ſtatutes 26 H. 8. c. 13. 35 H. 8. c. 2. 5 & 6 E. 6. c. 11.

1 & 2 Ph. & M. c. 10., and 2 Hawk. P. C. c. 4. as to its juriſdiction at this day, with reſpect to things done beyond ſea.

As the juriſdiction of this court is reſtrained to things touching war within the realm, it can have no juriſdiction as to a civil matter, and therefore cannot proceed againſt a perſon for bare ſcandalous words, reflecting on the honour and gentility of families.

Ruſhworth's Coll. Part 2. vol. 2. 1055. 2 Hawk. P. C. c. 4.

Alſo, though the marſhaling of publick funerals belongs to the heralds, who are the attendants of this court, and no other perſons, without their licence, can lawfully intermeddle in it; yet it ſeems to be ſettled, that this court cannot puniſh thoſe who ſhall be guilty of ſuch an incroachment, becauſe it is a proper ground for an action on the caſe; and by the above ſtatutes, this court has nothing to do with matters which may be determined by the common law,

Lev. 230. Sid. 353. Show. Rep. 353. Show. P. C. 58. 4 Mod. 128.

But by the conſtant practice, and the general opinion of lawyers, it ſeems at this day to have a juriſdiction as to diſputes concerning

2 Hawk. P. C. c. 4.

cerning precedency and points of honour, and ſatisfaction therein; and may proceed againſt perſons for falſely aſſuming the name and arms of honourable perſons, &c.

(C) Of the Form and Manner of its Proceedings.

3 Inſt. 125. 2 Hawk. P. C. c. 4.

THIS court is to be governed by its own uſages, as far as they go, and in other caſes, by the civil law; but ſince it is no court of common law, no condemnation in it cauſes any forfeiture of lands, or corruption of blood; neither can an error in it be remedied by writ of error, but only by appeal to the king; yet the judges of the common law take notice of its juriſdiction, and give credit to a certificate of its judges.

Hutton, 3.

It is made a doubt, whether the king hath any remedy in this court againſt an offender, by way of indictment or information by the attorney general.

Of the Court of the Juſtices of Oyer and Terminer, and Gaol-Delivery.

Co. Lit. 293. 4 Inſt. 184. Bacon's Elem. 15, 16.

JUSTICES of aſſiſe, *oyer* and *terminer*, and gaol-delivery, were appointed in the room of the juſtices in *eyre*, who formerly went their circuits once in ſeven years, and ſuperſeded the power of the ſheriff's torn wherever they came, and tranſacted all manner of civil and criminal buſineſs; theſe were part of the king's court, who exerciſed their juriſdiction in the ſeveral counties of the kingdom, and, by communicating with the king's court, kept an uniformity in the law.

(A) Of the Manner of authorizing Commiſſioners of *Oyer* and *Terminer*, and Gaol-Delivery: And herein of the Determination of their Power.

(B) Of their Juriſdiction when appointed.

(C) Of the Form of their Proceedings, and holding their Courts.

(A) Of the Manner of authorizing Commiſſioners of *Oyer* and *Terminer*, and Gaol-Delivery: And herein of the Determination of their Power.

AS all juſtice proceeds from the king, ſo theſe commiſſions muſt receive their authority from the (*a*) prerogative of the crown; and this the common law requires, and it is alſo expreſsly enacted by the 27 *H.* 8. *cap.* 24. Lamb. B. 1. chap. 5. Co. Lit. 114. Lev. 219.

(*a*) That the king is the proper judge, and may determine to whom, and upon what occaſions, ſuch commiſſions may be granted. 2 Inſt. 419.

The common (*b*) form of theſe commiſſions is to authorize the commiſſioners, or three or four of them, of which number ſuch or ſuch a perſon is to be one, to inquire, by the oaths of twelve men, of all treaſons, felonies, and miſdemeſnours, *&c.* in ſuch and ſuch place, and to hear and determine the ſame at ſuch times and places as ſuch commiſſioners ſhall appoint, *&c.* for which purpoſe the king acquaints them, that he has ſent a writ to the ſheriffs of ſuch counties, commanding them to return juries before them at ſuch days and places as ſhall be notified by them, *&c.* 4 Inſt. 162. Crom. Jur. 131. Plow. 384. 2 Inſt. 419. 2 Hawk. P. C. c. 5. § 30.

(*b*) Whether ſuch juſtices may be appointed as well by writ as by commiſſion; and for the difference *vide* 2 Hawk. P. C. c. 5. § 2. —— That the court of ſeſſions in *London* does not differ from other commiſſions of *oyer* and *terminer*, &c. Vaugh. 140.

The validity of ſuch commiſſions muſt be determined according to their conformity to ancient precedents; and therefore a commiſſion to a corporation, appointing ſome of its principal members to be juſtices of gaol-delivery, together with thoſe whom the king ſhall appoint from time to time, was adjudged void; for ſuch an authority, depending on the precarious appointment of other juſtices, is not agreeable to the known forms of ſuch commiſſions. But new commiſſions of *oyer* and *terminer* may be added to the former by a writ, or commiſſion of aſſociation, which, ſetting forth the purport of the former commiſſion, adds new commiſſioners to thoſe appointed by it; provided ſuch new commiſſioners attend at the times and places appointed by the former; and it is uſual to direct another writ to the former juſtices, commanding them to admit ſuch new juſtices as their aſſociates; but ſuch writ (*c*) binds not ſuch juſtices to admit the new ones, unleſs they alſo produce one directed to themſelves; and ſuch writ to the perſons aſſociated is always patent, but that to the others to admit them is cloſe. And. 296. 2 Hawk. P. C. c. 5. § 2. Reg. 124. F. N. B. 111. H. P. C. 159. 2 Hawk. P. C. c. 5. § 16.

(*c*) The king can grant but one patent of aſſociation to one commiſſion. 2 Hawk. P. C. c. 5. § 16. And Q. Whether a commiſſion of aſſociation, relating only to a ſpecial cauſe, can aſſociate the perſons named in it to thoſe appointed by a general commiſſion. 2 Hawk. P. C. *ubi ſupra*.

Upon the death of ſuch commiſſioners, after an indictment taken before them, and proceſs thereupon, a new commiſſion may authorize others to proceed, and a writ ſhall go to the executors of the firſt commiſſioners, to ſend the records and proceſſes before the new ones. Reg. 128. F. N. B. 111. 2 Hawk. P. C. c. 5. § 17.

After

Reg. 124. F. N. B. 111. 2 Hawk. P. C. c. 5. § 18.

After a writ of aſſociation, it is uſual to make out a writ of *ſi non omnes*, which authorizes ſuch a number of the juſtices appointed by the former commiſſions to proceed, if all of them cannot conveniently be preſent.

But for theſe *vide* 2 Hawk. P. C. c. 5. § 22., &c.

There are ſeveral ancient precedents of ſpecial commiſſions of *oyer* and *terminer*, as thoſe for inquiring and determining ſome particular enormous violence done to the party who ſues it out, *&c.*

2 Hawk. P. C. c. 5. § 21., and ſeveral authorities there cited.

As to the difference between a commiſſion of *oyer* and *terminer* and gaol-delivery, it may be proper to obſerve, that where the ſame perſons at the ſame time are both commiſſioners of *oyer* and alſo of gaol-delivery, they may proceed by virtue of the one commiſſion, in ſuch caſes wherein they have no juriſdiction by the other, and execute both at the ſame time, and make up their records accordingly.

4 Inſt. 163. H. P. C. 162. [By 25 Geo. 3. c. 18., and 32 Geo. 3. c. 48., the juſtices of *oyer* and *terminer* and gaol delivery of *Newgate* for the county of *Middleſex*, and the juſtices of the peace for that county, are empowered to continue and proceed in a ſeſſion of gaol-delivery, of the peace, and of *oyer* and *terminer*, notwithſtanding the happening of the eſſoign day of term, or the ſitting of the court of King's Bench at *Weſtminſter*, or elſewhere in the county of *Middleſex*.]

These commiſſions may be ſuſpended by the court of King's Bench ſitting in the ſame county; but the juriſdiction of the juſtices is revived of courſe, when the ſaid court no longer ſits there: alſo, their authority may be ſuſpended by a writ of *ſuperſedeas*, which is grantable on proof that their commiſſion was unduly granted; in which caſe their power may be reſtored by a writ of *procedendo*; but a commiſſion once (*a*) determined cannot be revived, nor can the juſtices be authorized a-new without another commiſſion.

(*a*) That ſuch commiſſion may be determined expreſsly or impliedly, and for the ſeveral ways it may be done, *vide* 2 Hawk. P. C. c. 5. § 4., &c.

(B) Of their Juriſdiction when appointed.

H. P. C. 158. 4 Inſt. 164. Bro. Coron. 179. 32 Co. 32.

JUSTICES of gaol-delivery may, by the (*b*) common law, proceed on any indictment of felony or treſpaſs, found before any (*c*) other juſtices, againſt any perſon in the gaol, mentioned in their commiſſion, and not determined.

(*b*) And by 4 E. 3. c. 2. the juſtices aſſigned to deliver gaols ſhall have power to deliver the ſame gaols of thoſe that ſhall be indicted before the juſtices of the peace. (*c*) But juſtices of *oyer* and *terminer* have regularly no ſuch power. 2 Hawk. P. C. c. 5. § 32.

Cro. Eliz. 90. 179. And. 111.

It ſeems the better opinion, that juſtices of gaol-delivery may take indictments againſt any perſons within their commiſſion.

2 Hawk. P. C. c. 6. § 2. H. P. C. 158. 4 Inſt. 168.

Vide 2 Hawk. P. C. c. 6. § 4.

Alſo, that they may, by virtue of a general commiſſion, deliver the gaol of perſons committed for treaſon.

Vide 2 Hawk. P. C. c. 6. § 5.

But juſtices of gaol-delivery have no power to proceed againſt any, except thoſe who are in actual cuſtody; and therefore they have no more to do with one let to mainprize, than if he were at large.

Juſtices

Juſtices of gaol-delivery have not only power to diſcharge priſoners acquitted before them on a trial, but alſo (*a*) all ſuch againſt whom, on proclamation, no evidence ſhall appear to indict them: Alſo, juſtices of gaol-delivery may award execution againſt priſoners outlawed for felony before juſtices of peace; and though their commiſſion be in ſtrictneſs determined after the end of their ſeſſion, yet may they, after their ſeſſion, order the reprieve or execution of the perſons condemned before them. 2 Hawk. P. C. c. 6. § 6. 8.

(*a*) Which neither juſtices of the peace, nor juſtices of *oyer* and *terminer* can do. 2 Hawk. P. C. c. 5. § 6.

By the 4 *E.* 3. *cap.* 2. it is enacted, "That juſtices aſſigned to "deliver gaols ſhall have power to inquire of thoſe in whoſe "ward perſons indicted before wardens of the peace ſhall be, if "they make deliverance, or let to mainprize any ſo indicted "which be not mainpernable, and to puniſh them if they do any "thing againſt this act." That by the common law they may puniſh thoſe who unduly bail priſoners.

By the 1 & 2 *Ph.* & *M.* "If any juſtice of peace of the *quo-* "*rum*, or coroner, ſhall offend againſt that ſtatute, either as to "bailing priſoners or taking their examinations, or the informa- "tion of thoſe that bring them before them, or not putting the "ſame in writing, or not certifying them to the next gaol- "delivery, or not putting in writing the evidence to a jury on a "coroner's inqueſt of murder or manſlaughter, or not binding "over material witneſſes, or not certifying ſuch evidence and "ſuch recognizances, the juſtices of gaol-delivery ſhall, on due "proof by examination, ſet ſuch fine for every ſuch offence as "ſhall ſeem meet." 2 Hawk. P. C. c. 5. § 9. 6.

By the 4 *E.* 3. *cap.* 5. "Juſtices of gaol-delivery ſhall puniſh "ſheriffs and gaolers refuſing to take felons into their cuſtody "from conſtables and townſhips, without being paid for ſuch "receipt."

By the 1 *E.* 6. *cap.* 7. "Where any perſons ſhall be found "guilty of treaſon or felony, for which judgment of death may "enſue, and ſhall be reprieved to priſon (*b*) without judgment at "that time, thoſe perſons who ſhall at any (*c*) time after be "aſſigned juſtices (*d*) to deliver the gaol where ſuch perſons "ſhall remain, ſhall have authority to give judgment of death "againſt ſuch perſons, as the ſame juſtices before whom they "were found guilty might have done, if their commiſſion of "gaol-delivery had continued." (*b*) But ſuch ſubſequent juſtices have no power to award the execution of perſons condemned by former juſtices, and reprieved by them.

Dalt. 20. Dyer, 165. 2 Hawk. P. C. c. 6. § 19. (*c*) Extends to ſubſequent commiſſioners authoriſed by a ſucceſſor, as well as to thoſe authoriſed by the ſame king. 7 Co. 31. Dalt. 20. (*d*) Extends not to juſtices of *oyer* and *terminer*. 12 Co. 33. [See 8 G. 3. c. 15. *infra*. vol. 3. 141.]

(C) Of the Form of their Proceedings and holding their Courts.

IF a commiſſion of *oyer* and *terminer* be awarded to certain perſons to inquire, &c. at ſuch a place, they can neither open it at another, nor (*e*) adjourn it thither, nor give judgment there; and if they do, their proceedings will be *coram non judice*; yet 2 Hawk. P. C. c. 5. § 14., and ſeveral authorities

there cited. (c) That it is moſt proper to enter their adjournments in the *preſent tenſe*; but by the multitude of precedents the entry of them in the *præter tenſe* is good. Raym. 115. 2 Hawk. P. C. c. 5. § 15. But an adjournment, of which no entry appears, ſhall not be intended to have been made. Sid. 348. 2 Keb. 284. 292.

juſtices appointed *pro hac vice* may adjourn from one day to another, though their commiſſion have no words to that purpoſe.

By the 9 *E.* 3. *cap.* 5. "Juſtices of aſſiſe, gaol-delivery, and of "*oyer*, ſhall ſend their records and proceſſes determined and put "in execution, to the *Exchequer* at *Michaelmas* every year; and "the treaſurer and chamberlains for the time being, having the "ſight of the commiſſions of ſuch juſtices, ſhall receive the ſame "records and proceſſes of the ſaid juſtices under their ſeals, and "keep them in the treaſury as the manner is; ſo that the juſtices "firſt take out the eſtreats of the ſaid records and proceſſes, to "ſend to the Exchequer, as they were wont before."

By the 6 *R.* 2. *cap.* 9. "Juſtices aſſigned to take aſſizes, and "deliver gaols, ſhall hold their ſeſſions in the principal towns of "the counties where the ſhire courts were then holden, or after "ſhould be holden."

[By *ſt.* 19 *Geo.* 3. *c.* 74. § 70. "Whenever the courts of aſſiſe, "*niſi prius*, *oyer* and *terminer*, or gaol-delivery, for any county "at large in *England*, ſhall be holden in or near any city or town "that is alſo a county of itſelf, and at the ſame time with the "like or any of the like courts for the ſaid city or town, the "lodgings of the judge or judges ſhall be conſtrued and taken to "be ſituate both within the county at large, and alſo within the "county of ſuch city or town, for the purpoſe of carrying this "act into execution, and of tranſacting the buſineſs of the aſ-"ſizes for ſuch county at large, and for the county of ſuch city "or town, during the time that ſuch judge or judges ſhall con-"tinue therein for the execution of their ſeveral commiſſions."]

Of the Court of the Juſtices of Aſſize and Niſi Prius.

4 Inſt. 158. Cromp. Jur. 204.

JUSTICES of (a) aſſize derive their authority from the commiſſion, by which they are empowered to inquire of all diſſeiſins, and to reſtore ſuch, as have been diſſeiſed of their lands or tenements, to the poſſeſſion of them, by trial at one aſſiſes.

(a) Are ſo called from the writ of aſſize; but for this *vide* tit. *Aſſize*, and 4 Inſt. 158. Co. Lit. 153.

To theſe, by writ of *niſi prius*, directed to the judges or commiſſioners of aſſiſe, and clerk of aſſiſe, is annexed an authority and juriſdiction of trying ſuch iſſues as are joined in the courts at *Weſtminſter*, in their proper counties; and this method was introduced after the laying aſide of the juſtices itinerant, and was contrived for the eaſe of the ſubject, that the jury and witneſſes might not be obliged to come out of their proper counties. 2 Inſt. 424. 4 Inſt. 159.

The manner of contriving it was, to direct the *venire*, *diſtringas*, or *habeas corpora juratorum*, to return the jury at ſome day the next term, unleſs the juſtices *prius tali die & loco venerint*; there were no iſſues returned on the *venire* to make them appear at *niſi prius*; yet it was ſo much a greater difficulty to them to appear afterwards at *Weſtminſter*, which if they did not, the *diſtringas* iſſued, that it had its effect to convene them in their proper counties; the writ was contrived to command them to come into court, becauſe it would have been improper for the court to have commanded them to come into any other place; ſo that their appearance before the juſtices of aſſiſe, is an excuſe for their non-appearance in *Bank*; but if they did not appear at the aſſiſe, nor at *Weſtminſter*, then iſſued a *habeas corpus* and *diſtringas* to bring them up. 4 Inſt. 159.

The day at *niſi prius* and in *Bank* are in conſideration of law the ſame, becauſe the writ of *niſi prius* which gives authority to the judge to try the cauſe in the county, is inſtead of the court; and therefore the *poſtea* certified by him on the day of *Bank* is the ſame as if the jury had come up to the court, and the trial had been had in open court. 6 Mod. 9.

The juſtices have large juriſdiction, by ſeveral ſtatutes, as to all criminal matters, and may puniſh offences in ſheriffs, gaolers, and other officers, *&c.* which ſee in 2 *Hawk. P. C. c.* 7.

Of the Court of Seſſions of Juſtices of the Peace.

A COURT of ſeſſions of juſtices of peace is (*a*) an aſſembly of two or more, whereof one is of the *quorum*, at a day and place before appointed by them, in order to inquire of, hear, and determine matters within their juriſdiction. Lamb. Book 4. c. 2. *Vide* tit. *Juſtices of the Peace.*

(*a*) Purſuant to the ſtatute 34 E. 3. c. 1. by which it is enacted, that two or three of the beſt reputation in the counties ſhall be aſſigned keepers of the peace by the king's commiſſion, and at what time need ſhall be, the ſame with other wiſe and learned in the law ſhall be aſſigned by the king's commiſſion, to hear and determine felonies and treſpaſſes done againſt the peace in the ſame counties, and to inflict puniſhment reaſonably, according to law and reaſon, and the manner of the deed.

Any

Lamb. B. 4. c. 20. (a) That ſuch precept can only be ſuperſeded by writ out of Chancery. Lamb. B. 4 c. 2.

Any juſtices, whereof one is of the *quorum*, may direct their (a) precept under their *teſte* to the ſheriff, for the (b) ſummons of ſuch a ſeſſions, thereby commanding him to return a grand jury, and to warn all (c) ſtewards, conſtables, and bailiffs of liberties, to be preſent before them or their fellow juſtices, at ſuch a day and place, and alſo to attend there himſelf, and to proclaim in proper places that ſuch ſeſſions will be holden.

Crompt. Juriſ. 122. (b) That a ſeſſions may be holden without any ſummons, as to proceedings on indictments, or on other particular occaſions which need no attendance of grand jurors or officers. Lamb. Book 4. c. 2. 2 Hawk. P. C. c. 8. § 52. 4 Burn. 191. (c) Who are all obliged to attend, on pain of being amerced at the diſcretion of the juſtices. 2 Hawk. P. C. c. 8. § 52. As is the keeper of the houſe of correction, *vide* 7 Jac. 1. c. 4.

Lamb. B. 4. c. 3. Cromp. 122. 2 Hawk. P. C. c. 8. § 57. (d) But in other inſtances, any juſtice of peace may require his fellow to find ſureties of the peace; for matters of this kind require an immediate remedy. 2 Hawk. P. C. *ubi ſupra*.

Juſtices of the peace, in their ſeſſions, have no juriſdiction one over the other, according to that rule *inter pares non eſt poteſtas*; therefore, they cannot amerce a juſtice for his non-attendance, nor bind a brother juſtice to his good behaviour for uſing ſuch expreſſions (d) in court, for which, if he were a private perſon, he might be committed, or bound to his good behaviour.

Lamb. B. 4. c. 19, 20. 2 Salk. 474. pl. 11. 2 Hawk. P. C. c. 8. § 58.

Seſſions holden for the general execution of the authority of juſtices of peace, and which are uſually holden in the four quarters of the year, are called general ſeſſions; and a ſeſſions holden on a ſpecial occaſion, for the execution of ſome particular branch of the authority of juſtices of peace, is called a ſpecial ſeſſions.

(e) 2 Leach's Hawk. P. C. c. 8. § 58. n. Ca. temp. Hardw. 80. (f) 2 Str. 832. 865. (g) Andr. 105. (h) 2 Lev. 229.

[When the juſtices are once legally convened, they cannot adjourn any matter depending before them, without expreſsly adjourning the ſeſſions alſo (e); which adjournment muſt ſhew when the original ſeſſions commenced (f). There is indeed no neceſſity to ſet out all the particular adjournments (g); though when a warrant is iſſued for taking any one, it muſt be ſhewn that the ſeſſions continued by adjournment till the taking (h).

(i) 4 Burn. Juſt. 184. (k) Ca. temp. Hardw. 81.

They cannot refer any ſubject of their inquiry to the determination of the judges of aſſiſe, without the conſent of the parties (i); for they are bound to make a final judgment themſelves (k).

(l) Ca. temp. Hardw. 79. (m) 2 Str. 1263.

When they proceed upon indictments, as a court of record at common law, their proceedings muſt contain the formal and regular continuances (l); for the ſeſſions once dropped cannot be reſumed (m).

2 Salk. 606.

The ſeſſions being conſidered as one day, the juſtices may alter their judgments during the continuance of it.

1 Burr. 245. 2 Salk. 477.

Upon appeals their diſcretion is co-extenſive with that of the two juſtices, and they need not give the reaſon upon which their opinion is founded.

(n) Cowp. 369. (o) 3 Burr. 1366.

The ſeſſions may proceed by information on 5 *Eliz.* for exerciſing a trade, (n) *&c.* But they cannot make an original order for late overſeers to pay over monies to their ſucceſſors (o); nor can they make

make a new ſcavenger's rate (*a*), or ſet aſide an aſſignment of an apprentice bound out by the juſtices (*b*), nor have they cognizance over the bailiff of a corporation for not qualifying (*c*).]

(*a*) *Id.* 1460.
(*b*) 1 Str. 40.
(*c*) Say. Rep. 138.

Of the Eccleſiaſtical Courts.

THE church, before the converſion of *Conſtantine*, was a diſtinct and independent ſociety from the ſtate, and, as ſuch, it was neceſſary they ſhould have rules and orders among themſelves; for the better government of the body of chriſtians, the power of judicature was placed in the biſhops, who had by their wiſdom and gravity obtained an authority in the church, and who uſed to ſend abroad their miniſters to propagate the goſpel in their ſeveral precincts; and therefore they determined all controverſies among them, which could not be carried into a heathen court without great ſcandal to the quiet and peaceable way of living which was the glory of the primitive chriſtians; and this they founded on the direction of St. *Paul* himſelf, *Dare any of you, having a matter againſt another, go to law before the unjuſt, and not before the ſaints?* After the converſion of the emperors, their zeal for chriſtianity made them allow the biſhops the ſame juriſdiction; but then thoſe biſhops, in their ſentences, followed the laws of their country: but, when the pope afterwards pretended to infallibility, he would no more conform his decrees to the laws of particular ſtates and kingdoms; and, therefore, thoſe ſtates were under a neceſſity of exerting their original right and power of judicature: Hence it is truly ſaid, that (*d*) the ſpiritual juriſdiction, within theſe kingdoms, is derived from the king, and that ſuch juriſdiction when exceeded, is ſubject to the controul of the king's temporal courts.

Godolph. *Repert. Canonic.* 129 to 133. 5 Co. 1. Cawdry's caſe.

(*d*) Roll. Abr. 361. Dav. 97.

But, for the better underſtanding the juriſdiction allowed the ſpiritual court at this day, we ſhall conſider,

(A) The ſeveral Eccleſiaſtical Courts which exerciſe a Juriſdiction: And herein,

1. Of the Court of Convocation.
2. Of the Court of Arches.
3. Of the Prerogative Court.
4. Of the Court of Audience.

5. Of the Court of Faculties.
6. Of the Court of Peculiars.
7. Of the Conſiſtory Courts.
8. Of the Court of the Archdeacon.
9. Of the Court of Delegates.
10. Of the Court of Commiſſioners of Review.

(B) Of appealing from an inferior to a ſuperior Court.

(C) Of citing one out of his own Dioceſe: And herein of the Boundaries of their Juriſdiction.

(D) In what Caſes the Eccleſiaſtical Courts are allowed to have a Juriſdiction.

(E) How they are to proceed as to thoſe Matters in which they have a Juriſdiction, otherwiſe will be controuled by the Temporal Courts.

(A) The ſeveral Courts which exerciſe a Juriſdiction: And herein,

1. Of the Court of Convocation.

THE *convocation* is commonly called a national ſynod, convened by the king's (*a*) writ, directed to the archbiſhops of *Canterbury* and *York*, requiring them to ſummon every biſhop, dean, and archdeacon, a proctor for the chapter, and two proctors for the clergy of each dioceſe in the province of (*b*) *Canterbury*; but in *York*, two proctors for each archdeaconry.

(*a*) That they were always aſſembled by the king's writ, *vide* 4 Inſt. 323. Godolph. Repert. 99. and the 25 H. 8. c. 19. the act of ſubmiſſion of the clergy, by which it is expreſsly declared, that they can only aſſemble by virtue of the king's writ, *&c.* (*b*) The Provincial Synod of *Canterbury* conſiſts of twenty-two biſhops, twenty-two deans, twenty-four prebendaries, fifty-four archdeacons, and forty-four clerks, repreſenting the dioceſan clergy. Godolph. Repert. 98.——The archbiſhop of *York*, at the ſame time and in like manner, holds a convocation of all his province, conſtantly correſponding, debating and concluding the ſame matters with the Provincial Synod of *Canterbury*. Godolph. Repert. 98.

4 Inſt. 322. This aſſembly are to meet at the time and place appointed by the king's writ, and conſtitute an eccleſiaſtical parliament, the archbiſhop and his ſuffragans as his peers ſitting together, and compoſing one houſe, called the upper houſe of convocation; the deans, archdeacons, a proctor for the chapter, and two proctors for the clergy, the lower houſe; in which they chuſe a prolocutor in the nature of a ſpeaker of the houſe of commons.

Their

Their juriſdiction is in matters of (*a*) hereſy, ſchiſms, and other mere ſpiritual and eccleſiaſtical cauſes; but they cannot meddle with any matters relating to the laws of the land, or the king's crown or dignity; and in thoſe in which they have a juriſdiction they are to proceed *juxta legem divinam & canones ſanctæ eccleſiæ.*

4 Inſt. 322. (*a*) That the convocation may declare what opinions are heretical; but whether at this day they have power to convene the heretick, Q. & *vide* 2 Roll. Abr. 226. Hawk. P. C. c. 2. § 3.

Alſo, by 25 *H.* 8. *cap.* 19. it was enacted, that no canons, conſtitution, or ordinance, ſhould be made or put in execution within this realm by authority of the convocation of the clergy, which were contrariant or repugnant to the king's prerogative royal, or the cuſtoms, laws, or ſtatutes of this realm: and by this act the court of convocation, as to the making of new canons, is to have the king's licence, as alſo his royal aſſent for putting the ſame in execution, with this proviſo, that ſuch canons as were made before that act, which be not contrariant nor repugnant to the king's prerogative, the laws, ſtatutes, or cuſtoms of the realm, ſhould be ſtill uſed and executed, as they were before the making of the act.

Vide 4 Inſt. 323. That this ſtatute is only declaratory of the common law, & *vide* Co. 72. 2 Roll. Abr. 226. Moor, 783. Vaugh. 327. 2 Vent. 44. 2 Salk. 412. pl. 2.

" By 8 *H.* 6. *cap.* 1. the clerks of the convocation, their ſervants, " and families, ſhall have ſuch privilege in coming, tarrying, and " going, as the commons called to parliament."

2. Of the Court of Arches.

The archbiſhop of *Canterbury* hath a peculiar juriſdiction in 13 pariſhes within *London*, which are (*b*) exempt from the juriſdiction of the biſhop of *London*; the chief of theſe is *Bow*; and, as this court was antiently held in the church of *Bow*, it was called the court of arches from the faſhion of the pillars of the ſteeple bent *arch-wiſe*.

4 Inſt. 337. (*b*) That by agreement, the archbiſhop of Canterbury and biſhop of London remit their courts to each other, ſo that for matters ariſing within the dioceſe of London, the ſuit may be either in the Arches or in the Conſiſtory Court of London. Cro. Car. 339. 456. But whether ſuch compoſition be good, and out of the ſtatute 23 H. 8. c. 19. which prohibits the citing a perſon out of his own dioceſe, *vide* 13 Co. 4. Raym. 3. Sid. 65. 178. Lev. 225. Keb. 597.

The juriſdiction of this court extends not only to eccleſiaſtical cauſes ariſing within theſe 13 pariſhes, of which it may take conuſance in the firſt inſtance, but alſo by way of appeal may examine, affirm, or reverſe the ſentences and decrees of all inferior eccleſiaſtical courts within the province of *Canterbury*.

4 Inſt. 337. 13 Co. 4., &c. Godolph. Repert. 100. Dyer, 241.

3. Of the Prerogative Court.

In this court all teſtaments are to be proved, and all adminiſtrations granted, where the party dying within the province of the archbiſhop of *Canterbury* hath *bona notabilia* in ſome other dioceſe than where he died, which regularly is to be to the value of 5*l.* but in the dioceſe of *London* it is 10*l.* By compoſition the archbiſhop of *York* hath the like court.

4 Inſt. 338. *Vide* head of *Executors and Adminiſtrators.*

4 Inſt. 335. The *probate* of every biſhop's teſtament, or granting of adminiſtration of his goods, although he hath not goods but within his own juriſdiction, doth belong to the archbiſhop.

4. Of the Court of Audience.

4 Inſt. 337. For the original inſtitution of this court, and that it meddles not with contentious matters, *vide* Godolph. Repert. 106.

This court is kept by the archbiſhop in his palace, in which are tranſacted matters of form only, as confirmations of biſhops, elections, conſecrations, the granting of the guardianſhip of the ſpiritualties, *ſede vacante* of biſhops, admiſſions and inſtitutions to benefices, diſpenſing with banns of matrimony, and ſuch like.

5. Of the Court of Faculties.

4 Inſt. 337. (*a*) That every dioceſan may do the ſame.

This is a court which belongeth to the archbiſhop, in which his officer, called *magiſter ad facultates*, grants diſpenſations, as to (*a*) marry, to eat fleſh on days prohibited, to ordain a deacon under age, that the ſon may ſucceed the father in a benefice, that one may have two or more benefices incompatible, *&c.*

4 Inſt. 337. [A faculty may be ſubſcribed, regiſtered, and enrolled by the deputy of the chief clerk of the faculty. Rex v. Epiſc. Ceſtr. 8 Mod. 364.]

This authority was raiſed and given to the archbiſhop of *Canterbury* by the ſtatute of 25 *H.* 8. *cap.* 21. whereby authority is given to the ſaid archbiſhop and his ſucceſſors, to grant diſpenſations, faculties, *&c.* by himſelf, or his ſufficient and ſubſtantial commiſſary or deputy, for any ſuch matter whereof heretofore ſuch diſpenſations, faculties, *&c.* then had been accuſtomed to be had at the ſee of *Rome*, or by authority thereof.

6. Of the Court of Peculiars.

4 Inſt. 338. Godolph. Repert. 119. (*b*) Within the province of the Archbiſhop of Canterbury there are 57 peculiars, all which belong to the archbiſhop. Godolph. Repert. 119. (*c*) Salk. 40. pl. 10. 41. 6 Mod. 241.

Theſe courts, which exerciſe an eccleſiaſtical juriſdiction, and are exempt from and not ſubject to the controul of the ordinary of the dioceſe, are called peculiars, and muſt be either regal, (*b*) archiepiſcopal, epiſcopal, or archidiaconal; and in every one of theſe the owner has (*c*) a power of common right to grant adminiſtration, *&c.* on ſuppoſition of an original compoſition between him and the ordinary of the dioceſe for that purpoſe.

[As the perſons, entitled to peculiar juriſdiction, have no known or certain regiſters, or publick place to keep their records in, and wills are therefore liable to be loſt: they are ordered by canon 126, once in every year, upon pain of being ſuſpended from the exerciſe of their juriſdiction, to exhibit into the publick regiſtry of the biſhop of the dioceſe, or of the dean and chapter, under whoſe juriſdiction the peculiars are, every original teſtament of every perſon in that time deceaſed, and by them proved, or a true copy of every ſuch teſtament, examined, ſubſcribed, and ſealed by the peculiar judge and his notary.

If

If a peculiar be ſubordinate to the biſhop, the cauſe muſt be referred to the immediate ordinary, as in the caſe of an archdeacon (*a*) or commiſſary, and not to the archbiſhop, unleſs the peculiar have his immediate reſort to the archbiſhop.

Hob. 186. (*a*) The peculiar juriſdiction of an archdeacon is not properly a peculiar, but rather a ſubordinate juriſdiction. *Per* Holt, C. J. 6 Mod. 308. 2 Roll. Rep. 446-8.

But if the peculiar be free by a general exemption from all ordinary juriſdiction (which was common in the caſe of monaſteries both by the grants of kings and popes) then the cauſe muſt be remitted to the king, as appeals muſt alſo be in ſuch caſes; and ſo it is provided by ſtat. 25 *H.* 8. *c.* 21.]

Hob. 186. A peculiar *primâ facie* is to be underſtood of him who hath coordinate juriſdiction with the biſhop. *Per* Holt, C. J. 6 Mod. 308. Where one dies poſſeſſed of goods in ſeveral peculiars within the ſame dioceſe, adminiſtration ſhall not be granted by the biſhop of the dioceſe, but by the metropolitan; inaſmuch as they are exempt from ordinary juriſdiction. Gibſ. 472. Swinb. a. 410.

7. Of the Conſiſtory Courts.

The conſiſtory court of each archbiſhop, and every biſhop of every dioceſe within this realm, is holden before the biſhop's chancellor in the cathedral church; or before his commiſſary, in places of his dioceſe, far remote and diſtant from the biſhop's conſiſtory ſo as the chancellor cannot call them to conſiſtory with any conveniency, or without great travel and vexation, for which reaſon ſuch commiſſary is called *commiſſarius foraneus*.

4 Inſt. 338. Godolph. Repert. 83.

8. Of the Court of the Archdeacon.

This court is holden by the archdeacon, in ſuch places as the archdeacon, either by preſcription or compoſition, hath juriſdiction in ſpiritual cauſes within his archdeaconry; he is called *oculus epiſcopi*, and exerciſes an eccleſiaſtical juriſdiction, either concurrently with the biſhop, or excluſively.

4 Inſt. 339. Godolph. Repert. 60. &c.

9. Of the Court of Delegates.

This court is erected by virtue of the king's commiſſion, which iſſues out of Chancery upon an appeal or petition (*b*) directed to him, complaining of ſome grievance or injury the party has ſuffered by the ſentence or proceedings of the eccleſiaſtical court.

4 Inſt. 339. [(*b*) Such a commiſſion may be granted at the inſtance of a perſon intereſted, though not an original party in the cauſe. Jones v. Bougett, 1 Atk. 298.]

On ſuch appeal, the king appoints (*c*) commiſſioners called (*d*) delegates, who are to hear the grievances complained of, and who by force of ſuch delegation have power (*e*) to reverſe or affirm the ſentence of the inferior court; and this the king, as is ſaid, may do by virtue of an original juriſdiction, which was always inherent in the crown.

(*c*) Theſe commiſſioners may be as well laymen as eccleſiaſticks, Comp. Incumb. 56. But by Gibſon's Codex, 1082. they were formerly only eccleſiaſticks. (*d*) The commiſſion being drawn by the clerks in Chancery, who were uſually civilians; or by the chancellor, who was uſually a biſhop; they obtained the name of delegates, being a name peculiar to that profeſſion. Comp. Incumb. 57. (*e*) They have power only to affirm or reverſe, but have no juriſdiction in the firſt inſtance, as to grant adminiſtration, &c. Latch. 85.

And by 25 *H.* 8. *cap.* 19. *for reſtraining appeals to* Rome, it is enacted, "That for lack of juſtice, at or in any courts of the "archbiſhops of this realm, or in any of the king's dominions, it "ſhall be lawful to the party grieved to appeal to the king's ma- "jeſty in the king's court of Chancery, and that upon every ſuch "appeal a commiſſion ſhall be directed under the great ſeal to "ſuch perſons as ſhall be named by the king's highneſs, his heirs "or ſucceſſors, like as in caſes of appeal from the admiral's court, "to hear and definitely determine ſuch appeals and the cauſes "concerning the ſame, which commiſſioners, ſo by the king's high- "neſs, his heirs and ſucceſſors, to be named or appointed, ſhall "have full power and authority to hear and determine every ſuch "appeal, with the cauſes and all circumſtances concerning the "ſame; and that ſuch judgment and ſentence, as the ſaid com- "miſſioners ſhall make and decree in and upon any ſuch appeal, "ſhall be good and effectual, and alſo definitive, and no further "appeals to be had or made from the ſaid commiſſioners for the "ſame."

4 Inſt. 340. Moor, 782. No appeal lies to them from a local viſitor, nor in any caſe of a temporal nature, nor did it lie from the high commiſſion court, when in being, becauſe they themſelves were only delegates acting by immediate commiſſion from the king.

Vent. 133. 2 Lev. 6. S. C. 2 Keb. 768. 778. S. C. Hetley, 107. Cro. Jac. 483. Leon. 277-8. A ſuit commenced before the delegates does not abate by the death of either of the parties.

Moor, 462. 3. Latch. 85, 86. 229. If the delegates exceed their authority, or proceed in matters not properly within their conuſance, they may be prohibited by the king's temporal courts.

10. Of the Court of Commiſſioners of Review.

But for this, *vide* 4 Inſt. 341. Moor, 463. 781. Dyer, 273. Lit. Rep. 232. After a ſentence by the delegates the king may grant a commiſſion of review, and ſuch commiſſioners may reverſe the ſentence of the delegates; for the king's power is not reſtrained by the ſtatute 25 *H.* 8. *cap.* 19. *ſupra*, which ſays, that ſuch ſentence ſhall be definitive; alſo the pope after a definitive ſentence by the canon law uſed to grant a commiſſion *ad revidendum*, and ſuch authority as the pope had, claiming as ſupreme head, doth of right belong to the crown, and is annexed thereto by the ſtatutes of 26 *H.* 8. *cap.* 1. 1 *Eliz. cap.* 1.

(B) Of appealing from an inferior to a ſuperior Court.

4 Inſt. 340. EVERY ſubject has a right to appeal, and every ſuperior court, enabled by law to hear and determine ſuch appeal, is obliged to receive the ſame, and after ſuch appeal duly made, the inferior court is tied up from proceeding any farther in the cauſe.

"By

" By 24 *H.* 8. *cap.* 12. from the archdeacon's court the appeal " is to the biſhop of the dioceſe; but when the cauſe is com- " menced before an archdeacon, or any archbiſhop or his com- " miſſary, the appeal muſt be to the court of arches.

" And by the ſaid ſtatute, from the biſhop of the dioceſe, his " chancellor or commiſſary, the appeal is to the archbiſhop of " either province reſpectively.

" By 25 *H.* 8. *cap.* 19. the appeal from the prerogative court is " to the king in Chancery, who appoints delegates by commiſſion " to hear and determine the appeal."

And it ſeems by the ſaid ſtatute that an appeal from the arches is to be to the (*a*) king in Chancery.

(*a*) But by 24 H. 8. c. 12., ſuch appeal is to be to the archbiſhop; and ſo is 4 Inſt. 341. But *vide* Carth. 169. That an appeal does not lie from the dean of the arches to the archbiſhop as viſitor, becauſe they are one and the ſame; at leaſt it would be but appealing from the deputy to the principal.

" Alſo, by 25 *H.* 8. *cap.* 19. appeals from the court of pecu- " liars, or places exempt, which were before to the ſee of *Rome*, " ſhall be henceforth into the Chancery, and ſhall be there de- " termined before commiſſioners of delegates under the great " ſeal, *&c.*"

If the matter concerns the king, the appeal muſt be to the higher houſe of convocation of that province. 4 Inſt. 339, 340.

" By 24 *H.* 8. *cap.* 12. and 25 *H.* 8. *cap.* 19. all appeals from " a definitive ſentence muſt be within 15 days. 4 Inſt. 339.

" By 25 *H.* 8. *cap.* 19. there ſhall be no appeal to the ſee of " *Rome*, under pain of a *præmunire*." 4 Inſt. 340. *Vide* title *Præmunire*.

(C) Of citing one out of his own Dioceſe: And herein of the Boundaries of their Juriſdiction.

BY 23 *H.* 8. *cap.* 9. it is enacted, " That no manner of perſon " ſhall be from henceforth cited, or ſummoned, or otherwiſe " called to appear by himſelf, or herſelf, or by any procurator, " before any ordinary, archdeacon, commiſſary, official, or any " other judge ſpiritual, out of the dioceſe or peculiar juriſdiction, " where the perſon which ſhall be cited, ſummoned, or other- " wiſe (as is aforeſaid) called, ſhall be inhabiting and dwelling at " the time of awarding or going forth of the ſame citation or ſum- " mons, except that it ſhall be for, in, or upon any of the caſes " or cauſes hereafter written, that is to ſay, for any ſpiritual " offence or cauſe, committed or done, or omitted, followed, or " neglected to be done, contrary to right or duty by the biſhop, " archdeacon, commiſſary, official, or other perſon, having ſpiritual " juriſdiction, or being a ſpiritual judge, or by any other perſon " or perſons within the dioceſe, or other juriſdiction whereunto " he or ſhe ſhall be cited, or otherwiſe lawfully called to appear " and anſwer; and except alſo it ſhall be by or upon matter or " cauſe of appeal, or for other lawful cauſe, wherein any party " ſhall find himſelf or herſelf grieved or wronged by the ordinary,

" judge, or judges of the dioceſe or juriſdiction, or by any of his " ſubſtitutes, officers, or miniſters, after the matter or cauſe there " firſt commenced, or begun to be ſhewed unto the archbiſhop or " biſhop, or any other having peculiar juriſdiction, within whoſe " province the dioceſe or place peculiar is; or in caſe that the " biſhop, or other immediate judge or ordinary, dare not, nor will " not convene the party to be ſued before him; or in caſe that " the biſhop of the dioceſe, or the judge of the place, within " whoſe juriſdiction, or before whom, the ſuit by this act ſhall " be commenced and proſecuted, be party directly or indirectly " to the matter or cauſe of the ſame ſuit; or in caſe that any " biſhop or any inferior judge, having under him juriſdiction in " his own right and title, or by commiſſion make requeſt or in- " ſtance to the archbiſhop, biſhop, or other ſuperior ordinary or " judge, to take, treat, examine, or determine the matter before " him or his ſubſtitutes; and that to be done in caſes only where " the law civil, or canon, doth affirm execution of ſuch requeſt " or inſtance of juriſdiction to be lawful or tolerable; upon pain " of forfeiture to every perſon, by any ordinary, commiſſary, of- " ficial, or ſubſtitute, by virtue of his office, or at the ſuit of any " perſon, to be cited or otherwiſe ſummoned or called, contrary " to this act, of double damages and coſts, for the vexation in " that behalf ſuſtained, to be recovered againſt any ſuch ordinary, " commiſſary, archdeacon, official, or other judge, as ſhall award " or make proceſs, or otherwiſe attempt or procure to do any " thing contrary to this act, by action of debt or action upon the " caſe, according to the courſe of the common law of this realm " in any of the king's high courts, or in any other competent " temporal court of record, by original writ of debt, bill, or plaint, " in which, &c., and upon pain of forfeiture for every perſon ſo " ſummoned, cited, or otherwiſe called, (as is aboveſaid) to an- " ſwer before any ſpiritual judge out of the dioceſe, or other juriſ- " diction, where the ſaid perſon ſo dwelleth, or is reſident, or " abiding, 10*l.* the one half thereof to be to the king; and the " other half to any perſon that will ſue for the ſame in any of " the king's ſaid courts.

" Provided, that it ſhall be lawful to every archbiſhop of this " realm to call, cite, and ſummon any perſon or perſons inhabit- " ing or dwelling in any biſhop's dioceſe within his province for " cauſes of hereſy, if the biſhop or other ordinary immediate " thereunto conſent, or if that the ſame biſhop, or other imme- " diate ordinary or judge, do not his duty in puniſhment of the " ſame.

" Provided alſo, that this act ſhall not extend in any wiſe to the " prerogative of the moſt reverend father in God the archbiſhop " of *Canterbury*, or any of his ſucceſſors, of or for calling any " perſon or perſons out of the dioceſe where he or they be inha- " biting, dwelling, or reſident, for (*a*) probate of any teſtament " or teſtaments, any thing in this act contained to the contrary.

(*a*) Godb. 214. Extends only to the probate of wills.

" Provided alſo, that this act be not any way hurtful or preju- " dicial to the archbiſhop of *York*, nor to his ſucceſſors, of, for, or

" concern-

" concerning the probate of teſtaments within his province and " juriſdiction, by reaſon of any prerogative; any thing in this " act to the contrary notwithſtanding."

In the conſtruction of this ſtatute the following opinions have been holden, that the archbiſhop of *Canterbury* cannot cite a perſon for ſubſtraction of tithes living in *Eſſex* into the court of arches holden in *London*, although *Eſſex* be within the dioceſe of *London*, and that this ſtatute, like all other acts of parliament, ſhall be expounded by the judges of the common law, although they relate to ſpiritual perſons and affairs, and that wherever an act of parliament prohibits the doing of a thing, any court acting contrary may be reſtrained by prohibition. 13 Co. 4, 5., &c.

If a perſon inhabiting within one dioceſe doth ſubſtract and with-hold his tithes within another dioceſe, a ſuit may be commenced and proſecuted in the court of the biſhop, in whoſe dioceſe the tithes are ſo ſubſtracted, and the party ſo ſubſtracting his tithes may be there cited and ſummoned, although inhabiting within another dioceſe. Lev. 56. & Godb. 191. 2 Brownl. 12. 27. Hard. 421. Winch. Ent. 570. a. Cro. Car. 97. Roll. Rep. 329. Carth. 476. Machin and Moulton, S. P. adjudged, for dioceſe in this ſtatute ſignifies juriſdiction, and it is the locality of the lands which gives juriſdiction, although the maxim in the civil law is *forum ſequitur reum*. 5 Mod. 450. S. C. 2 Salk. 549. pl. 9. S. C.

So, a ſuit for a legacy may be in the dioceſe where the will is proved, although the defendant lives in another dioceſe, and the citing of him out of ſuch dioceſe is not within the ſtatute. Vent. 233. 3 Keb. 619. Cro. Car. 97. Like point.

So, where *A.*, and others, who lived in the dioceſe of *Litchfield* and *Coventry*, but occupied lands in the dioceſe of *Peterborough*, were taxed in the pariſh where they occupied lands for the new caſting of the bells of the church; and, upon refuſal to pay, a ſuit was commenced againſt them in the dioceſe of *Peterborough*; it was holden, that occupying lands made them inhabitants, and that the citing of them into the dioceſe where the lands lay, and in reſpect to which they were chargeable, was not within the ſtatute; alſo, that bells were more than a mere ornament, which the inhabitants were bound to repair. Salk. 164. pl. 1. 3 Mod. 211. S. C. And there ſaid, that a prohibition was granted, becauſe but a perſonal charge, and not like the repairing of the church which is a real charge upon the land, let the owner live where he w

My Lord *Coke* ſays, that by this ſtatute the archbiſhop is reduced to a proper dioceſe, or peculiar juriſdiction, unleſs it be in five caſes; as 1*ſt*, In default of the ordinary. 2*dly*, In caſe of appeal. 3*dly*, Or in caſe the ordinary dares not, or will not, convene the party. 4*thly*, Or if the ordinary be party to the ſuit below. 5*thly*, In caſe (*a*) of inſtance and requeſt by the ordinary. 13 Co. 4 Porter a Rocheſt caſe. (*a*) On geſtion the pa ſued the dioceſe, the court grants a prohibition; but if it appears upon proof that it was upon requ archbiſhop, according to the exception, the prohibition will be ſtayed. 5 Mod. 71. G Latch. 180.——The party in alleging ſuch requeſt need not ſhew the matter ſpecially, th appear to have been of a ſpiritual nature, nor that the requeſt was under ſeal. Cro. Car. requeſt may be from a peculiar to the ordinary of the dioceſe. Cro. Car. 162.—But wh peculiar court, or from the archdeacon's court immediately to the archbiſhop, *vide* Syd. 90. 5 Mod. 238, 239.

The party who is cited out of his dioceſe muſt move for a p hibition before ſentence, for by litigating the matter in that c he ſubmits to the juriſdiction.

Carth. 34, 35.

But if upon the face of the libel it appears that the party is an inhabitant at a place out of the dioceſe, there the libel is *felo de ſe*, and in ſuch caſe the ſentence makes no alteration.

Carth. 34.

Yet in a caſe where *A.*, in the libel was named of *D.*, in *Hampſhire*, which is known to be within the dioceſe of *Wincheſter*, was cited into the dioceſe of *London*, though affidavits were offered of that matter, yet being after ſentence, the court held, that they could not take any notice within what dioceſe *D.* in *Hampſhire* was, for they could not *ex officio* take notice of the limits of biſhopricks, but they ſhould not take it to be within the proper dioceſe.

2 Roll. Abr. 291. Several caſes to this purpoſe.

The boundaries of all juriſdictions ſhall be determined in the king's temporal courts; ſo, if the queſtion be, whether in ſuch a place there be a peculiar juriſdiction exempt from the ordinary, this ſhall be determined by the king's temporal courts; for it would be unreaſonable that the archbiſhop, or biſhop, ſhould be judge in his own cauſe, and if they take upon them to determine any of thoſe matters, a prohibition will be granted.

(D) In what Caſes the Eccleſiaſtical Courts are allowed to have Juriſdiction.

THE ſtatute 13 *E.* 1. called the ſtatute of *circumſpecte agatis*, and 9 *E.* 2. called *articuli cleri*, are the moſt antient, as well as the principal ſtatutes, which declare in what caſes the eccleſiaſtical courts ſhall have juriſdiction.

(*a*) The Biſhop of Norwich is only put for an example, for it extendeth to all the biſhops within the realm. Inſt. 487. As herein of ſchiſm, orders, and ſuch like. 488. Of inceſt, illicit-

The words of the firſt are, "The king to his judges ſendeth "greeting: uſe yourſelves circumſpectly in all matters concerning "the Biſhop of (*a*) *Norwich* and his clergy, not puniſhing them if "they hold plea in court chriſtian, of ſuch things as be (*b*) merely "ſpiritual, that is, to wit, of penance enjoined by prelates for "deadly ſin, as fornication, adultery, and (*c*) ſuch like, for the "which, ſometimes corporal penance, and ſometimes (*d*) pecuni-"ary is enjoined, eſpecially if a freeman be convict of ſuch things: "alſo, if prelates do puniſh for leaving the church-yard uncloſed, or "for that the church is (*e*) uncovered, or not conveniently decked; "in which caſes none other penance can be enjoined but pecu-"niary. *Item*, If a parſon demand of his pariſhioners oblations or "(*f*) tithes due or accuſtomed, or if any parſon do ſue againſt "another parſon for tithes greater or ſmaller; ſo that the fourth "part of the value of the benefice be not demanded. *Item*, If a "parſon demand mortuaries in places where a mortuary hath "been uſed to be given. *Item*, If a prelate of a church, or patron, "demand of a parſon a penſion due to him; all ſuch demands "are to be made in a ſpiritual court, and for laying (*g*) violent "hands on a clerk; and in cauſe of defamation it hath been granted "already, that it ſhall be tried in the ſpiritual court, when money "is not demanded; but a thing done for puniſhment of ſin, and "likewiſe for breaking an oath, in all caſes afore rehearſed, the "ſpiritual

"ſpiritual judge ſhall have power to take knowledge, notwithſtanding the king's prohibition."

chapel which a man has to his own uſe, nor to the chancel, which is to be repaired by the parſon. 2 Inſt. 489. (*f*) For this *vide* title *Tithes*. (*g*) The ſuit muſt be *pro ſalute animæ*; and therefore, if the clerk ſue in the court chriſtian for damages for the battery, he incurs a *præmunire*, for the eccleſiaſtical judge ought to proceed only to correct the ſin. 2 Inſt. 492.——If a clerk be arreſted by proceſs of law, he cannot for this ſue in the eccleſiaſtical court. 2 Inſt. 492.——If a clergyman be only aſſaulted, no remedy is to be had in the ſpiritual court, but in the common law courts. Cro. Eliz. 753. Pryn's caſe.

The ſtatute *articuli cleri*, or 9 *E.* 2. enumerates ſeveral caſes in which the ſpiritual courts ſhall have juriſdiction; particularly as to tithes, obventions, oblations, mortuaries, redemption of penance, violent laying of hands on clerks, defamation; in which caſes the king's prohibition ſhall be of no force.

For the expoſition of this ſtatute, *vide* 2 Inſt. 599 to 639.

Matters teſtamentary, as the granting probate of wills, granting of adminiſtration, *&c.*, are of eccleſiaſtical (*a*) conuſance, and in theſe they may proceed according to the eccleſiaſtical law, and their ſentences ſhall be preſumed juſt and agreeable to ſuch law, though (*b*) contrary to the rule and reaſon of the common law.

(*a*) Matters teſtamentary are within the juriſdiction of the ſpiritual courts by the cuſtom of England, and not by the eccleſiaſtical law. Lynwood, 174. *Verbo approbatis*, *vide* Salk. 37 ——Anciently the probate of teſtaments was in the county courts. Lamb. Saxon Laws, 111. Where the biſhop and ſheriff ſat together. Wilkins, 78. Lamb. Saxon Laws, 64. William the Conqueror firſt ſeparated the eccleſiaſtical from the civil juriſdiction; yet his charter does not mention matters teſtamentary, or the probate of wills, to be of eccleſiaſtical conuſance, but only ſays, that the crimes that were to be proſecuted *pro ſalute animæ* were to be of that conuſance. Selden Eadm. 167. But afterwards the eccleſiaſtical courts obtained a juriſdiction herein, the clergy having perſuaded the people that every diſpoſition of the teſtator was gratuitous and charitable, and to be diſpoſed of by the executor, for the good of the ſoul of the party deceaſed. Selden Eadm. 168. 9 Co. 38. (*b*) 4 Co. 29. 7 Co. 47.

Although the ſpiritual court hath conuſance of the probate of teſtaments, yet if (*c*) a court-baron hath had probate of wills time out of mind, and hath always continued that uſage, every will within the precincts thereof muſt be proved there; and if the ſpiritual courts take upon them to grant the probate of any ſuch will, a prohibition lies.

5 Co. 73. b. 2 Roll. Abr. 313. (*c*) So, by the cuſtom of London, the government of orphans, and effects of perſons dying in London, belongs to the mayor and aldermen of London; and if any ſuit be commenced, or proceedings had in the eccleſiaſtical court, for any matter within ſuch regulation, a prohibition lies. 5 Co. 734. 2 Inſt. 249. 660. March, 107.

If the will is proved in the eccleſiaſtical court, that court has executed its authority, and the (*d*) executors muſt ſue in the temporal courts to get in the eſtate of the deceaſed.

9 Co. 38. Henſlow's caſe. (*d*) An adminiſtrator muſt ſue for the goods of the inteſtate in the temporal courts, for the eccleſiaſtical courts cannot try the property of goods. 2 Roll. Abr. 287. Say and Harwood; and a prohibition granted for ſuch a ſuit.

As the eccleſiaſtical courts have now the probate of teſtaments, they, as incident to ſuch juriſdiction, have power to determine all thoſe matters that are neceſſary to the authenticating of every ſuch teſtament; therefore, (*e*) if the ſeal of the ordinary appears, it cannot be ſuggeſted or given in (*f*) evidence in the common law courts, that the will was forged, or that the teſtator was *non compos*, or that another perſon was executor; for of theſe they had a proper juriſdiction, and the remedy muſt be by appeal.

(*e*) Raym. 406, 407. 2 Roll. Abr. 299. Hard. 131. (*f*) But it may be given in evidence that the ſeal was forged, or the will repealed, or that there were *bona notabilia*, becauſe that is not in contradiction to the real ſeal of the courts,

courts, but admits the ſeal and avoids it. Lev. 235, 236. Vaugh. 207. Show. 293. Salk. 36. pl. 1. Comb. 185. Skin. 299. pl. 2. Holt, 305. pl. 4. See 3 Vol. 34.

2 Roll. Abr. 291. 299. Hob. 12. 12 Co. 65. Hetley, 87. 2 Inſt. 608. Lynwood, 174. Sid. 161. Cro. Eliz. 88. 666. Richardſon and Deſborow adjudged. [1 Ventr. 291. S. P. Shatter v. Friend, 1 Show. 158. 172. S. P. Comb. 160. S. C. Holt, 752. S. C. 2 Salk. 547. S. C.] 3 Mod. 283. S. C. 1 Raym. 220. S. C. cited. Carth. 142. S. C. adjudged.——But it is not ſufficient ground for a prohibition, to ſuggeſt that the ſpiritual court objected to the credibility of a witneſs, nor to ſuggeſt that the plaintiff had only one witneſs to prove the fact, unleſs that he allege that he offered ſuch proof, and it was refuſed for inſufficiency. Carth. 143, 144.

Although regularly, where the ſpiritual courts have conuſance of the principal, they ſhall have conuſance of the incidents and acceſſaries; yet if the incident is a matter merely temporal, or if a temporal matter be pleaded in bar of an eccleſiaſtical demand, they muſt proceed in the eccleſiaſtical court according to the temporal law; otherwiſe they will be prohibited.

As if payment be pleaded in bar of a legacy, and there be but one witneſs, which the eccleſiaſtical court will not admit, becauſe their law requires two witneſſes; there, the temporal courts will prohibit them, becauſe it is a matter temporal, that bars the eccleſiaſtical demand.

Carth. 143. *per Cur.* (*a*) Yet if a revocation of ſuch a will is pleaded, and proved by one witneſs, and they refuſe the plea for want of ſufficient proof, a prohibition will go, becauſe the revocation is a temporal matter. Yelv. 92. by three judges againſt two, & *vide* 2 Roll. Abr. 299. Carth. 143. S. C. cited.

But if there be only one witneſs to prove a nuncupative will, and the eccleſiaſtical court refuſe the (*a*) probate thereof, becauſe to every ſuch will their law requires two witneſſes, no prohibition lies; becauſe there is no other way of authenticating ſuch will but in the ſpiritual court, and this being the principal matter, they had conuſance thereof.

For this *vide* tit. *Executors and Adminiſtrators*, and there, that in certain caſes, the court of Chancery will compel executors to give ſecurity, 3 Vol. 7-8.

If the ſpiritual court admit a will, but yet will not give the probate to the executor becauſe he cannot give ſecurity for a juſt adminiſtration, the temporal courts will grant a *mandamus*; for though they are to determine whether there be a will or not, yet if there be a will, the executor has a temporal right, and they cannot put any terms upon him but what are mentioned in the will.

Skin. 299. pl. 2. Salk. 36. pl. 1. (*b*) But if an executor becomes *non compes*, the ſpiritual court may commit adminiſtration to another, becauſe that is a natural diſability. Salk. 36. pl. 1.

If an executor, after probate, becomes (*b*) a bankrupt, yet the ſpiritual court cannot revoke the adminiſtration; for he is intruſted by the teſtator who was the proper judge of his fitneſs and ſufficiency.

(*c*) Hob. 265. Cro. Jac. 279. 364. Cro. Car. 16. 2 Roll. Abr. 285.

But the juriſdiction of the eccleſiaſtical courts is confined to wills relating to goods and chattels only; and therefore (*c*) if a man gives lands to be ſold for the payment of debts, and diſpoſes of the money to ſeveral perſons, that cannot be ſued for in the eccleſiaſtical courts, but only in a court of equity; becauſe that is not a legacy merely of goods and chattels, but it ariſes originally out of lands and tenements.

Lev. 179. Sid. 279. 2 Keb. 8. S. C.

But if a rent be deviſed out of a term for years, the eccleſiaſtical courts may hold plea thereof; for the term for years being only

only a chattel, is teſtamentary, and, conſequently, the rent deviſed thereout.

If a man makes a will, and appoints *A.* and *B.* his executors, to each of whom he gives five pounds, but makes no diſpoſition of the reſidue of his eſtate, the eccleſiaſtical courts cannot compel a diſtribution of (*a*) ſuch reſidue, for they have only a juriſdiction to order a diſtribution where the party dies inteſtate. Petit v. Smith, Ld. Raym. 86. 1 P. Wms. 7. S. C. Comb. 378. S. C. Com. Rep. 3. S. C. 5 Mod. 247. S. C. and a prohibition granted accordingly. (*a*) Where the courts of equity in ſuch caſe conſider the executors as truſtees only, and compel a diſtribution, *vide* tit. *Executors and Adminiſtrators*, and where they have a concurrent juriſdiction with the eccleſiaſtical courts, *vide* Chan. Ca. 200. 2 Chan. Ca. 85. 95. 2 Vent. 362. 2 Vern. 47. 76. Preced. Chan. 546.

Matrimonial cauſes, as marriage contracts, conſanguinity, divorces, alimony, *&c.*, are within the juriſdiction of the ſpiritual court. But for this, *vide* tit. *Marriage*.

Tithes, oblations, mortuaries, and penſions, are of eccleſiaſtical conuſance; but if to a demand of tithes the party pleads a *modus decimandi*, ſuch cuſtom, like all (*b*) others, muſt be determined in the temporal courts; and if the eccleſiaſtical courts take upon them to determine it, a prohibition will lie. *Vide* head of *Tithes*. (*b*) As if the churchwardens libel againſt *J. S.* for not repairing part of the church wall; wherein he ſets forth, that *J. S.* was ſeiſed of ſuch a manor, *&c.* and that the lords thereof, for the time being, were by cuſtom immemorial bound to repair part of the wall *ratione tenuræ*; if if this cuſtom be denied, a prohibition will be granted, although after ſentence, for on the face of it, it appears that the ſpiritual court had not juriſdiction. Carth. 33. *Vide* Carth. 151.

But if *A.* ſues for ſubſtraction of tithes in the ſpiritual court, and the defendant pleads a verbal compoſition for two years, no prohibition will be granted: and where the eccleſiaſtical courts refuſe a plea of compoſition for life or years, there is no remedy but by appeal to the arches. Carth. 70. Bradſhaw and Swanton, adjudged.

The eccleſiaſtical courts have no juriſdiction to hold plea of a matter of record; therefore, if the parſon of a church be outlawed, and the benefit of the outlawry be granted to *J. S.*, who receives the tithes from the pariſhioners, and afterwards the parſon ſue the pariſhioners for tithes, who plead the outlawry and the grant to *J. S.*, a prohibition lies; for the outlawry is a matter of record, of which they have not conuſance. 2 Roll. Abr. 307.

The ſpiritual courts cannot hold plea *pro reformatione morum*, in a cauſe that is criminal and (*c*) triable at our law; and, therefore, they cannot hold plea *pro reformatione morum* for a legal perjury; but for perjury in their own courts they may puniſh. Lev. 138. Sid. 217. Keb. 721. (*c*) But they may deprive for a temporal crime. Dyer, 293. But not after the crime is pardoned. Hob. Searl's Caſe. Comp. Incumb. 53.

So, if the ſpiritual court proceed againſt a man for writing a libel, a prohibition lies; for this is an offence indictable at common law. Comb. 71.

If the goods of a church be ſtolen, it is ſacrilege and robbery, and the churchwardens ſhall have an (*d*) appeal of robbery; alſo, (*e*) the offender may be libelled againſt in the ſpiritual court *pro ſalute animæ & reformatione morum*, but not to recover damages. (*d*) Bro. Appeal, 31. 45. 37 H. 6. 39. (*e*) Sid. 281. 2 Keb. 23. 2 Inſt. 492. 4 Keb. 743. An action at law lies for a battery on a ſpiritual perſon, as alſo a ſuit in the ſpiritual court for irreverence to his character. 6 Mod. 156. *Vide* Cro. Eliz. 655.

(E) How they are to proceed, as to thoſe Matters in which they have a Juriſdiction, otherwiſe will be controuled by the Temporal Courts.

4 Co. 29. a. 7 Co. 42. b. Roll. Abr. 530. 2 Roll. Abr. 298, 299.

THE eccleſiaſtical juriſdiction is derived from the common law, but the form of the proceedings, and the coercive power exerciſed in the eccleſiaſtical courts, is after the form of the canon or civil law; and, therefore, the judges of the common law will give credit to their proceedings and ſentences, in matters in which they have a juriſdiction, and believe them conſonant to the law of the holy church, although againſt the reaſon of the common law; and if there be a *gravamen* it muſt be redreſſed by appeal.

Skin. 27. pl. 3. 28.

They may cite the members of a corporation by their chriſtian names and names of baptiſm, for a duty due from them in their corporate capacity, as a rate for not repairing a church; for they have no *diſtringas* as at common law, by which they may take their lands or goods, and therefore muſt proceed againſt them in their natural capacity.

5 Mod. 449. Carth. 504. Ld. Raym. 706. *arg.* 12 Mod. 275. [*Vide infra*, 3 vol. 476.]

A citation may be ſerved on a *Sunday*, or, according to the cuſtom of the eccleſiaſtical court, it may be fixed to the church-door on a *Sunday*; and this ſhall not be ſaid to be reſtrained by the 29 *Car.* 2. *cap.* 7. which prohibits the ſerving of any proceſs whatſoever upon a *Sunday*, except in caſes of treaſon, felony, or breach of the peace.

For the proceedings *ex officio* before this ſtatute, *vide* Cro. Eliz. 201. Cro. Car. 291. Moor, 755. pl. 1342. Cro. Jac. 37. Jones, 257. And for the conſtruction of this ſtatute *vide* Sid. 232. Mod. 185. 10 Mod. 349. Ld. Raym. 263. 468. 2 Ld. Raym. 767. 2 Mod. 118. Vent. 41.

By the 13 *Car.* 2. *cap.* 12. it is enacted, "That it ſhall not be "lawful for any archbiſhop, biſhop, vicar general, chancellor, com- "miſſary, or any other ſpiritual or eccleſiaſtical judge, officer or "miniſter, or any other perſon, having or exerciſing ſpiritual or "eccleſiaſtical juriſdiction, to tender or adminiſter, unto any per- "ſon whatſoever, the oath uſually called the oath *ex officio*, or any "other oath, whereby ſuch perſon, to whom the ſame is tendred "or adminiſtred, may be charged or compelled to confeſs, or "accuſe, or to purge him or herſelf, of any criminal matter or "thing, whereby he or ſhe may be liable to any cenſure or pu- "niſhment."

2 Roll. Abr. 298. Palmer's caſe.

If a man is proceeded againſt in the ſpiritual court for defamation, and the libel charges that he ſpoke ſuch and ſuch words, *aut in effectu conſimilia*, although a declaration at law, in this form, would be naught for incertainty; yet the libel is good, being according to the courſe of the eccleſiaſtical court.

2 Roll. Abr. 292. (*a*) But where an executor pleaded *plenement adminiſter*, and the plea was refuſed, a prohibition was moved for, but denied being a matter of eccleſiaſtical conuſance. Sid. 274. Keb. 939. Saunderſon's Caſe, & *vide* Noy, 77. Latch. 114. Golſb. 4. (*b*) That there muſt be an affidavit of ſuch refuſal. Skin. 20. pl. 20.

If

If the ſpiritual court refuſes to give a copy of the libel, a prohibition will be granted *quouſque*; but there muſt be an affidavit that ſuch copy was demanded and refuſed. Vent. 252. 6 Mod. 308.

The eccleſiaſtical court can (*a*) neither fine, impriſon, nor amerce; for their juriſdiction being founded on the canon or civil law, their proceedings are only by eccleſiaſtical cenſures. 11 Co. 44. a. 4 Inſt. 324. Noy, 17.

(*a*) They have but two ſorts of puniſhment, penance and coſts, which firſt may be commuted or diſpenſed with for money. 5 Mod. 70.

If a man be ſued in the eccleſiaſtical court, and the judge take an obligation from him that he will perform the ſentence, a prohibition lies; for if it be in a matter within his juriſdiction, there are lawful means of compelling him to perform the ſentence. 2 Roll. Abr. 302.

Of the Court of Admiralty.

See Peacock & Ux. v. Stubbard in Exchequer 22. May 1710. in Report to Admiralty. Lord Ch. B. Ward's MSS. A. 6.

THE court of Admiralty is a court for all maritime cauſes or matters ariſing upon the high ſea, and its juriſdiction is derived from the king, who (*b*) protects his ſubjects from pirates, &c., and who has (*c*) a dominion over all the *Britiſh* ſeas; this juriſdiction he exerciſes by the (*d*) lord high admiral, or thoſe lawfully deputed for that purpoſe. 4 Inſt. 142. (*b*) Inſt. 167. (*c*) Molloy, 66. Selden's *Mare Clauſum*. (*d*) For the antiquity of this high officer, *vide* Co. Lit. 260. 12 Co. 80. And for antient records relating to his juriſdiction, *vide* 4 Inſt. 142.——By the 2 W. & M. Seſſ. 2. c. 2. commiſſioners of the admiralty have the like authority and juriſdiction as the lord high admiral.——By the 2 H. 5. ſtat. 1. c. 6. the king by letters patent may appoint in every port a conſervator of a truce, worth 40 *l. per ann.* in land; who by the king's patent, and the admiral's commiſſion, ſhall inquire of offences againſt truce and ſafe conduct, &c. as the admirals have done, &c. ſaving the determination of the death of a man, and the execution thereupon, to the admiral. The lord warden of the *cinque ports* is alſo admiral there, and hath the juriſdiction of the Admiralty exempt from the admiralty of England. 4 Inſt. 223. 2 Jones, 66, 67.—which juriſdiction is ſaved to him by ſeveral acts of parliament, as 2 H. 5. ſtat. 1. c. 6. 27 H. 8. c. 4. 28 H. 8. c. 15. 5 Eliz. c. 5. 11 & 12 W. 3. c. 7. *Vide*, &c.

[The juriſdiction of the admiralty is twofold, and holden before diſtinct tribunals: the one, is the ordinary court for deciding in controverſies relating to contracts made at ſea, and is called the *inſtance* court: the other determines the right to maritime captures and ſeizures, and is called the *prize* court. The juriſdiction in both caſes is exerciſed by the ſame perſon: he is appointed judge of the admiralty by a commiſſion under the great ſeal, which enumerates particularly, as well as generally, every object of his juriſdiction, but makes no mention of prize. To conſtitute *that* authority, or to call it forth, in every war, a commiſſion under the great ſeal iſſues to the lord high admiral, to will and require the court of admiralty, and the lieutenant and judge Dougl. 613-4.

of the ſaid court, his ſurrogate or ſurrogates, and they are thereby authoriſed and required, to proceed upon all and all manner of captures, ſeizures, prizes, and repriſals of all ſhips and goods, that are, or ſhall be taken; and to hear and determine, according to the courſe of the admiralty, and the law of nations. And a warrant iſſues to the judge accordingly.]

For the better bringing together the ſeveral caſes and reſolutions that have been in the temporal courts, relating to the juriſdiction of the court of admiralty, I ſhall conſider,

(A) To what Places the Juriſdiction of the Admiralty is confined.

(B) To what Things its Juriſdiction extends: And herein of ſuch Matters as ariſe, partly on Sea, and partly on Land.

(C) To what Contracts its Juriſdiction extends: And herein of Contracts made on the Sea.

(D) To what Crimes and Offences its Juriſdiction extends.

(E) By what Law it proceeds; and the Form of ſuch Proceedings.

(A) To what Places the Juriſdiction of the Admiralty is confined.

IT is laid down as a general rule in our common law books, that the admiral's juriſdiction is confined to matters ariſing on the (*a*) high ſeas only, and that he cannot take conuſance of contracts, &c. made or done in any river, haven, or creek, within any county; and that all matters ariſing within theſe are triable by the common law.

(*a*) As 4 Inſt. 137, 138, 139, 140. 12 Co. 129. Moor, 122. 892. Godb. 261. 2 Sid. 81.

Hob. 79, 212. 13 Co. 52. 2 Brownl. 10. 37. 2 Bulſt. 322. Roll. Rep. 133. But our books ſeem not to be agreed what ſhall be counted *altum mare*, or the high ſea; by ſome, it is no part of the ſea where one may ſee what is done on the other ſide of the water. 4 Inſt. 140, 141. 12 Co. 80. Moor, 892.—That what is within the body of the county is no part of the ſea. 4 Inſt. 140.—That the admiralty court cannot hold plea of a thing done upon the river Thames, becauſe within the body of the county. Roll. Abr. 531. Owen, 122. 2 Brownl. 37. S. C. adjudged. Leon. 106. Moor, 916. 2 Roll. Rep. 413. S. P. adjudged.——Nor of a matter ariſing at Limehouſe. Cro. Jac. 514. 2 Roll. Rep. 49. Moor, 891. S. P. adjudged.——But by Owen, 123. ſuch place as is covered with ſalt water is *altum mare*.——And Roll. Rep. 250. By *Coke*, the admiralty court hath conuſance of a matter done in a ſhip, riding in a port that is not within the body of a county.—But it ſeems agreed, that though in a libel in the court of Admiralty the fact is laid to be done *ſuper altum mare*; yet it may be ſurmiſed that it was done *in corpore com.*, &c. and thereupon a prohibition will be granted, for the ſurmiſe is traverſable. Moor, 891. pl. 1255. Latch. 11.

But

But it hath been reſolved, That between the high and low water mark, the common law and admiralty have *imperium diviſum, ſcilicet*, the one when it is not, and the other when it is covered with water; and that (*a*) the ſoil upon which the ſea flows and reflows, may be parcel of a manor.

5 Co. 107. Sir Henry Conſtable's caſe. And. 89. S. C. 3 Inſt. 113. S. P.

(*a*) If a man's lands lie to the ſea, if they are increaſed by inſenſible degrees, they belong to the ſoil adjoining; but if the ſea leaves any ſhore by a ſudden falling off of the water, then ſuch derelict lands belong to the king. Dyer, 326. 2 Roll. Abr. 170. If a river, as far as there is a flux of the ſea, leaves its channel, it belongs to the king; for the Engliſh ſea and channels belong to the king, and he hath the property in the ſoil, having never diſtributed them out among his ſubjects. 2 Roll. Abr 170.—But if a river, in which there is no tide, ſhould leave its bed, it belongs to the owners on both ſides; for they have, in that caſe, the property in the ſoil, being no original part or appendix to the ſea, but diſtributed out as other lands. 2 Roll. Abr. 170.—If the ſea overflow my land for forty years, and after re-flow, yet I ſhall have my land again; for the act of nature cannot alter the property. 2 Roll. Abr. 1168.

By the 13 *R.* 2. *cap.* 5. Upon complaint of incroachments made by the admirals and their deputies, it is enacted, "That the admirals and their deputies ſhall (*b*) meddle with nothing done "within the realm, but only with things done upon the ſea."

For the conſtruction of this ſtatute, *vide* 3 Bulſt. 205.

(*b*) This muſt be intended of holding pleas, and not of awarding execution; for, notwithſtanding this ſtatute, the judge of the Admiralty may do execution in the body of the county. 13 Co. 52.

By the 15 *R.* 2. *cap.* 3. upon the like complaint, it is declared, "That all contracts, pleas, and quarrels, and other things done "within the bodies of counties by land or water, and of wreck, "the admiral ſhall have no conuſance, but they ſhall be tried, "*&c.* by the law of the land; but (*c*) of the death of a man, "and of mayhem done in great ſhips, being in the main ſtream "of great rivers beneath the (*d*) bridges near the ſea, and in no "other place of the ſame river, the admiral ſhall have conu-"ſance; and alſo to arreſt ſhips in great flotes, for the great "voyages of the king and the realm, ſaving to the king his for-"feitures; and he ſhall have juriſdiction in ſuch fleets during "ſuch voyages only, ſaving to lords, *&c.* their liberties."

(*c*) By the reſolution of the judges in Cro. Car. 297., by the equity of this ſtatute he may redreſs all annoyances and obſtructions in thoſe rivers, which are an impediment to navigation, and may try contracts and injuries done there which concern navigation at ſea; but Q.

(*d*) In Owen, 122. it is ſaid *per Cur.*, That the tranſlator miſtook *bridges* for *points*, as the land's end. [The words in the act are, "*paraval les pountz.*" In the old abridgment it is *portis*: in the *Nova Statuta* it is *pointz.*]

By the 2 *H.* 4. *cap.* 11. reciting the 13 *R.* 2. *cap.* 13. it is enacted, "That he that (*e*) finds himſelf aggrieved (*f*) againſt "the form of the ſtatute, ſhall have his action by writ grounded "upon the caſe againſt (*g*) him that ſo purſues in the Admiralty, "and recover his double damages againſt him, and he ſhall incur "the pain of 10*l.* if he be attainted."

(*e*) The action may be brought by one part-owner, for it is grounded merely on a tort.

Carth. 295. [Ca. temp. Hardw. 271. 2 Str. 1075.] (*f*) If upon petition to the judge of the Admiralty, a ſhip is ſtopped in the harbour till caution given not to trade within the limits of the Eaſt India Company, this is a proſecution within the ſtatute, though there is no formal plaintiff or defendant; and in many caſes the ſuits there are againſt the ſhip itſelf. Carth. 294. Skin. 361. pl. 3. 4 Mod. 176. Salk. 31. pl. 1. 3 Lev. 353. S. C. between Child and Sands. (*g*) Though the proſecution be by the command of the king, and in the name of his proctor, yet if it was upon the ſolicitation and by the procuration of the parties, and they pay the fees, they purſue within the intention of the act. 3 Lev. 353.

[The above ſtatutes, it hath been ſolemnly determined, are intended to check the uſurpations of the *Inſtance* court only, and do

Lindo v. Rodney, Dougl. 615.

do not at all relate to the *Prize* court: for the juriſdiction in caſes of prize does not depend on the locality, but the nature of the queſtion, which is not governed by the rules of the common law, but by the *jus belli*. Hence, the prize court have excluſive cognizance of all captures made *at land* by the aſſiſtance of a fleet.]

(B) To what Things its Juriſdiction extends: And herein of ſuch Matters as ariſe partly on Sea, and partly on Land.

5 Co. 107. 2 Inſt. 167. 4 Inſt. 154. Palm. 96. Sid. 178. Roll. Abr. 531.

THE Admiralty court has juriſdiction, where a ſhip founders, or is ſplit at ſea, over the goods which become (*a*) *flotſam*, *jetſam*, or *ligham*; and a ſuit for theſe muſt be in that court; but for goods wrecked they (*b*) muſt be claimed by action at common law.

(*a*) There are four ſorts of ſhipwrecked goods, *viz. flotſam*, *jetſam*, *ligam*, and *wreck*. *Flotſam* is when the ſhip is ſplit, and the goods float upon the water between high and low water mark; *jetſam* is when the ſhip is in danger to be drowned, and for ſaving the ſhip the goods are caſt into the ſea; *ligam*, *lagan*, or *ligan*, is when the heavy goods are caſt into the ſea with a buoy, that the mariners may know where to retake them; *wreck* is, where goods ſhipwrecked are caſt upon the land; theſe, when all the crew are drowned, belong to the king, or the lord of the manor, to whom, it is preſumed, the king has granted them; but by Weſtm. 1. c. 4., if a dog or cat (which are put for inſtances) eſcape alive, the right owner ſhall have them again, if he claim them within a year and a day after the ſeizure. 2 Inſt. 167. 5 Co 106. Bract. lib. 3. f. 120. Molloy, 237. See the ſtat. 12 Ann. ſtat. 2. c. 18. and 26 Geo. 2. c. 19. (*b*) By the expreſs words of 15 R. 2., they have no conuſance of goods wrecked.

Sid. 178. Keb. 657.

And although the Admiralty court has juriſdiction of *flotſam*, *&c.* and ſhall determine what it is by the rules of the civil law, yet that muſt be underſtood where the thing is *ſuper altum mare*; and, therefore, if a ſhip, which becomes *flotſam* and derelict, comes into the body of a county, they have no juriſdiction.

2 Mod. 294.

So, if *flotſam* comes to land, and is taken by one that hath no title, an action lies at common law, and no proceedings ſhall be thereon in the Admiralty; for it need not be condemned as a prize.

4 Inſt. 148. (*c*) But by 8 Eliz. c. 13. the maſter, wardens, aſſiſtants of

At (*c*) common law, none but the king only could erect beacons, light-houſes, and ſea-marks; but of later times, by letters patents granted to the lord admiral, he hath power to erect (*d*) beacons, ſea-marks, and ſigns for the ſea.

the Trinity Houſe at Deptford Strond, had power given them to erect beacons, marks, and ſigns for the ſea, *&c. vide* 4 Inſt. 149. (*d*) A ſuit for the profits of the beaconage of a rock in the ſea, near —— in Cornwall, may be in the court of Admiralty. Croſs and Diggs, Sid. 158. adjudged; and it was ſaid, as the profits of the beacons belong to the admiral, ſo the ſuit for them ought to be in his court, though the rock be the freehold of another, and part of his inheritance.

Vent. 173. 2 Lev. 25. Sid. 320.

If the original cauſe ariſes upon the ſea, and other matters happen upon the land depending thereupon, yet the trial ſhall be in the court of Admiralty.

Roll. Abr. 533. 4 Inſt. 130. 12 Co. 97.

As, if a man takes a thing upon the ſea and brings it to the land, and afterwards carries it away, the ſuit for this ſhall be in the Admiralty court, for this is a continued act.

12 Mod. 135. Like point.

So,

So, if goods are taken piratically out of a ſhip, and afterwards ſold upon land, a ſuit may be commenced in this caſe in the Admiralty court, againſt the vendee. March, 110. Cro. Eliz. 685. S. P. adjudged; And that in unleſs the ſale had been in a market overt: But *vide* Hob. 78. Roll. Abr. 531, 532. ſuch caſe the party may have an action of trover and converſion at common law.

So, if a ſhip be taken by pirates and carried to *Tunis*, and there ſold, it being originally within the juriſdiction of the admiral, it ſo continues, notwithſtanding the ſale afterwards upon the land. Vent. 308.

But if the owner of a ſhip ſends her to the *Indies* to merchandize, and the crew commit piracy, by which, according to the admiral law, the ſhip becomes forfeited, and the admiral ſeiſes her accordingly, if afterwards the owner takes the ſails and tackling out of the ſhip, lying *infra corpus com.*, no ſuit for this can be in the Admiralty court; for the admiral hath his remedy by action at common law. Roll. Abr. 532. Roll. Rep. 285. S. C. adjudged. 3 Built. 148. [But if a ſhip be arreſted by proceſs out of the Admiralty court for a matter ariſing within their juriſdiction, and ſhe be reſcued afterwards at land, the cognizance of the reſcue belongs to the Admiralty juriſdiction. Rigden v. Hedges, 1 Ld. Raym. 446. *Per* Holt, C. J.]

If a ſuit be in the Admiralty court for making a lighter for the carriage of mud, or the like, within the body of the county upon the *Thames*, and not for navigation, a prohibition lies. Roll. Abr. 533.

If a ſhip is taken by pirates upon the ſea, and the maſter to redeem the ſhip contracts with the pirates to pay them 50*l.* and pawns his perſon for it, and the pirates carry him to the iſle of *S.* and there he pays it with money borrowed, and gives bond for the money, he may ſue in the Admiralty for the 50*l.* becauſe the original cauſe aroſe upon the ſea, and what followed was but acceſſary and conſequential. Hard. 183. Spark and Stafford, adjudged.

If there be wars with the *Dutch*, and one having letters of marque take an *Oſtender* for a *Dutch* ſhip, and bring it into an haven, and libel againſt it to have it condemned as a prize, but ſentence be given that it was no prize; the *Oſtender* may libel in the Admiralty againſt the captain, for the damage the ſhip received while it lay in the port; for the original taking being at ſea, the bringing it into the port, in order to have it condemned, is but a conſequence thereof. Lev. 243. Turner and Neal, Sid. 367. S. C. adjudged.

If an *Engliſh* ſhip takes a *French* ſhip richly laden, the *French* being in enmity with us, and ſuch ſhip is libelled againſt, and after due notice on the *Exchange*, &c. declared a (*a*) lawful prize, the king's proctor may exhibit a libel in the Admiralty court, to compel the taker (who ſent the ſhip to *Barbadoes*, and converted the lading to his own uſe) to anſwer the value of the prize to the king; although it was objected, that by the firſt ſentence the property was veſted in the king, and that this ſecond libel was in nature of an action of trover, of which the court of Admiralty cannot hold plea. Carth. 499. Rex v. Broom, Ld. Raym. 271. adjudged; being fully debated; and that the ſecond libel was but a continuance of the firſt ſuit, and a charge grounded upon the firſt ſentence by way of execution thereof. Salk. 32. pl. 3. S. C. & *vide* Carth. 423. (*a*) That prize or no prize is a matter altogether appropriated to the juriſdiction of the Admiralty, and not triable at common law, *vide* Carth. 475, 476. [And that court having excluſive juriſdiction over

over all queſtions of prize; hath the ſame juriſdiction over all matters that are conſequential to it, Le Caux v. Eden, Doug. 594. &c. Lindo v. Rodney, *id.* 591, n. 1. Livingſtone v. M'Kenzie, 3 Term Rep. 332. Smart v. Wolff, *id.* 323. or ariſe incidentally in the conſtruction of acts of parliament or proclamations. Home v. Earl of Camden, 1 H. Bl. 476. *contr.* but reverſed in K. B. 4 Term Rep. 382. and that reverſal affirmed in parliament. Printed Caſes of the Lords, June 22d 1795.]

(C) To what Contracts its Juriſdiction extends: And herein of Contracts made on Sea.

4 Inſt. 134. 139. 12 Co. 103. Hob. 79. 212.

THE court of Admiralty hath no juriſdicton as to contracts made at (*a*) land, whether ſuch contract be made here or in foreign parts.

(*a*) If a contract be made upon the ſea, which is afterwards ſealed upon the land, the court of Admiralty cannot hold plea thereof. Hob. 79. 212.

Latch. 11. *per* Dod.

If a ſhip lying at anchor wants victuals, and ſends to land to *J. S.* to bring victuals, and ſo the contract is made in the ſhip, the Admiralty ſhall have conuſance; *ſecùs*, if the contract is made entirely at land, and the victuals after ſent to the ſhip.

Hob. 12. Bridgman's caſe. Roll. Abr. 532. S. C.

If a contract or obligation be made upon the ſea, yet if it be not for a marine cauſe, the ſuit upon this contract or obligation ſhall be at common law; and not in the Admiralty court; for if a man makes an obligation for the ſecurity of a debt growing before upon the land, or if he makes a promiſe to pay it, this cannot be ſued in the court of Admiralty, but at common law.

Roll. Abr. 325. 4 Inſt. 139.

If a man contracts with me in *London*, in conſideration of 100 *l.* to tranſport certain commodities into *Turkey*, if he does not perform it, I cannot ſue him in the court of Admiralty, becauſe the contract was here, and nothing done upon the ſea.

Roll. Abr. 532, 533. Roll. Rep. 486. S. C. 4 Inſt. 135. 139. 142. Moor, 450.

If a charter-party be made in *England*, to do certain things in ſeveral places upon the ſea, though no act is to be done in *England*, but all upon the ſea, yet no ſuit can be in the Admiralty court for the non-performance of the agreement; for the contract is the original, (*b*) without which no cauſe of ſuit can be, and this contract is out of their juriſdiction; and where part is triable by the common law, and part by the admiral law, the common law ſhall be preferred.

(*b*) Both the contract and breach muſt concur to make the cauſe of ſuit, which is entire; therefore, &c. Hob. 212.

Roll. Abr. 530. Hob. 11. Moor, 918.

In caſes of neceſſity, the maſter may hypothecate or pledge the ſhip or goods, and (*c*) ſuch contract is cognizable in the Admiralty court.

(*c*) That ſuch hypothecation is allowed, becauſe no other remedy at common law; but where *A.* contracted with *B.* for a cable, which he delivered at Ratcliffe upon Thames, and *B.* ſued in the Admiralty, a prohibition was granted; though it was inſiſted, that the want of the cable was occaſioned by the ſtreſs of weather at ſea; for here the contract was at land, and a remedy for the breach at common law; but had the hypothecation been at Rotterdam, or in any other foreign part, the remedy had been proper in the Admiralty court. Salk. 34. [An hypothecation bond given in the courſe of a voyage, though it be executed on land, and *under ſeal*, is cognizable in the Admiralty court. Menetone v. Gibbons, 3 Term Rep. 267. Johnſon v. Shippen, 2 Ld. Raym. 982. 1 Salk. 35. S. C. 6 Mod. 79.]

Winch. 8. 4 Inſt. 141. Vent. 146.

The mariners may ſue in the Admiralty court for their wages, although the hiring was by the maſter on land; and this is allowed

lowed of in favour of navigation, for here they may all join in the ſame libel: alſo, by the admiral law they have remedy againſt the ſhip and owners, as well as againſt the maſter; and it would be a great diſcouragement to ſeafaring men, to oblige them to bring ſeparate actions, and thoſe againſt a maſter, who may happen to be inſolvent. 343. 3 Mod. 244, 245. Salk. 33. pl. 4. Ld. Raym. 576. 632. Carth. 518.

2 Ld. Raym. 1044. 12 Mod. 405. [In the caſe above referred to in Salk. 33. p. 4., Lord Holt is made to ſay, that it was by mere indulgence that mariners were permitted to ſue in the Admiralty for their wages: that it is againſt the ſtatute of 15 R. 2. expreſsly, but that *communis error facit jus*. But the ſtat. 4 Ann. c. 16. § 17. puts ſuits for ſeamens' wages very clearly, though by implication, upon a legal footing, for the words of that ſection are, "That all ſuits and actions in the court of Admiralty "for ſeamens' wages, ſhall be commenced and ſued within ſix years next after the cauſe of ſuch ſuits "or actions ſhall accrue."]

So, of the other officers under the maſter, as the (*a*) mate, (*b*) purſer, boatſwain, &c. for though they contract with the maſter, yet it is on the credit of the ſhip, &c. (*a*) Salk. 33. pl. 5. 2 Stra. 937. 2 Barnard.

K. B. 160. 12 Mod. 440. (*b*) Raym. 3. 2 Stra. 858. 2 Barnard. K. B. 297. So, a carpenter, Stra. 707. 2 Vent. 181. Salk. 33. pl. 5. Mod. 93.

So, a ſhipwright may ſue in the Admiralty court for the (*c*) building of a ſhip (*d*) for navigation upon the ſea. (*c*) Roll. Abr. 533. For amending a ſhip. Cro. Car. 296.

(*d*) If a contract be with ſeamen to go on a voyage, and they, in order thereunto, work in a harbour, and after, the voyage is intercepted through the owner's fault, as, if the ſhip be arreſted for his debt, &c.; the ſeamen ſhall ſue for their wages for the work done in the harbour, in purſuance of the contract to go on a voyage, in the Admiralty, as much as if they had gone the voyage; *ſecùs*, if the retainer of them had been only to do the work in the harbour. 6 Mod. 238. 2 Ld. Raym. 1044. [2 Wilſ. 264.]

But if there be any ſpecial agreement, by which the mariners are to receive their wages in any other manner than is uſual; or if the agreement is under ſeal, the mariners cannot ſue in the Admiralty court. Salk. 31. pl. 1. Opy and Addiſon. [Campion v. Nicholas, Stra. 405. Day v. Searle, 2 Stra. 968. How v. Nappier, 4 Burr. 19.]

Nor can the maſter ſue in the Admiralty court; for his contract is on the credit of the owners, and not like that of the mariners, which is on the credit of the ſhip. 4 Inſt. 141. Raym 3. Salk. 33. pl. 4. Ld. Raym. 576. [Com. Rep. 74.] Carth. 518. S. P. although the owner was beyond ſea, and the ſhip lay here.

If a contract is made at *Malaga*, concerning the lading of a ſhip, and for breach thereof upon the ſea, *viz.* that he would not receive forty butts of wine into the ſhip, according to agreement, there is a libel in a foreign Admiralty, and ſentence that the wine ſhall be received into the ſhip, which is refuſed; yet there can be no ſuit in the Admiralty here, reciting the former ſentence, and charging the defendant with a breach thereof; for though one may libel here upon a ſentence in a foreign Admiralty, for the execution of it, yet there being no complete ſentence in the foreign Admiralty, but an award only, that the wine ſhould be received; this ſuit for breach thereof is in nature of an original ſuit, which ought not to be, though the breach was at ſea, becauſe upon a contract made at land. Vent. 32. Jurado and Gregory, Sid. 418. Lev. 267. S. C.

If there are ſeveral partners of a ſhip, and the major part of them are for ſending her a voyage to ſea, to which the reſt diſagree; Carth. 26. Knight and Berry, ad-

judged, and prohibition to ſuch a ſuit granted, though after ſentence and appeal to the delegates; & *per* Holt, the part-owners, who are the major part, are not without remedy in ſuch caſe; for a ſpecial action on the caſe may be framed at the common law. Hard. 473. S. P., but no reſolution. 6 Mod. 162. S. P., but no reſolution. [The whole doctrine here advanced hath been over-ruled, and the right of the Admiralty court to compel ſecurity in ſuch caſe as well for the freight, as for the value of the reſpective ſhares in the ſhip, in the event of her being loſt, and to do execution upon it, hath been recognized in ſeveral ſubſequent caſes. Dimmock v. Chandler, Fitzg. 197. 2 Str. 890. S. C. 1 Barnardiſt. 415. S. C. Lambert v. Achetree, 1 Ld. Raym. 227. Blacket v. Anſley, *id.* 235. De Grave v. Hedges, 2 Ld. Raym. 1285. Ouſton v. Hebden, 1 Wilſ. 101. Such right had indeed been allowed in preceding caſes. Anon. 2 Ch. Ca. 36. Shelly v. Winſon, 1 Vern. 297. Anon. Skin. 230.]

gree; whereupon, according to the common uſage in ſuch caſes, the greater number ſuggeſt in the Admiralty court, the diſagreement of their partners; and then, according to their uſage there, they order certain perſons to appraiſe the ſhip, who accordingly ſet a value thereon; and then the major part, who agreed to the voyage, enter into a recognizance, wherein they bind themſelves jointly and ſeverally to the diſagreeing parties, in a ſum proportionable to their ſhares, according to the value ſet by the appraiſers, to ſecure the ſhares in the ſhip of thoſe who diſagree to the voyage, againſt all adventures; there can be no ſuit on this agreement or ſtipulation in the admiralty court; for the contract was made on land, and therefore the temporal courts muſt have conuſance of it.

(D) To what Crimes and Offences its Juriſdiction extends.

See 2 H. H. P. C. 12., &c. 2 Hawk. P. C. c. 25. §. 43. How piracy, and offences committed on the ſea, were puniſhed before this ſtatute, *vide* 4 Aſſ. 25. 3 Inſt. 115. S. P. C. 10. b. H. P. C. 77.

BY the 28 *H.* 8. *cap.* 15. it is enacted, "That all felonies and "robberies, &c. upon the ſea, or in any haven, river, creek, "or place, where the admiral or admirals have, or (*a*) pretend to "have power, authority, or juriſdiction, ſhall be inquired, tried, "heard, determined, and judged in ſuch ſhires and places in the "realm as ſhall be limited by the king's commiſſion or commiſ-"ſions to be directed for the ſame, in like form and condition as "as if any ſuch offence or offences had been committed or done "in or upon the land; and ſuch commiſſions ſhall be had under "the king's great ſeal, directed to the admiral or admirals, or to "his or their lieutenant, deputy or deputies, and to three or four "ſuch other ſubſtantial perſons as ſhall be named or appointed by "the lord (*b*) chancellor of *England* for the time being, from "time to time, and as oft as need ſhall require, to hear and de-"termine ſuch offences after the (*c*) common courſe of the laws "of this land, uſed for felonies and robberies, &c. done and "committed upon the land within this realm: *And it is further* "*enacted*, That if any perſon or perſons happen to be indicted "for any ſuch offence done, or hereafter to be done upon the "ſeas, or in any other place, above limited, that then ſuch or-"der, proceſs, judgment, and execution ſhall be uſed, had, done, "and made to and againſt every ſuch perſon and perſons ſo be-"ing indicted, as againſt felons, &c. for any felony, &c. upon "the land, by the laws of the land is accuſtomed; and ſuch as "ſhall be convict of any ſuch offence, by verdict, confeſſion, or "proceſs, by authority of any ſuch commiſſion, ſhall have and "ſuffer

(*a*) This muſt be intended between the high water and low water-mark, where there is *diviſum imperium* at ſeveral times. 3 Inſt. 113. But if done in ſuch creek or haven where the admiral

" ſuffer ſuch pains of death, loſſes of lands, goods, and chattels, " as if they had been attainted and convicted of ſuch offence " done upon the land; and alſo, that they ſhall be excluded from " the benefit of the clergy."

hath no juriſdiction, the commiſſioners cannot meddle with it.

Owen, 122. Moor, 756. Roll. Rep. 175. H. P. C. 77. (*b*) Hob. 146. (*c*) Yet it ſtill remains an offence of a ſpecial nature; and therefore the indictment muſt allege the fact to be done upon the ſea, and muſt have both the words *felonicè* and *piraticè*; and no offence is puniſhable by virtue of this act as piracy, which would not have been felony if done on land; conſequently, the taking of an enemy's ſhip by an enemy is not within the ſtatute. 3 Inſt. 112. S. P. C. 114. Roll. Rep. 175.—And although the ſtatute ordains, that it ſhall have the like trial and puniſhment as are uſed for felony at common law, yet this ſhall not be carried ſo far as to make it alſo agree with it in other particulars which are not mentioned; and therefore it ſhall not be included in a general pardon of all felonies. Moor. 756. 3 Inſt. 112. Co. Lit. 391. H. P. C. 77. 2 Hal. Hiſt. Plac. Cor. 370.—Nor ſhall an attainder for this offence work any corruption of blood. 3 Inſt. 112. H. P. C. 77.—But it hath been reſolved, that an offender ſtanding mute on an arraignment, by force of this ſtatute, ſhall have judgment of *pain fort & dure*. 3 Inſt. 114. Dyer, 241. [But by 12 Geo. 3. c. 20. " Standing mute in piracy " amounts to a conviction, and the court ſhall award the ſame ſentence as on a conviction by verdict or " confeſſion."]

It was (*a*) held, that by force of this ſtatute acceſſories to this offence could not be tried; but this is remedied by 11 & 12 *W.* 3. *cap.* 5. by which their aiders, and comforters, and the receivers of their goods, are made acceſſories, and to be tried as pirates, by 28 *H.* 8. *cap.* 15. [And by 8 *Geo.* 1. *c.* 24. made perpetual; by 2 *Geo.* 2. *c.* 28., perſons made acceſſories by 11 & 12 *W.* 3. are to be deemed principal pirates, felons, and robbers, and to be proceeded againſt accordingly.] Alſo, the ſaid ſtatute 11 & 12 *W.* 3. directs how pirates may be tried beyond ſea, according to the civil law, by commiſſion under the great ſeal of *England*.

(*a*) *Vide* Yelv. 134.

By the 5 *Eliz. cap.* 5. § 30. ſeveral offences in the act mentioned, if done on the main ſea, or coaſts of the ſea, being no part of the body of any county, and out of any haven and pier, ſhall be tried before the admiral or his deputy, and other juſtices of *oyer* and *terminer*, according to the ſtatute of 28 *H.* 8. *cap.* 15.

By 1 *Ann. ſeſſ.* 2. *cap.* 9. § 4. captains and mariners belonging to ſhips, and deſtroying the ſame at ſea, ſhall be tried in ſuch places as ſhall be limited by the king's commiſſion, and according to 28 *H.* 8. *cap.* 15.

And by 4 *Geo.* 1. *cap.* 11. § 7. all perſons, who ſhall commit any offence for which they ought to be adjudged pirates, felons, or robbers, by 11 & 12 *W.* 3. *cap.* 5. may be tried and judged for every ſuch offence according to the form of 28 *H.* 8. *cap.* 15. and ſhall be excluded from their clergy.

See 4 G. 1. c. 12. § 3. & 8 G. 1. c. 24., made perpetual by 2 Geo. 2. c. 28. § 7. and 11 Geo. 1. c. 29. § 6. 18 Geo. 2. c. 30.

[By *ſtat.* 33 *Geo.* 3. *c.* 66. § 70., which is to continue in force during the preſent hoſtilities with *France*, a ſeſſion of *oyer* and *terminer* and gaol-delivery for the trial of offences committed on the high ſeas, within the juriſdiction of the Admiralty of *England*, is required to be holden twice at leaſt in the year. And any commiſſioner named in the commiſſion for trying ſuch offences, or any juſtice of the peace may take informations upon oath touching the ſaid offences, and cauſe the parties to be apprehended and committed; and ſhall bind over all perſons, whom they

§ 71.

§ 72.

they ſhall reſpectively judge neceſſary, to appear, proſecute, and give evidence againſt the offender at the next Admiralty ſeſſions, which information and recognizance ſhall be tranſmitted to the
§ 73. regiſtrar to be laid before the court: And the marſhal, his deputy, all ſheriffs, and other officers for keeping the peace are required diligently to obey and execute the precepts, warrants, and orders of the court.]

(E) By what Law it proceeds, and the Form of ſuch Proceedings.

Godolph. Adm. Juris, 40. (a) So called, for that they were made by King Richard 1. when he was there. Co. Lit. 11. b. 260. b.

ALL maritime affairs are regulated chiefly by the civil law, the *Rhodian* laws, the laws of (a) *Oleron*, or by certain peculiar and municipal laws and conſtitutions appropriated to certain cities, towns, and countries bordering on the ſea.

Roll. Abr. 530.; but *vide* Roll. Rep. 285.

If the owner of a ſhip victuals it, and furniſhes it to ſea with letters of repriſal, and the maſter and mariners when they are at ſea commit piracy upon a friend of the king, without the notice or aſſent of the owner, yet by this the owner ſhall loſe his ſhip by the admiral law, and our law ought to take notice thereof.

Sid. 179. Mod. 93. Vent. 146. 12 Mod. 408, 409. 442. (b) But whether the executors of those mariners who died before the caſting away of the ſhip may recover the wages due to their teſtators, Q. & *vide* Sid. 179. Keb. 684. (c) For refuſing to fight when commanded by the maſter, *vide* 22 & 23 Car. 2. c. 11.

By the civil law and cuſtom of merchants, if the ſhip be (b) caſt away, or periſh through the mariners' default, they loſe their wages; ſo, (c) if taken by pirates, or if they run away; for if it were not for this policy they would forſake the ſhip in a ſtorm, and yield her up to enemies in any danger.

Roll. Abr. 530. Wiet's caſe. (d) So, upon a judgment given in a court of admiralty, execution may be ſued in foreign parts. Godb. 260. *arguendo*.— If a ſhip is condemned as the king's prize in a foreign admiralty, ſuch ſentence may be executed here. Salk. 32. pl 3. 33. (e) If a ſhip is ſold by virtue of a ſentence in the court of Admiralty in France, (being then in amity with England,) the ſentence ſhall not be examined in an action at common law; for we ought to give credit to their ſentences, elſe they will not give credit to the ſentences of our court of Admiralty. 2 Ld. Raym. 893. 936. but the way to be relieved is to petition the king, who will examine the caſe, and, if he finds cauſe of complaint, ſend to his ambaſſador reſiding there, and upon failure of redreſs will grant letters of marque and repriſal. Raym. 473. Skin. 59. pl. 2. & *vide* Vent. 32.——But where the court ſaid they would give no regard

If a man of *Friezland* ſues an *Engliſhman* in *Friezland* before the governor there, and there recovers againſt him a certain ſum, upon which the *Engliſhman*, not having ſufficient to ſatisfy it, comes into *England*, (d) and the governor ſends his letters miſſive into *England*, *omnes magiſtratus infra regnum Angliæ rogans* to make execution of the ſaid judgment, the judge of the Admiralty may execute this judgment by impriſonment of the party, and he ſhall not be delivered by the common law; for this is by the law of nations, that the juſtice of one nation ſhall be aiding to the juſtice of another nation, and for one to execute the judgment of the other; and the law of *England* (e) takes notice of this law, and the judge of the Admiralty is the proper magiſtrate for this purpoſe, for he only hath the execution of the civil law within this realm.

regard to a ſentence in the court of Admiralty of Scotland, *vide* Rudly and Egglesfield, 2 Sand. 259, 260. Vent. 174. ——But it was agreed the ſentence in Scotland was pleadable in the court of Admiralty here. Vent. 274. 2 Lev. 25. and 2 Sand. 260. The validity of the ſentence of the Admiralty in Scotland is determinable by the law of the Admiralty here.

The (*a*) maſter of a ſhip may hypothecate or pledge the ſhip without the conſent of the owner, for tackling and victuals, or he (*b*) may borrow money for the neceſſaries of the ſhip, and in ſuch caſes the party may in the Admiralty court (of which our law will take notice) (*c*) either proceed againſt the owner or againſt the ſhip. Hob. 11. Moor, 918. Roll. Abr. 530.

(*a*) Or he that is reputed maſter. Noy, 95.

But not before the voyage begins. Stra. 695. See 12 Mod. 406. (*b*) Though in fact it be not employed accordingly, and the owner muſt take his remedy againſt the maſter. Noy, 95. (*c*) 2 Sid. 161., ſaid to have been ſo lately agreed.——But *vide* Salk. 35. pl. 9 Ld. Raym. 982. 6 Mod. 79. 11 Mod. 30 pl. 1., That the maſter cannot by his contract make the owners perſonally liable, although he may bind the ſhip, without which the maſter can have no credit abroad without ſuch ſecurity by hypothecation.

But the maſter cannot ſell the ſhip and broken tackle, though there is no probability of its being ſaved, partly in reſpect of the tempeſt, and partly in reſpect of the barbarity of the inhabitants, who took away every thing that was caſt upon the ſhore. Sid. 453. *per* Hale, Ch. Baron.

If a merchant's ſhip is taken by an (*d*) enemy, and a month after is retaken by an *Engliſh* ſhip, (*e*) the firſt owner (*f*) ſhall not have reſtitution, for the ſhip was gained by battle with an enemy. 2 Brownl. 11. Weſton's caſe.

(*d*) Otherwiſe if by a pirate.

Vent. 174. (*e*) Where the property is not altered until the prize is brought *infra præſidia* of that king, by whoſe ſubject it is taken. March. 110, 111. [(*f*) But the property is not completely veſted ſo as to bar the former owner, in favour of a reſcuer or vendee, till there has been a ſentence of condemnation in ſome, foreign or domeſtick, Admiralty court. 10 Mod. 79. 2 Burr. 694. 1208-9. Doug. 617. And it is uſual in the prize acts to preſerve the right of the original owner, even after condemnation, paying the ſalvage thereby fixed.]

If two ſhips meet at ſea together, though they went not forth conſorts, and one of the ſhips in the preſence of the other takes a prize, the other ſhip which was preſent ſhall have the moiety, for the preſence of this ſhip was a terror to the ſhip taken. 2 Leon. 182. *per Curiam.*

If an infant, being maſter of a ſhip at St. *Chriſtopher*'s, beyond ſea, by contract with another, undertakes to carry certain goods from St. *Chriſtopher*'s to *England*, and there to deliver them according to the agreement, but waſtes and conſumes them, he may be ſued for the goods in the court of Admiralty, though he be an infant; for this ſuit is but in nature of a detinue or trover and converſion at the common law. Roll. Abr. 530. Furnes and Smith adjudged.

If goods are thrown over-board in ſtreſs of weather, in danger or juſt fear of enemies, in order to ſave the ſhip and the reſt of the cargo, that which is ſaved ſhall contribute to a proportion of that which is loſt; and this average, which by the civil law and cuſtom of merchants binds the owners, may be (*g*) pleaded to an action at common law. Molloy, 246.

(*g*) 2 Bulſt. 290.

But average is not due, unleſs the goods are loſt in ſuch a manner that thereby the reſidue in the ſhip are ſaved; as if goods are thrown over-board to lighten the ſhip, or by compoſition part is given to a pirate to ſave the reſt; but if a pirate takes part by violence, average ſhall not be paid for them. Moor, 297.

So,

Show. Parl. Ca. 18, 19.

So, where *A.* being one of the owners of a ſhip, loaded on board her 210 tuns of oil, and *B.* loaded on board her 80 bales of ſilk upon a freight, by contract both to be delivered at *London;* the ſhip was purſued by enemies, and forced into an harbour, *&c.* and the maſter ordered the ſilk on ſhore, being the moſt valuable commodity, (though they lay under the oils, and took up a great deal of time to get at them,) the ſhip and oils were afterwards taken, and the owner of the oils brought his bill in equity to have contribution from the owner of the ſilk; but in this caſe, as the loſs of the oils did not ſave the ſilks, nor the ſaving of the ſilks loſe the oils, the bill was diſmiſſed.

Roll. Abr. 531. Cro. Eliz. 685. Noy, 24. Hard. 473. 13 Co. 52. 2 Brownl. 26. 2 Inſt. 51. Yelv. 135. Godb. 193. 260.

By the civil law the Admiralty court may take a recognizance in (*a*) nature of a ſtipulation from the defendant to anſwer the action; and if he does not obey, they may take his body; for it is neceſſary that every court ſhould have a compulſory power of enforcing obedience to its decrees, and this courſe, having prevailed there time out of mind, cannot be altered without an act of parliament.

(*a*) But being no court of record they cannot take a recognizance. 4 Inſt. 135. 137.——Yet ſuch a ſtipulation is good. Raym. 78. adjudged, [though in the form a recognizance. Brymer v. Atkins, 1 H. Bl. 164.]

Roll. Abr. 531. (*b*) Raym. 78. Keb. 489.

So, they may require *fidejuſſores* to enter into ſuch ſtipulation, and ſuch ſtipulation, if the practice has been ſo, may be good, though entered into (*b*) for a ſum certain, and the bail taken in execution thereupon; and if they had not this power, the party might be obliged to lie in gaol during the whole ſuit.

13 Co. 53. adjudged. (*c*) But not fine as judges of a court of record may do. 12 Co. 104.

Though the court of Admiralty is no court of record, becauſe they proceed there according to the civil law, yet by the cuſtom of the court they may (*c*) amerce the defendant for his (*d*) default by their diſcretion, and may make execution for the ſame of the (*e*) goods of the defendant *in corpore com.* and if he hath no goods take his body.

—But they may fine and impriſon for a contempt in the face of the court. Vent. 1. (*d*) They may puniſh one that reſiſts the execution of the proceſs of the court, but not give damages to the party. Vent. 1. But becauſe they had no cognizance of the original matter, upon which the proceſs was grounded, a prohibition was granted, &c. Style, 171. 340. (*e*) But they can in no caſe take land in execution. Godb. 193 260. Said by Coke, that the proceſs of the Admiralty court is to impriſon according to 19 H. 6. *vide* Hard. 474. Noy, 24. Godb. 260. Sid. 148.

Vent. 174. (*f*) That upon ſuch interlocutory decree no appeal lies to the delegates. Vent. 174.

When a (*f*) proviſionate decree, as they call it, or *primum decretum*, is given for the poſſeſſion of a ſhip, and ſhe is ſeiſed, upon ſecurity given by the courſe of the Admiralty ſhe may be hired out.

[For this court, as well as the court of Chivalry, is governed by the civil law; and by that law, there can be no appeal, but where *gravamen eſt irreparabile*. Sir Henry Blount's caſe, 1 Atk. 295. *Vide* Moor, 814. *contr.*]

(*g*) For in ſuch caſe no writ of error lies. 4 Inſt. 135. 339. 341.

By 8 *Eliz. cap.* 5. "A definitive ſentence in a civil or marine "cauſe, by delegates by commiſſion upon an (*g*) appeal in Chan- "cery, ſhall be final."

[It

[It is only from the ordinary court of the Admiralty, that the appeal lies to the delegates. From the *prize* court the appeal is in purſuance of national conventions, to commiſſioned members of the privy council, called lords commiſſioners in prize cauſes.] 3 Bl. Com. 69.

Of the Marſhalſea and Palace Court.

AT the time of the juſticiar, the diſputes between the king's ſervants were determined before the ſteward and marſhal, and for that purpoſe the court was held within the king's verge, that his ſervants might not be drawn away from their attendance on him; the proceedings were by plaint without any original writ. Fleta, lib. 2. c. 3. Spelm. tit. *Juſtic. Gren.*

This court hath ſtill a continuance, being holden in *Southwark*, and is a court of record, exerciſing a juriſdiction within twelve miles of the king's palace, or where his (*a*) ordinary reſidence is. 13 R. 2. ſt. 1. c. 3. 15 H. 6. c. 1. 33 H. 8. c. 12. Cromp. Juriſ. 102. 2 Inſt. 548. 4 Inſt. 130.

(*a*) The king's going out of the houſehold for his recreation is not ſuch a removing as changes his ordinary reſidence. 10 Co. 74.

By 28 *E.* 1. *cap.* 3. called *Articuli ſuper chart.* "The ſteward "and marſhal of the king's houſe ſhall not hold plea of freehold, "neither of debt nor of covenant, nor of any contract, but "only of debts and other things of the people of the ſame houſe, "of contracts and covenants that one of the king's houſe ſhall "have made with another of the ſame houſe, and in the ſame "houſe, and of other (*b*) treſpaſſes done within the verge." For the conſtruction hereof *vide* 2 Inſt. 548. 10 Co. 71. The Marſhaller's caſe. 6 Co. 20, 21. 4 Co. 46.

(*b*) Does not extend to treſpaſs *quare clauſum fregit*, ejectment, for they cannot hold plea of any real or mixed action. 10 Co. 75.

In every action of debt or covenant, both the parties muſt be within the juriſdiction of the court: (*c*) alſo, the contract and conſideration muſt be laid to have ariſen within the juriſdiction; but in treſpaſs it is ſaid to be ſufficient, if one of the parties be within the precincts or juriſdiction of the court. 6 Co. 20. Michelborn's caſe. (*c*) Sid. 105.

King *Charles* the Firſt, by letters patent, granted to the Marſhalſea or palace-court, juriſdiction of holding plea of all manner of perſonal actions whatſoever, as debt, treſpaſs, battery, ſlander, trover, actions on the caſe, which ſhall ariſe within twelve miles of the palace of *Whitehall*. *Vide* Sid. 180., where it ſeemed to Keeling that ſuch letters patent were void. [The court of the *Marſhalſea*, and the *palace court*, though here treated of, and indeed very frequently confounded together, are in fact two diſtinct courts. The former is by preſcription: the latter was erected by letters patent in the 6th year of King Charles the Firſt: the former was originally holden before the ſteward and marſhal of the king's houſe, and was inſtituted to adminiſter juſtice between the king's domeſtick ſervants. 1 Bulſtr. 211. holding plea of all treſpaſſes committed within the verge of the

the court, where only one of the parties was in the king's domeſtick ſervice, 1 Sid. 105. and of all debts, contracts, and covenants, where both of the contracting parties belong to the royal houſehold; Artic. *ſup. cart.* 28 Edw. 1. c. 3. ſt. 5 Edw. 3. c. 2. 10 Edw. 3. ſt. 2. c. 2. The latter is to be holden before the ſteward of the houſehold, and knight marſhal, and the ſteward of the court, or his deputy; with juriſdiction to hold plea of all perſonal actions whatſoever, which ſhall ariſe between any parties within twelve miles of the palace at Whitehall. 1 Sid. 180. 2 Salk. 439. This court, therefore, is ſtationary, whereas the other is ambulatory, and obliged to follow the king in all his progreſſes, its verge extending for twelve miles round his majeſty's place of reſidence. 13 R. 2. ſt. 1. c. 3. Both of the courts are now holden together in the borough of Southwark once a week: and a writ of error lies from both to the court of King's Bench: the writ of error from the Marſhalſea court is allowed by the ſtatutes of 5 Edw. 3. c. 2. and 10 Edw. 3. ſt. 2. c. 3. for as this tribunal was never ſubject to the juriſdiction of the chief juſticiary, the writ of error, at common law, lay only to parliament. 1 Bulſtr. 211. 10 Co. 79. 3 Bl. Comm. 76.]

Courts Palatinate.

Cromp. Juriſ. 137. 2 Inſt. 557. (*a*) 4 Inſt. 204. 213. —Is a general court for all the ſubjects of the palatinate,

THE Palatinate courts are ſuperior courts of record, which exerciſe a juriſdiction within their own precincts in as (*a*) ample a manner as the courts of *Weſtminſter*, into which the king's ordinary writs do not run; and although they have (*b*) *jura regalia*, yet they derive their authority (*c*) from the crown; but (*d*) at this day no palatinate juriſdiction can be erected without an act of parliament.

and not merely for cauſes ariſing within the palatinate; and therefore if a debtor goes from a foreign into a palatinate juriſdiction, his obligations go along with him as much as if he removed from one kingdom into another, and he may be ſued there, though the cauſe of action aroſe not within ſuch palatinate juriſdiction. Sand. 74. Peacock and Beſt reſolved. (*b*) Might formerly pardon treaſons, murder, felonies, &c. but their power as to many things is now reſtrained, for which *vide* 4 Inſt. 205. 27 H. 8. c. 24. (*c*) And were probably erected at firſt as being adjacent to thoſe countries, which were generally in enmity with England, *viz.* That the people of Lancaſter and Durham, which lie towards Scotland, and Cheſter that lies towards Wales, might have juſtice adminiſtered to them at home, and not be obliged to any attendance elſewhere, which might render them leſs able to defend themſelves againſt their neighbours' incurſions. Vent. 155. *Arguendo.* (*d*) *Vide* 4 Inſt. 204. Cromp. Juriſ. 139.

4 Inſt. 205.

By 27 *H.* 8. *cap.* 24. § 3. it is enacted, "That all original "writs and judicial writs, and all manner of indictments of trea- "ſon, felony, and treſpaſs, and all manner of proceſs to be made "upon the ſame in every county palatine, and other liberty with- "in this realm of *England* and *Wales*, ſhall be made only in the "name of our ſovereign lord the king, and his heirs, kings of "*England*; and that every perſon or perſons having ſuch county "palatine, or any other ſuch liberty to make ſuch originals, ju- "dicials, or other proceſs of juſtice, ſhall make the *teſte* in the "ſaid original writs and judicial in the name of that ſame perſon "or perſons that have ſuch county palatine or liberty."

By 11 & 12 *W.* 3. *cap.* 9. reciting 22 and 23 *Car.* 2. *cap.* 9. and its reference to 43 *Eliz.* *cap.* 6. and that the clauſe, *That in actions*

actions of treſpaſs, aſſault, and battery, and other perſonal actions, the plaintiff in ſuch actions, in caſe the jury ſhall find the damages to be under the value of 40 s. ſhall not recover or obtain more coſts of ſuit than the damage ſo found ſhall amount unto, relates only to the courts at *Weſtminſter*, it is enacted, "That as well the ſaid clauſe "and all the powers and proviſions thereby, or by any other law "now in force, made for prevention of frivolous and vexatious "ſuits, commenced in the courts of *Weſtminſter*, ſhall be extended "to, and be of the ſame force and efficacy in all ſuch ſuits, to be "commenced or proſecuted in the court of great ſeſſions for the "principality of *Wales*, the court of great ſeſſions for the county "palatine of *Cheſter*, the court of common pleas for the county "palatine of *Lancaſter*, and the court of pleas for the county "palatine of *Durham*, as fully and amply as if the ſaid courts "had been mentioned therein."

And it is further enacted by the ſaid laſt mentioned ſtatute, "That no ſheriff, or other officers within the ſaid principality or "counties palatine, upon any writ or proceſs iſſuing out of any of "his majeſty's courts of record at *Weſtminſter*, ſhall hold any "perſon to ſpecial bail unleſs an affidavit be firſt made in writ-"ing, and filed in that court, out of which ſuch writ or proceſs "is to iſſue, ſignifying the cauſe of action, and that the ſame is "20*l.* or upwards, and where the cauſe of action is 20*l.* and "upwards, bail ſhall not be taken for more than the ſum ex-"preſſed in ſuch affidavit.." *Vide* Vol. I. 326.

The palatinate courts are at this day three, *viz. Cheſter, Durham,* and *Lancaſter.*

1. Of the County Palatine of *Cheſter.*

This is a county palatine by preſcription, and according to my Lord *Coke* is the moſt ancient and honourable remaining at this day. 4 Inſt. 211. Cromp. Juriſ. 137.

Within this county palatine, and the county of the city of *Cheſter*, there is and anciently hath been a principal officer called the Chamberlain of *Cheſter*, who hath, and time out of mind hath had, the juriſdiction of a chancellor; and the court of Exchequer at *Cheſter* is, and time out of mind hath been, the chancery court for the ſaid county palatine, whereof the Chamberlain of *Cheſter* is judge in equity: he is alſo judge of matters at the common law within the ſaid county, as in the court of Chancery at *Weſtminſter*, for this court of Chancery is a mixt court. 4 Inſt. 211.

There is alſo, within the ſaid county palatine, a juſtice for matters of the common pleas, and pleas of the crown, to be heard and determined within the ſaid county palatine, commonly called the Chief Juſtice of *Cheſter.* 4 Inſt. 212.

All pleas of lands or tenements, and all other contracts, cauſes, and matters riſing and growing within this county palatine are pleadable, and ought to be pleaded, heard, and judicially determined within the ſaid county palatine, and not elſewhere; and if any be pleaded, heard, or judged out of the ſaid county pala- 4 Inſt. 212.

tine, the ſame is (a) void, and *coram non judice*, except it be in caſe of treaſon, error, foreign plea, or foreign voucher.

(a) That this muſt be underſtood where the plaintiff by his declaration ſhews that the matter aroſe within a county palatine; for as to a tranſitory action, the plaintiff may allege that the cauſe of action accrued at any place. *Vide* Sid. 103. and *ſupra* of courts in general.

Roll. Abr. 374. Roll. Rep. 246. 3 Bulſt. 117. 12 Co. 113. 4 Inſt. 213.

A man cannot ſue in the Chancery of *Cheſter* for a thing which in intereſt concerns the chancellor there, becauſe he cannot be his own judge; and therefore he may in this caſe ſue in the Chancery of *England*; for (b) otherwiſe there would be a failure of right.

S. P. (b) If a man hath cauſe to complain in equity of a matter ariſing within the county palatine of Cheſter; if the defendant lives out of the county palatine, he may be ſued in the Chancery here; otherwiſe there would be a failure of juſtice; for proceeding in equity binding the perſon only, if the perſon lives out of the juriſdiction of the chamberlain of Cheſter, there can be no relief there. 4 Inſt. 213. [In the caſe of Edgworth v Davies, 1 Ch. Caſ. 41. it is ſtated to have been reported, upon view of precedents, *that the juriſdiction of the counties palatine was allowable between parties dwelling in the ſame county, and for lands there, and for matters local.*]

Fitz. Coro. 233. 12 E. 4. 16. D. Plit. 396. Vent. 157. 2 Sid. 146.

Outlawry in a county palatine cannot be pleaded in any of the courts at *Weſtminſter*, for the party outlawed is only ouſted of his law within that juriſdiction, and it ſhall not extend to diſable a man in another county, where they have no power; for the county palatine being a royal juriſdiction within bounds, the loſing the privileges of the law within that juriſdiction can be no diſadvantage to him in another county; and if he does not live within the palatine juriſdiction, he is not obliged to attend there; but it ſeems that outlawry in the county palatine of *Lancaſter* may be pleaded in the courts of *Weſtminſter*, becauſe that county was erected by act of parliament in *Edward* the Third's time, but *Durham* and *Cheſter* are by preſcription.

2. Of the County Palatine of *Durham*.

4 Inſt. 216. Cromp. Juriſ. 138. See 12 Mod. 181.

This is alſo a county palatine by preſcription, and ſaid to have been erected ſoon after the conqueſt, and is parcel of the biſhoprick of *Durham*.

Roll. Abr. 540. Roll. Rep. 397. 3 Bulſt. 156.

The juriſdiction of the Biſhop of *Durham* (c) extends to all places between *Tine* and *Teſe*.

S. P. (c) His juriſdiction extends as well to the manors of other men as to the demeſnes of the biſhop. Roll. Rep. 397. 3 Bulſt. 156.

4 Inſt. 218.

In this county palatine there is a court of Chancery, which is a mixed court both of law and equity, as the Chancery at *Weſtminſter*.

4 Inſt. 218.

If an erroneous judgment be given, either in the Chancery upon a judgment there, according to the common law, or before the juſtices of the biſhop, a writ of error ſhall be brought before the biſhop himſelf; and if he give an erroneous judgment thereupon, a writ of error ſhall be ſued returnable in the King's Bench.

2 Inſt. 219, 220.

If a man be ſurety for another to keep the peace, and, after he break the peace, and the ſurety have lands in the county palatine of *Durham*, the king ſhall command the biſhop of *Durham*, or

or his chancellor, to do execution; and ſo it is in the other counties palatine, and in the ſame manner it is of a ſtatute ſtaple, &c. recognizances, &c.

* The court of King's Bench will expect a return of a *latitat* to the county palatinate of *Durham*.* 2 Stra. 1089. Andr. 191.

3. Of the County Palatine of *Lancaſter*, and the Dutchy Court.

The county palatine and dutchy of *Lancaſter* were erected by act of parliament in the reign of *Ed.* 3. 4 Inſt. 204. Plow. 215. It does not appear that this county palatine was erected by any ſtatute in this reign; Edmund, ſon of Henry III. was Duke of Lancaſter. It hath been a county palatine time out of mind. Cromp. Juriſ. 137.

If lands, (*a*) parcel of the dutchy lie within the county palatine, a ſuit in equity may be for them in the dutchy court. Vent. 157. See 9 Mod. 95. Roll. Abr. 539. (*a*) How the county palatine became parcel of the dutchy, *vide* 1 E. 4. c. 1. 1 H. 7. 4 Inſt. 205. Vent. 155.

But if a man enters into an obligation concerning lands lying in the county palatine, and he is ſued upon this at common law, he cannot ſue in equity in the dutchy court to be relieved againſt this bond, for the juriſdiction being local, it cannot be extended to this collateral matter. Roll. Abr. 539., Holt's caſe. Hob. 77. S. C. adjudged; and a prohibition awarded, becauſe the dutchy hath no juriſdiction in reſpect of the perſon, as becauſe the ſuitors dwell within the county palatine, nor upon the lands of the ſubject any where but upon the king's own land, and his own revenue, and perhaps upon bonds and aſſurances given for his revenue of the dutchy.

But it hath been ſince holden that a bill may be exhibited in the dutchy court, to be relieved againſt the forfeiture of a mortgage of lands lying within the county of *Lancaſter*. 2 Lev. 24. 2 Keb. 826. S. C. Vent. 155. Fiſher and Batten,

The proceedings of the dutchy court at *Weſtminſter* are as in a court of (*b*) Chancery for lands, &c. within the (*c*) ſurvey of the court by *Engliſh* bill, &c. and decree, and the proceſs the ſame as in Chancery; but it is not a mixed court, as the Chancery of *England* is, (*d*) partly of the common law, and partly of equity. 4 Inſt 206. (*b*) It doth not appear how this court of equity began, but it would be inconvenient now to examine the power thereof after ſo long continuance, &c. 2 Lev. 24. (*c*) Whatever belongs to the juriſdiction of the dutchy may be determined in the Exchequer. Hard. 171. [or in the court of Chancery. 1 Ch. Rep. 55.] (*d*) They cannot try the validity of letters patent, or other matter properly triable at law. Roll. Rep. 42. 252. 3 Bulſt. 119. 12 Co. 114.

It was granted by patent, that this court might make ordinances for the hoſpital of *W.* how they *ſe gererent*, *converſarentur & eligerentur*, and this patent was confirmed by the ſtatute of the 14 *Eliz.* yet it was reſolved that the court hereby hath no power to determine the right of the poſſeſſions; and the hoſpital having exhibited a bill in this court to avoid a leaſe by them made, of lands lying out of the dutcy, a prohibition was granted. Roll. Rep. 42. Sir Thomas Beaumont and the Hoſpital of Wigſton.

By the ſtatute of 16 *Car.* 1. *cap.* 10., reciting that the proceedings, cenſures, and decrees of the court of *Star-chamber* were found an intolerable burden to the ſubject, &c. it is enacted, "That the court of *Star-chamber* and all its power, juriſdiction, "and authority, ſhall be diſſolved, and the like juriſdiction then "uſed

" uſed and exerciſed in the court of the dutchy of *Lancaſter*, &c. " is repealed, revoked, and made void."

* By 4 *Geo.* 3. *cap.* 16. infants in counties palatine are enabled to convey by order of the reſpective courts belonging to the counties palatine*.

Of the Royal Franchiſe of Ely.

4 Inſt. 220. (*a*) 2 Inſt. 223. Carth. 109. So reſolved.

ELY is (*a*) not a county palatine, but a royal franchiſe, granted by *H.* 1. to the biſhop of *Ely* and his ſucceſſors, (*b*) of hearing and determining as well civil as criminal pleas.

(*b*) This juriſdiction the biſhop now excerciſes by his juſtices, by preſcription grounded on the ſaid grant. 4 Inſt. 220. [The franchiſe is of much earlier date than the time of Henry the Firſt. The biſhoprick was founded by that prince in the tenth year of his reign, A. D. 1109., and immediately after, the grant here alluded to was made. But the franchiſe itſelf may be traced back to the ſeventh century, and Henry's charter refers to preceding grants, and declares that the church of Ely ſhall *continue* to have the ſame privileges and liberties as it had *die, quâ Edwardus vivus et mortuus fuit*. See Bentham's Ely, 46. Appendix, 23.]

Carth. 109. Cotton and Johnſon, Salk. 183. pl. 1. S. C. adjudged.

And therefore the party, who is ſued in the courts of *Weſtminſter*, cannot plead that the lands lie, or that the cauſe of action aroſe within *Ely*, but (*c*) conuſance muſt be demanded, which is all the juriſdiction a franchiſe hath.

(*c*) Of the manner of demanding conuſance, *vide* Sid. 283. Keb. 946. 948. [See the record in this caſe, Bentham's Ely, Appendix, 26. *Vide ſupra*, tit. *Courts and their Juriſdiction in general*, D. 3.]

4 Inſt. 221. (*d*) But if an action, that in its nature is joint, riſe partly within and partly without the franchiſe, the franchiſe cannot claim conuſance. 4 Inſt. 220.

If one be bailiff of lands in *A.* and *B.*, and *B.* be within the franchiſe of *Ely*, and *A.* not, the bailiff cannot be charged in (*d*) a joint action, for this would ouſt the franchiſe of its juriſdiction.

Courts of the Foreſt.

Manwood, 143. (*e*) The king only can make a foreſt, and

A Foreſt, as deſcribed by *Manwood*, is a certain territory of woody grounds and fruitful paſtures, privileged for wild beaſts and fowls of foreſt, chaſe, and warren, to reſt and abide there in the ſafe protection of the (*e*) king for his delight and pleaſure,

pleaſure, which territory of ground ſo privileged is meted and bounded with (*a*) unremoveable marks, meets, and boundaries, either known by matter of record, or by preſcription, and alſo repleniſhed (*b*) with wild beaſts of venary or chaſe, and with great coverts of (*c*) vert for the ſuccour of the ſaid beaſts there to abide; for the preſervation and continuance of which place, together with the vert and veniſon, there are particular (*d*) officers, (*e*) laws, and privileges belonging to the ſame, requiſite for that purpoſe, and proper only to a foreſt, and to no (*f*) other place.

therefore every foreſt muſt appear to be ſuch by matter of record, or by preſcription, which ſuppoſes a grant from the crown for that

purpoſe. Plow. 318. Bract. lib. 2. c. 1. 4 Inſt. 300. Bro. *Quo Warranto*, 7.—But a ſubject may have a foreſt by grant from the crown. Dyer, 169. Manwood, 155.———Before the ſtatute of *Charta de Foreſta*, the king uſed to convert the open and woody grounds of his ſubjects into foreſts; but though at this day he may make a foreſt, yet he cannot afforeſt any of his ſubject's lands. 4 Inſt. 300. (*a*) But need not be actually incloſed with hedge, ditch, &c. Manwood, 145. (*b*) Of the ſeveral beaſts of the foreſt, *vide* 4 Inſt. 316. (*c*) This word comprehends every thing bearing green leaves in the foreſt. Manwood, 146. (*d*) The chief of whom is the chief juſtice in *eyre*, who was formerly created by writ, as other juſtices in *eyre*; but by the ſtatute 27 H. 8. c. 24. he is made by letters patent, and may execute his office by deputy. [The office is divided between two, one for the foreſts on this ſide of Trent, the other for thoſe beyond.] 4 Inſt. 291. 314.——The other officers are the rangers, ſtewards, verderors, foreſters, regarders, agiſtors, and woodwards; theſe muſt duly attend their reſpective offices, and therefore are privileged from attending on juries in the county, &c. F. N. B. 164. 2 Inſt. 291. 1 Jon. 266. (*e*) Which differ in many caſes from the common law of England, for which *vide* 4 Inſt. 315. (*f*) For although warrens and parks are civil incloſures, and a chaſe is a franchiſe differing only from a park, in that it is not incloſed; and though theſe enjoy privileges by grant from the crown diſtinct from other lands, yet are they not to be conſidered as foreſt, having neither particular laws, nor particular officers; and, therefore, offences committed in theſe muſt be puniſhed by the common law. 4 Inſt. 308. Manwood, 49. Co. Lit. 233.

There are three courts (*g*) incident to a foreſt. (*g*) Poph. 150. Roll. Rep. 191.

1. The Juſtice Seat.
2. The Swainmote Court.
3. The Court of Attachments.

1. Of the Juſtice Seat.

This court is ſo (*h*) incident to a foreſt, that there cannot be a foreſt without it, but it (*i*) cannot be holden oftner than every third year. (*h*) 2 Bulſt. 298. (*i*) 4 Inſt. 290.

It muſt be ſummoned at leaſt 40 days before ſitting, and one writ of ſummons ſhall be directed to the ſheriff, &c. the other *cuſtodi foreſtæ vel ejus locum tenenti*, to ſummon all officers, &c., and all perſons that claim liberties within the foreſt, to ſhew how they claim them. 4 Inſt. 291.

This court may inquire, hear, and determine all treſpaſſes within the foreſt, (*k*) according to the law of the foreſt, and all claims of franchiſes, &c. within the foreſt. 4 Inſt. 291. (*k*) Whether a man may be impriſoned for non-payment of a fine ſet there, Webb's caſe, Roll. Rep. 411. 2 Bulſt. 213. *dubitatur.*

By the 7 *R.* 3. *cap.* 3. it is enacted, "That (*l*) no jury ſhall be "compelled by any officer of the foreſt, or other perſon, to travel "from place to place, out of the place where the charge is given, "but ſhall give their verdict in the place where their charge is "given." [(*l*) In a *ſcire facias* againſt the defendant, *quare non ſatisfecit* a fine ſet upon him at the juſtice ſeat in the foreſt of Deane, the plea was, that the juſtice was at Glouceſter, which is

is out of the foreſt; and thereupon it was demurred, becauſe the beginning of the juſtice ſeat was at ſuch a place within the foreſt, and adjourned to Glouceſter. All the court held it good enough, although the juſtice ſeat were began in a place out of the foreſt, and gave judgment for the king.] Roll. Abr. 534. Cro. Car. 409.

Jones, 168. (a) Where the indictment was removed in B. R., and the defendant there put to anſwer. 4 Inſt. 295.

The proceedings in this court are *de horâ in horam*, and therefore the defendant muſt plead to an indictment there (a) preſently.

By 9 *H.* 3. *cap.* 2. "Dwellers out of foreſts ſhall not come before juſtices of the foreſt by common ſummons, unleſs empleaded there, or ſureties for others attached for the foreſt."

By 34 *E.* 1. *ſtat.* 5. *cap.* 6. "The juſtice of the foreſt, or his lieutenant, in preſence or by aſſent of the treaſurer, may take fines and amercements of indictees for treſpaſſes done there, and not tarry for the *eyre* of the juſtices."

4 Inſt. 315. A felony committed within the foreſt muſt be inquired of, &c. before the judges of the common law, and it belongs not to the conuſance of the chief juſtice of the foreſt.

4 Inſt. 317. A receipt of an offender in hunting, &c., or of the king's veniſon, out of the foreſt, cannot be puniſhed by the law of the foreſt, becauſe the juriſdiction is local.

4 Inſt. 290. (b) By 9 H. 3. c. 16., Preſentments of the foreſters, when enrolled and encloſed under the ſeals of the verderors, ſhall be preſented to the chief juſtices, &c. and be determined before them. —— How the truth of ſuch preſentment ſhall be inquired of, and after by aſſent of the foreſters, verderors, regarders, &c. and confirmed and ſealed with their ſeals, *vide* 34 E. 1. c. 1. And indictments taken in other manner ſhall be void.—And by 34 E. 1. ſtat. 5. c. 2. If any officer is dead, or ſick, ſo that he cannot be at the ſwainmote, the juſtice of the foreſt ſhall put another in his place, ſo that the indictment may be by all, in form. —— If ſealed with the ſeal of one officer only, by aſſent of all the verderors, &c. it is well enough. Jones, 268.

This court may proceed upon the (b) preſentments or verdicts in the ſwainmote.

Jones, 279. If, upon the firſt ſitting of the juſtice ſeat, the four men and reeve of any town make default, the whole vill ſhall be amerced; but if after appearance they make default upon an adjournment, the defaulters only ſhall be amerced.

4 Inſt. 290. (c) Jones, 347. (d) Nothing can be done but upon their preſentments. 2 Bulſt. 297.

If at the ſwainmote the preſentment of the foreſters concerning vert and veniſon is found true, the offender is convict in law, and (c) cannot traverſe; but a preſentment at a juſtice ſeat (d) not found at the ſwainmote may be traverſed, becauſe preſented but by one jury.

4 Inſt. 313. If the king pardons a treſpaſs in a foreſt, and an offender at a juſtice ſeat pleads it, by the law of the foreſt, before any allowance thereof, the juſtices muſt charge the miniſters of the foreſt to inquire whether the delinquent hath done any treſpaſs in vert or veniſon ſince the date of the pardon, and when the pardon is allowed, the entry is *quod invenit manucaptores quodammodo non forisfac. &c.*

4 Inſt. 313. If an offender be convicted for a treſpaſs in the foreſt in hunting, &c. and adjudged to be fined or impriſoned, though he pays the fine, yet he muſt find ſureties for his good abearing.

If

If a claim is allowed there which (*a*) ought not, the party grieved may, by *certiorari*, remove the record *in B. R.*, and thereupon have a *ſcire facias*, *&c.* 4 Inſt. 294. (*a*) How the ch. juſtice may inquire of the truth of ſuch claims *per miniſtros foreſtæ*, or *tam per miniſtros quam per alios*, at his diſcretion. 4 Inſt. 294, 295.

But if refuſed to be allowed where it ought, the party ſhall have a writ *de libertatibus allocandis* to the juſtices of the foreſt. 4 Inſt. 297.

But if upon ſuch claim a difficulty ariſes, or a demurrer is joined, the chief juſtice may adjourn it *in B. R.*, *&c.* 4 Inſt. 295.

A *certiorari* was prayed on behalf of the Duke of *Norfolk*, to remove a preſentment taken in the foreſt of *Pickering*, to be directed to the chief juſtice in *eyre*; the judgment was, becauſe there was a queſtion of right, to whom certain woods there did belong, whether to the Duke of *Norfolk*, or to the Duke of *Newcaſtle*; and the Duke of *Newcaſtle*, being chief juſtice in *eyre*, would not let the woods be cut, to the prejudice of the Duke of *Norfolk*'s right, but cauſed them to be preſented; whereas in truth theſe woods had been deafforeſted: it was holden by the court, that in this caſe no *certiorari* ſhould go, for the right of the woods is not in queſtion; for a man (*b*) cannot cut his own woods to deſtroy the vert, but ſhall fine for it; and ſo the chief juſtice in *eyre* may be a judge for the king, though not for himſelf; and if it be deafforeſted, treſpaſs lies, for the proceedings will be *coram non judice*; but if they ſhould be removed, there will be a failure of juſtice; for the *K. B.* cannot proceed to convict, not having their laws nor their officers; but after a conviction it may be otherwiſe. Sid. 296. Duke of Norfolk v. Duke of Newcaſtle, 2 Keb. 43. 82. S. C. (*b*) *Vide* Manwood, 370., &c.

The chief juſtice in *eyre* cannot, upon an information that ſuch and ſuch perſons have killed does and felled trees in the foreſt, iſſue his warrant for apprehending ſuch perſons; for it is (*c*) expreſsly provided, that no man ſhall be taken or impriſoned by any officer of a foreſt without due indictment, or being taken with the (*d*) manner. Carth. 77. Lord Lovelace's caſe, and ſeveral perſons apprehended on his warrant, diſcharged on a *habeas corpus*. (*c*) As by 1 E. 3. c. 8. 7 R. 2. c. 4. *& vide* Reg. f. 8. F. N. B. 67. 4 Inſt. 289. (*d*) What ſhall be a taking in the manner, Carth. 79. *& vide poſt.*

Nor can any ſuch warrant be directed to a meſſenger or other perſon that is not an officer of the foreſt; for herein the authority of the chief juſtice in *eyre*, and that of a juſtice of peace, is the ſame, who cannot direct his warrant to his ſervant, or any other perſon, but muſt direct it to the conſtable or pariſh officers; and the warrant *ſupra* being directed to a meſſenger, for this reaſon, principally, the perſons were diſcharged. Carth. 78.

2. Of the Swainmote Court.

The ſwainmote is holden by the ſteward by the verderors as judges, (*e*) thrice in the year, and the (*f*) foreſters are to preſent their attachments at the next ſwainmote, where the freeholders within the foreſt are to appear to ſerve on juries. 4 Inſt. 289. (*e*) And at what time, and who bound to appear there, *vide* 9 H. 3. c. 8. (*f*) 9 H. 3. c. 6.

4 Inſt. 289. & *vide* 34 E. 1. ſtat. 5. c. 4.

This court may inquire *de ſuperoneratione foreſtarum & aliorum miniſtrorum foreſtæ & de eorum oppreſſionibus populo illat.*

4 Inſt. 289. (*a*) And therefore a ſwainmote without a juſtice ſeat is of no force at all. 2 Bulſt. 298. *per Coke.*

This court may not only inquire, but convict, but (*a*) not give judgment.

3. Of the Court of Attachments.

4 Inſt. 289. (*b*) Taking in the manner, is when a man is taken in the very fact, or ready to do it, as with his bow bent, or ready to ſlip his dogs, or with his hands bloody; alſo taking upon a freſh purſuit, is a taking in the manner. Carth. 79. Agreed *per totam Curiam.*——But finding timber of the foreſt in a man's poſſeſſion, as in his yard, is not a taking in the manner. Carth. 79., *per* three juſtices againſt the chief juſtice, who doubted.

The court of attachments or woodmote court, is to be held before the verderors, every forty days; and at this court the foreſters bring in their attachments *de viridi & venatione*, and the preſentments thereof, and the verderors receive and enrol them: but no man ought to be attached by his body for vert or veniſon, unleſs taken with the (*b*) manner within the foreſt, elſe the attachment muſt be by his goods.

[By ſome late acts of parliament for the puniſhment of deer-ſtealers, the accuſations are to be judged and ſentence is to be given in the ordinary tribunals.

2 Wilſ. 104. It is to be obſerved, that as the foreſt law is not the general law of the land, the king's courts are not bound to take notice of it, unleſs it be pleaded.]

Of the Sheriff's Torn.

2 Inſt. 70, 71. Bract. 124.

THE inhabitants of every county were formerly divided into decennaries, *i. e.* ten families living together in the ſame precinct, the maſters whereof were every one them mutually bound for each other, and puniſhable for the default of any member of any ſuch family, in not appearing to anſwer for himſelf on any accuſation made againſt him.

Preface to 9 Co. 2 Inſt. 70. 121. (*c*) Hence the ſtile of this court is *Curia Viſus*

Over every county an earl preſided, and he, or the ſhire-reeve, arrayed the ſeveral perſons within the county; and for this purpoſe the perambulation was through the county twice every year, and (*c*) if any perſon was found that had no compurgators, he was put into priſon until he could procure ſome decennary to admit him: on the law-days the ſheriff uſed to give in charge the ſeveral articles

articles of the crown law, and if any perſon was guilty of the breach of any of them, he was delivered up by his compurgators. *Franci Plegii Domini Regis tenta apud* C. *coram vicecom. tent. in turno ſuo tali die, &c.* But the law takes no notice of any ſuch court, under the ſtile of *torn vicecom. tent. &c.* for the word *torn* does not properly ſignify the ſheriff's court, but his perambulation. 2 Inſt. 71. Dalt. Sheriff, 385. 391. Fitz. Leet, 11. 2 Hawk. P. C. c. 10. § 3.

But though the cuſtom of the decennary be now worn away, yet the ſheriff's torn ſtill ſubſiſts, which is the king's court of record, holden before the ſheriff, for the redreſſing of common grievances within the county, to which all perſons, above the age of twelve years, not ſpecially privileged, are bound to attend; not only to make proper inquiries, but to take the oaths of allegiance, *&c.* Finch, 241. F.N.B. 82.

But for the better underſtanding hereof I ſhall conſider,

(A) The Manner of holding this Court.

(B) What Perſons owe Suit to it.

(C) In what Caſes it has a Juriſdiction.

(D) Of the Form of its Proceedings.

(A) The Manner of holding this Court.

BY the common law the ſheriff might hold his torn at what place, and as often as he thought fit; but this proving inconvenient, in giving the ſheriff too great a power of oppreſſing the ſubject, 6 H. 7. 1. b. Co. Lit. 115. *cont.*

By the ſtatute of *magna charta*, *cap.* 35., it is enacted, "That "no ſheriff, or his bailiff, ſhall make his torn through a hundred "but twice in a year, and at the place accuſtomed, *viz.* once "after *Eaſter*, and again after the feaſt of St. *Michael*: and that "the view of frankpledge ſhall be at the term of St. *Michael*."

Alſo, by the 31 *E.* 3. *cap.* 15., it is enacted, "That every ſheriff "ſhall make his torn yearly one time within the month after "*Eaſter*, and another time within the month after St. *Michael*; "and if they hold them in other manner, that then they ſhall loſe "their torn for the time."

It is agreed, that ſince theſe ſtatutes, if the ſheriff holds his torn at a different time, or at an unuſual place, he may be indicted for it. Dyer, 151. Keilw. 193. 2 Hawk. P. C. c. 10. § 6.

Alſo, it hath been holden, that in every caption of an indictment taken in a ſheriff's torn, or court-leet, the day whereon it was taken ought to be ſet forth, that it may appear not to have been on a *Sunday*. Vent. 107. 2 Sand. 290. 2 Keb. 732. 2 Hawk. P. C. c. 19. § 9.

The ſheriff is to hold his torn in each particular hundred; yet, as he has a juriſdiction in the whole county, he may receive preſentments [2 Hawk. P. C. c. 19. § 12.]

ſentments in one hundred, of offences committed in another; but the jury cannot be charged on oath to preſent any offences but thoſe which aroſe within their particular hundreds. Alſo, by the ſtatute of *Marlbridge*, *cap.* 10. it is provided, that thoſe who have tenements in different hundreds, ſhall not be compelled to come to any torn, but only in the bailiwick wherein they ſhall be converſant.

(B) What Perſons owe Suit to it.

2 Hawk. P. C. c. 10. § 10.

ALL perſons, as well maſters as (*a*) ſervants, above the age of twelve years, are by the common law bound to appear at this court in their (*b*) proper perſons.

(*a*) That every maſter may be amerced for ſuffering a ſervant to continue with him a year and a day without being put into the decennary. 41 E. 3. 26. b. 45 E. 3. 26. b. (*b*) And therefore no perſons ſo bound to appear, are within the benefit of the ſtatute of *Merton*, c. 10. which allows ſuit ſervice to be performed by attorney. 2 Inſt. 99.

F.N.B. 161. 2 Inſt. 121. 2 Hawk. P. C. c. 10. § 11.

But tenants in antient demeſne are privileged by the common law from coming to this court, unleſs they and their anceſtors have time out of mind uſed to come to it: alſo, parſons of churches have the like privilege by the common law, and all peers of the realm, and women have the ſame privilege by the ſtatute of *Marlbridge*, 52 *H.* 3. *cap.* 10. unleſs their preſence be required for ſome particular cauſe.

2 Hawk. P. C. c. 10. § 12.

Alſo, by the common law, as well as the ſtatute of *Marlbridge*, 52 *H.* 3. *cap.* 10., no one is bound to ſuch ſuit to a torn, within the juriſdiction whereof he doth not reſide.

2 Hawk. P. C. *ubi ſupra.*

And if a man has a houſe which ſtands within the precincts of (*c*) two leets, he ſhall do his ſuit to the court in whoſe juriſdiction his bed-chamber lies.

(*c*) If one have a houſe and family in two leets, he ought to do his ſuit to that wherein for the moſt part he perſonally reſides. 2 Hawk. P. C. *ubi ſupra.*

2 Hawk. P. C. *ubi ſupra.*

But no man can be of two leets; and therefore one, who lives within a private leet, ſhall owe no ſuit to the torn or other leet, unleſs the private leet be ſeiſed into the king's hands, or unleſs the lord neglect to hold his court.

(C) In what Caſes it has a Juriſdiction.

2 Hawk. P. C. c. 10. § 50.

THE juriſdiction of the ſheriff's torn is confined to offences at common law, and cannot take conuſance of any crime made ſo by an act of parliament, unleſs (*d*) enabled to do ſo by the act itſelf; (*e*) nor can it inquire of any offence, unleſs it aroſe ſince the holding of the laſt court.

(*d*) *Vide* 2 Dan. 291. Several ſtatutes mentioned which give the ſheriff's torn and court-leet juriſdiction. (*e*) Keilw. 66.

Cromp. Juriſ. 12. 2 Hawk. P. C. *ubi ſupra.*

All capital offences being of a publick nature, as (*f*) treaſons, (*g*) felonies are properly inquirable of at the ſheriff's torn.

(*f*) Except againſt the king's perſon. 9 H. 6. 44.——But 2 Hawk. P. C. *ubi ſupra*

ſupra cont., and yet it ſeems ſtrange, that the higheſt offence ſhould be exempted; however, it is clear, that the ſheriff has no power to inquire of any offence made treaſon by ſtatute, as of a treaſon, but only as it was an offence at common law. (*g*) Except rape, becauſe, as the law now ſtands, it is a felony only by ſtatute 2 Hawk. P. C. c. 10. § 51.——And except the death of a man, becauſe no common nuiſance. But *Q. & vide* 2 Hawk. P. C. *ibid.*

It may inquire of aſſaults and batteries, if accompanied with bloodſhed, but otherwiſe not; becauſe without bloodſhed they are not accounted common grievances. 2 Hawk. P. C. c. 10. § 53.

Alſo, it may inquire of all affrays, as being *in terrorem populi*. 2 Hawk. P. C. c. 10. § 54.

Alſo, it may inquire of the common breaking of hedges, dikes, or walls, and of all pound breaches, as being common grievances; alſo it may inquire generally of inferior offences, touching the king's intereſt, as of all purpreſtures or incroachments upon the king, and alienations in mortmain, and (*a*) ſeizures of treaſure-trove, or of waifs or eſtrays, or wreck belonging to the king. *Vide* 2 Hawk. P. C. c. 10. § 55. 57. and the ſeveral authorities there cited.

(*a*) But *Q.* Whether it can preſcribe to inquire of the ſeizure of ſuch things belonging to the lord, being a ſubject. 2 Hawk. P. C. *ibid.*

It may inquire of all common nuiſances, as all annoyances to common bridges, or highways, bawdy-houſes, *&c.*, and alſo, of all other ſuch like offences, as ſelling corrupt victuals, breaking the aſſiſe of beer and ale, neglecting to hold a fair or market, keeping falſe weights or meaſures, *&c.* Alſo, it is ſaid, that it may inquire of all common diſturbers of the peace, as barrators, eves-droppers, and of all common oppreſſors, as uſurers, *&c.*, and of all dangerous perſons, as vagabonds, night-walkers, *&c.*, and of all ſuitors to the court who ſhall make default, and of thoſe who ſhall levy hue and cry without cauſe, or ſhall neglect to levy one where they ought, *&c.*, and of the neglect of keeping a pair of ſtocks in any vill within the precinct, for which every ſuch vill ſhall forfeit 5 *l.* 2 Hawk. P. C. c. 10. § 58, 59. and the authorities there cited.

But a man cannot be amerced in a leet for ſurcharging a common, becauſe this only concerns the private intereſt of the inhabitants. Roll. Abr. 541. 2 Roll. Abr. 83.

But it hath been holden, that (*a*) a by-law made at a leet, in purſuance of a cuſtom to make ſuch by-laws, that no one, under a certain penalty, ſhall receive a poor man to be his tenant, who afterwards ſhall become chargeable to the town, is good. Roll. Abr. 542. Lane, 55.

(*a*) Of common right, any leet, with the aſſent of the tenants, may make by-laws under certain penalties, in relation to matters properly cognizable by the court, as the reparation of highways, &c. But by-laws of a private nature are moſt proper for a court-baron. 2 Hawk. P. C. c. 10. § 62.

Although the above-mentioned offences are properly inquirable of in the ſheriff's torn, yet is his power, as to the puniſhing of ſuch offences, much reſtrained by ſeveral ſtatutes; as by *magna charta, cap.* 17. *which enacts, that no ſheriff, conſtable, or* (*b*) *other bailiff of the king, ſhall hold pleas of the crown.* 2 Hawk. P. C. c. 10. § 13.

(*b*) As this ſtatute has been conſtrued to extend to ſtewards of courts, neither the torn nor court-leet can deliver any perſons indicted before them for felony, but muſt refer them to the juſtices of gaol-delivery. 2 Inſt. 32. 2 Hawk. P. C. *ibid.*

2 Hawk. P. C. c. 10. § 14.

But this ſtatute of *magna charta* doth neither reſtrain the torn nor leet from taking indictments, or awarding proceſs thereon as before; but this power of awarding ſuch proceſs is taken from the ſheriff's torn, but not from courts-leet, by 1 *E.* 4. *cap.* 2.

By which it is enacted, "That on indictments and preſentments before any of the king's ſheriffs, in his counties, except "in *London*, their under-ſheriffs, clerks, bailiffs, or miniſters, at "their torns, or law-days, they nor any of them ſhall have (*a*) "power to attach, arreſt, or put in priſon, or to levy or take any "fine or amercement of any perſon ſo indicted or preſented, by "reaſon of any ſuch indictment or preſentment; but that the ſaid "ſheriffs and under-ſheriffs, clerks and bailiffs, and their miniſ-"ters, ſhall deliver all ſuch indictments and preſentments to the "juſtices of the peace at their next county ſeſſions, on pain of "40*l.* and that the ſaid juſtices of the peace ſhall have power to "award proceſs on all ſuch indictments and preſentments as the "law doth require, and in like form as if the ſaid indictments "and preſentments were taken before the ſaid juſtices of peace; "and alſo to arraign and deliver all ſuch perſons ſo indicted and "preſented before the ſaid ſheriffs, *&c.*, and ſuch perſons which "ſhall be indicted or preſented of treſpaſs, ſhall make ſuch a fine "as ſhall ſeem lawful by their diſcretions; and the eſtreats of the "ſaid fines and amercements ſhall be enrolled, and by indenture "be delivered to the ſaid ſheriffs, under-ſheriffs, their clerks, "bailiffs, or miniſters, or ſome of them, to the uſe and profit of "him that was ſheriff at the time of ſuch indictments or pre-"ſentments taken; and if any of the ſaid ſheriffs, their under-"ſheriffs, clerks, bailiffs, or their miniſters, do arreſt, attach, or "put in priſon, or cauſe any fine or ranſom to be taken, or levy "any amercement of any perſon or perſons ſo indicted or pre-"ſented, by reaſon or colour of any ſuch indictment or preſent-"ment taken before them, at their terms or law-days above re-"hearſed, before that they have proceſs from the ſaid juſtices of "peace, or eſtreats delivered out of the ſaid indictments or pre-"ſentments ſo brought, delivered, and preſented to them; that "then the ſheriffs, which ſo do, ſhall forfeit an hundred pounds."

(*a*) Not only the judge of the court is puniſhable for awarding ſuch proceſs, but alſo the officer for obeying it. Jones, 301. Cro. Car. 275.

2 Hawk. P. C. c. 10. § 13. 76.

It ſeems agreed, that, at this day, neither the torn nor leet have any power to try any perſon indicted before them, of any offence whatſoever, and that there is no remedy for ſuch preſentments as are traverſable, but by removing them into the King's Bench.

2 Hawk. P. C. c. 10. § 75. 3 Mod. 138.

But a preſentment by twelve or more, in a torn or leet, of any offence within the juriſdiction of the court, being neither capital, nor concerning freehold, ſubjects the party to a fine or amercement, without any farther proceeding, and binds him for ever, after the day on which it is found, and admits of no traverſe (*b*); but if it concern life or freehold, as if it charge a man with not repairing a highway as he ought to do by the tenure of his lands, it may be removed into the King's Bench, and there traverſed; but not if it barely charge his perſon, as for not cutting the branches of his trees hanging over the highway, *&c.*, alſo it ſeems, that an in-

(*b*) A preſentment is not traverſable in a court leet; but in order to give the defendant an opportunity of

dictment

dictment of an offence out of the jurisdiction of a leet, as of an affray done out of its precinct, is in like manner traversable.

being heard, it may be removed by *certiorari* into the King's Bench, and there traversed. Rex v. Roupell, Cowp. 458. But the court will not grant a *certiorari* for such purpose, where the amercement has been estreated, and the fine paid. Rex v. Ripon, 2 Term Rep. 184.]——If a fine in a court-leet be unreasonable, it may be avoided by plea, and judgment of the court; for the judges are to determine the reasonableness of the fine. R. 11. Co. 44.

Also, notwithstanding the above-mentioned statutes, the sheriff may, at this day, impose a (*a*) fine on all such as shall be guilty of a contempt in the face of the court, and on a suitor refusing to be sworn, and on a bailiff refusing to make a panel, and on a tithingman refusing to make a presentment, and on a juryman refusing to present the articles given in charge, and on a person duly chosen constable, refusing to be sworn, but he (*b*) ought to fine each offender severally, and not all jointly, except where a vill is to be fined. But for this *vide* tit. *Fines and Amercements.*

2 Hawk. P. C. c. 10. § 15.

(*a*) Or may award an amercement at his discretion. 8 Co. 39. Dalt. Sheriff, 400.

(*b*) 8 Co. 38.

Also, on the presentment of a nuisance in a torn or leet, the sheriff or steward may either amerce the party, and also order him to remove it, by such a day, under a certain pain, or may order him to remove it, under such a pain, without amercing him at all; and the party having notice of such order, shall forfeit the pain on a presentment at another court, that he hath not removed the nuisance, without any farther proceeding; and every pain so forfeited may be recovered in like manner as a fine or amercement, by distress, or action of debt; neither shall it be affeered to a less sum than was at first set.

2 Hawk. P. C. c. 10. § 21., &c. and several authorities there cited.

(D) Of the Form of its Proceedings.

IN making presentments, it is said to have been the course, formerly, to impanel, not only a grand jury, but also a jury of twelve men which was commonly called the petit jury, and to have offences first presented by the headboroughs, and the presentment affirmed by the petit jury, before they were brought to the grand jury.

Keilw. 66. 141. 148. Dalt. Sheriff, 388. Cromp. 212. 9H.6.44. b.

But however the practice might have been, it seems now agreed, that no exception can be taken to any such indictment, in respect of the non-observance of any such custom or usage; for that no averment lies against the acts of a court of record, and every judge of such court shall be presumed to act according to the rules of it.

2 Hawk. P. C. c. 10. § 70.

By *Westm.* 2. 13 *E.* 1. *cap.* 13. "The sheriff shall take no inquest (*c*) but by twelve men at the least, who shall put their "seals thereto."

(*c*) In the construction hereof, it hath been holden, that if there be more than twelve jurors, and all agree, all must put their seals, but that if twelve only agree, it is sufficient for those twelve to set their seals. Dalt. Sheriff, 389.

By *Ibid.* 3. *cap.* 4. "No officer shall return or impanel any person on any inquiry in a (*d*) torn, but such as be of good name, "and have freehold of 20*s. per ann.* or copyhold of 26*s. per ann.*

(*d*) That a court leet seems not to be within

"on

the equity of this ſtatute, for it is ſaid, that any perſon happening to be preſent at a leet, or riding by where it is holden, may, for want of jurors, be compelled to be ſworn. 7 H. 6. 13. 12 H. 7. 18. b. Bro. Leet, 15.

" on pain of 40 *s.* and every indictment taken otherwiſe ſhall be " void."

By 1 *E.* 3. *ſtat.* 2. *cap.* 17., "Sheriffs, and all others who take " indictments in their torns, or elſewhere, ſhall take them by roll " indented, whereof the one part ſhall remain with the indictors, " and the other with him that takes the inqueſt; ſo that the in- " dictments ſhall not be embeziled as they had been in time paſt."

28 E. 3. c. 9. But it muſt be obſerved, that what is above ſaid, concerning indictments taken before the ſheriff at his torn, is to be intended of ſuch as are taken before him *ex officio*, for he is reſtrained to take them by virtue of any writ or commiſſion, by 28 *E.* 3. *cap.* 9. which, reciting the miſchiefs which had happened from commiſſions and general writs granted to ſheriffs at their own ſuit, for their ſingular profit, enacteth, that no ſuch commiſſions nor writs ſhall be granted.

Of the Court Leet.

Finch. 246. 2 Hawk. P. C. c. 11. A Court-leet is a court of record, (*a*) having the ſame juriſdiction within ſome particular precinct, which the ſheriff's torn hath in the county.

(*a*) And ſaid to have been derived out of the torn, being a grant to certain lords for the eaſe of their tenants and reſiants within their manors, that they may have the array of them, and adminiſter juſtice amongſt them in their manors, &c. from whence came the duty in many leets *de certo letæ*, towards the charge of obtaining the grant of the leet; for the non-payment whereof, or default to preſent it, ſuch grantees may preſcribe to amerce the defaulters, and to diſtrain for the amercement; but they cannot ſo preſcribe for any matter of a private nature. 2 Inſt. 71. Jones, 283. 6 Co. 77. b. Dyer, 30. pl. 209. See 12 Mod. 598.

4 Inſt. 261. Cromp. Jur. 213. The ſtatute 18 *E.* 2. which ſhews of what things the ſheriff's torn and court-leet ſhall have conuſance, (*b*) does not confine their juriſdiction to thoſe particulars enumerated in the ſtatute.

(*b*) That the leet may inquire of the ſame offences with the ſheriff's torn, of which *vide* tit. *Sheriff's Torn*, *ſupra*. —— May inquire of corrupt victuals, as a common nuiſance, though omitted in this ſtatute. 4 Inſt. 261. —— That a railer is preſentable there. Hob. 247. —— So, a night-walker. Poph. 208. —— Of the ſeveral ſtatutes which impower this court to inquire, &c. *vide* 2 Dan. 291. —— That by the 31 Eliz. 5., they may inquire of uſer, of unlawful games, or of any art or myſtery, not being brought up in it; but exerciſing a trade contrary to 5 Eliz. c. 4. is not within the act, nor preſentable in the leet. Sid. 289. 2 Keb. 50. Raym. 154. S. C.

2 Hawk. P. C. c. 11. § 3, 4. and ſeveral au- No man can be within two leets at the ſame time, and in the ſame reſpect; therefore, he who reſides within the precincts of a leet, the lord whereof doth duly hold his court, cannot be compelled

pelled to come to a ſuperior leet, for any purpoſe which may as well be anſwered by his attendance at his own leet; but if a private leet be ſpecially granted for two or three articles only, it ſeems that the inhabitants muſt attend the torn for all other matters: alſo, a grand leet may preſcribe to oblige a certain number of inhabitants in every town within its precinct, to appear at every ſuch grand leet, to inquire of ſuch offences as were omitted by the inferior: alſo, if a leet be ſeized into the king's hands, all who owed ſuit to it ought to come to the torn, *&c.*, alſo the ſheriff's torn, as an overſeer of the leet, is to inquire whether the tithings be full, and may inquire of the concealments of offences inquirable in leets. thorities there cited.

A court-leet ſhall be forfeited, not only by acts of groſs injuſtice, but alſo by bare omiſſions and neglects, eſpecially if often repeated, and without excuſe. 2 Hawk. P. C. c. 11. § 5.

The caption of an indictment in a court-leet, *ad cur. vif. franc. pleg. cum cur. baron.*, *&c.* is good, for the words *cum cur. baron.* ſhall be rejected; for it ſhall be intended that that the indictment was taken by that court, which alone hath the colour of authority to take it. Salk. 195. Ld. Raym. 638.

The not ſetting forth in the caption, whether the court was holden by grant or preſcription, is helped by the multitude of precedents. Salk. 200. pl. 2. See 12 Mod. 400.

But the buſineſs of both the torn and leet hath declined many years, and is devolved on the quarter-ſeſſions.

Of the County Court.

BY the eſcheat of earldoms and baronies, the tenants of ſuch earls and barons were to hold from the king, and not being qualified to ſit in the king's own court, they compoſed a court in each county, under the array of the ſheriff, or the king's bailiff; thoſe were the *pares* of the county court: and hence it is, that ever ſince it has been (*a*) held, that the ſheriff is no judge, but only the ſuitors. Spelm. Rem. 50. 4 Inſt. 266. (*a*) That ſuitors are judges. 2 Inſt. 225. —Though the proceedings be upon a *juſticies*. 2 Inſt. 312. 6 Co. 11. b. Mod. 171.

(*b*) This court is no court of (*c*) record, therefore an action of account againſt a receiver for 13*s.* and 4*d.* or other ſum under 40*s.* lies not in the county court; for being no court of record it cannot aſſign auditors. 2 Inſt. 380. 4 Inſt. 266. (*b*) The ſtile of the court is *Curia prima comitat. E. C. milit. vic. com. prædict. tent. apud B. &c.* 4 Inſt. 266. (*c*) Therefore a writ of falſe judgment lies of a judgment there, and not a writ of error. 4 Inſt. 266.——But in a rediſſeiſin the ſheriff is made judge by the ſtatute of *Merton*, c. 3. And a writ of error lieth of his judgment. 4 Inſt. 266.

It

2 Inſt. 312. It is a maxim of the common law, *quod placita de catallis, debitis, &c.*, (*a*) *quæ ſummam* (*b*) 40 *s. attingunt vel excedunt ſecundum legem & conſuetudinem Angliæ ſine breve regis placitari non debent.*

(*a*) Though founded upon ſeveral contracts, each of which were under 40 *s.* Vent. 65. (*b*) An entire debt, cannot be divided and ſued for by ſeveral plaints under 40 *s.* 2 Inſt. 312. But for this *vide* 2 Roll. Abr. 317. pl. 1.——If the plaintiff counts to his damages 40 *s.* though the jury finds the damages under 40 *s.* ſo that in truth the cauſe *de jure* belonged the court, yet he ſhall not have judgment. 2 Inſt. 312.

2 Inſt. 312. But by *juſticies* this court may hold plea of goods, (*c*) debts, *&c.*, of any value, and the proceſs therein is an attachment of his goods, *&c.*, but no *capias*.

(*c*) Of debts *ex contractu*, but not of debts *ex delicto*, as upon the ſtatute of tithes. Lev. 253. *dubitatur.*

2 Inſt. 312. So, by force of a *juſticies* it may hold plea of treſpaſs *vi & armis*.

2 Inſt. 139. 312. In replevin, by writ or plaint upon the ſtatute of *Marlbridge*, this court may hold plea of goods and chattels above the value of 40 *s.*

(*d*) So that this court hath no juriſdiction in ſuch caſe; *ſecùs*, of a battery without wounding or maiming. 2 Inſt. 312.——But it cannot hold plea of any treſpaſs *vi et armis*. Co. Lit. 118. 2 Lev. 93. Mod. 215.

By the ſtatute of *Glouceſter*, made 6 *E.* 1. *cap.* 6. "Sheriffs ſhall "plead pleas of treſpaſs in their counties, as accuſtomed, *&c.*, "(*d*) but for maims and wounds a man ſhall have his writ, as be"fore hath been uſed."

And by the ſtatute of 12 *Geo.* 2. *cap.* 13. § 7. "If any perſon "ſhall commence or defend any action, or ſue out any writ, "proceſs, or ſummons, or carry on any proceedings in the county "court, who ſhall not be admitted an attorney or ſolicitor accord"ing to the act of 2 *Geo.* 2. *cap.* 23. he ſhall forfeit 20*l.* with "coſts, to him who ſhall ſue, in any court of record."

Of the Hundred Court.

2 Inſt. 71. 4 Inſt. 267. (*e*) THIS court was, for the eaſe of the ſubject, by the king divided and derived from the county court, and hath the (*f*) ſame juriſdiction.

(*e*) Of the firſt diviſion of counties into hundreds, and of the grants of hundreds, *vide* 6 Co. 11. 9 Co. 25. 4 Co. 33. Dyer, 175. Roll. Rep. 118. Raym. 360. Vent. 399. 3 Mod. 199. (*f*) And therefore is no court of record. 4 Inſt. 267.——Cannot hold plea of debt or treſpaſs, where the debt or damages amount to 40 *s.* Co. Lit. 118.——Nor of treſpaſs *vi et armis*. Co. Lit. 118.

4 Inſt. 267. Although the ſtile of this court is *curia E. C. militis hundredi ſui de B. in com. Buck. tent. &c., coram A. B., ſeneſchallo ibidem*, yet the ſuitors are judges.

In

In an hundred court, the plea was laid to be *coram ſeneſchallo & ſectatoribus*; Serjeant *Newdigate* took an exception to it, that it ſhould be laid to be held *coram ſeneſchallo per ſectatores*; but *Wyndham*, *Atkins*, and *Scroggs* thought it well enough; but the chief juſtice *con.*, and cited the caſe of *Wyat* and *Wigges*, 4 *Co.* 47. where the coroner of the hoſtel and the coroner of the county took an indictment, where it did not appear that the party was killed within the verge; and reſolved to be ill; for that there the record was entire, and it could not lie *coram non judice*, as to the coroner of the hoſtel, and ſo void; and good as to the coroner of the county; and perhaps the jury, in their finding, were principally directed by the coroner of the hoſtel; ſo it might be here, for they in the hundred court may be ſwayed principally by what the ſteward ſaid. Another objection was, that the firſt proceſs was an (*a*) attachment; but as the defendant appeared, the court ſaid that fault was cured; ſo judgment was affirmed.

Paſch. 30 Car. 2. Clever and Curteis.

(*a*) That the court of King's Bench daily grants attachments againſt ſtewards of hundred courts, for granting attachments againſt all the parties' goods. Salk. 201. pl. 4.

The true proceſs of this court at common law is a *diſtringas*, but by cuſtom the proceſs may be (*b*) a *levari facias*; and it is ſaid, that moſt hundred courts have this cuſtom.

Salk. 201. pl. 3.

(*b*) An execution may be in the hundred court by *levari facias*; and therefore where the books ſpeak of a *diſtringas*, they muſt be intended of a *levari*, for a diſtreſs infinite would be endleſs in an execution. 2 Lev. 81. 2 Keb. 117. 126. *Vide* Carth. 54. ——And for the manner of ſetting forth a judgment in this court, *vide* alſo Carth. 53, 54. 2 Lutw. 1369. 3 Lev. 403.

If a jury in an hundred, or other inferior court, will not agree on their verdict, the way is, as in other courts, to keep them without meat, drink, fire, or candle, till they agree; and the ſteward may from time to time adjourn the court till they do agree.

Salk. 201. pl. 3.

Of the Court-Baron.

THIS court is (*c*) incident to every manor, and had (*d*) anciently conuſance of all pleas of land within the manor, ſo that no perſon within the manor could apply to any other juriſdiction without a *remiſit curiam* from the lord.

4 Inſt. 264. 4 Co. 33. Co. Lit. 58.

(*c*) That it is incident to a manor, and was at firſt inſtituted for the eaſe of the tenants, for ending controverſies where the debt or damage was under 40 *s.* at home, &c. 4 Inſt. 268. Owen, 35. Brownl. 175. Bulſt. 55. (*d*) But at this day is no court of record, nor can it hold plea of debt or treſpaſs, where the debt or damage amounts to 40 *s.* Co. Lit. 118. 2 Inſt. 311. ——Nor of treſpaſs *vi et armis*, becauſe it cannot impoſe a fine. Co. Lit. 118. 2 Inſt. 311, 312.

The ſuitors are (*e*) judges, and the (*f*) ſteward but as a regiſtrar.

6 H. 4. pl. 3. Co. Lit. 58. 4 Co. 33. b.

4 Inſt. 268. S. P. [4 Term Rep. 446. S. P.] (*e*) Though the plea there is held upon a writ of right. 6 Co. 11. b. 12. a. 4 Inſt. 268. (*f*) And a man cannot preſcribe to hold a court-baron before

fore his ſteward, but before ſuitors. Cro. Jac. 582. adjudged. See Mod. 173. Cro. Eliz. 792. Noy, 20. Godb. 49.—But perhaps may preſcribe to hold a court before his ſteward, but not a court-baron. Cro. Jac. 582. Leon. 316. Brownl. 21. Noy, 20. 2 Jones, 23. Godb. 68.——A court-baron being incident to a manor of common right cannot be preſcribed for. Cro. Eliz. 792. adjudged. Noy, 20. adjudged.

4 Inſt. 268. (a) My Lord Coke ſays, he hath ſeen court rolls in the reign of Edw. 1. (having the name of the manors in the margin) ſtiled thus, *Aula ibidem tent. tali die, &c.* becauſe it was holden in the hall of the manor. 4 Inſt. 268.

The ſtile of this court is (a) *curia barones E. C. militis manerii ſui prædicti* (having the manor's name written in the margin) *tent. tali die coram A. B. ſeneſchallo ibidem, &c.*

Co. Lit. 58. a.

This court cannot be holden out of the manor; but if a man be lord of two or three manors, and there be a cuſtom to hold a court at one for them all, ſuch courts are by cuſtom good.

Co. Lit. 58. (b) Note: The court of King's Bench has granted informations againſt lords and ſtewards for oppreſſing the tenants, by warning courts-baron every three weeks, and diſtraining them to appear, or pay a certain ſum of money, upon no occaſions at all, but to extort amercements from them. (c) For this *vide* 4 Co. 27. Cro. Car. 366. Jones, 342.

This court is of two natures, the firſt is by common law, and called the freeman's court, or court-baron; and of this the ſuitors are judges, and the ſteward is regiſtrar; and this may be kept from (b) three weeks to three weeks; the ſecond is (c) a cuſtomary court, and concerns copyholders, of which the lord, or his ſteward, is judge; as the firſt cannot be without freeholders, ſo this cannot be without copyholders; a court-baron may be of this double nature, and then the roll contains matter concerning both.

(d) For the expoſition thereof, *vide* 2 Inſt. 39.

By *magna charta*, (d) *cap.* 24. "A *præcipe in capite* is not to be "granted, whereby any freeman may loſe his court."

(e) The king bound hereby in his court-baron, hundred, or county court. 2 Inſt. 143. (f) Intended between party and party, for to inquire for the lord of all the articles belonging to the court-baron or hundred, they may be ſworn. 2 Inſt. 142. For which articles *vide* ſtatute 4 Edw. intituled *extenta manerii*. (g) In a writ of right patent, wherein plea is held of freehold, the court may give an oath, for the writ is *mandatum regis*. 2 Inſt. 143.

By 52 *H.* 3. *cap.* 22. (e) "No man ſhall cauſe his freeholders "to ſwear (f) againſt their will, for that ought not to be done "without the king's (g) commandment."

4 Inſt. 143.

All pleas in a court-baron, of common right, and by courſe of law, are determinable by wager of law; but by preſcription they may be determined by jury.

4 H. 6. 17. 22 Aſſ. 72. Roll. Abr. 543. Bro. Court-Baron, 6. S. C.

If a man recovers in a court-baron, they have not power to make execution to the plaintiff of the goods of the defendant; but they may diſtrain him, and retain the diſtreſs till ſatisfaction.

But a *quære* made, for it is uſual for the ſuitors, aſſigned by the ſteward, to tax the ſums, and then to award a *levari facias*. *Quære*, If by cuſtom, or common law? See 12 Mod. 124.—By Brownl. 81. Upon a *levari* out of a court-baron, goods cannot be ſold without a cuſtom to ſell, *&c.*, *& vide* Noy, 17.

Yelv. 194. Gomerſal and Medgate, adjudged. Cro. Jac. 255. Bulſt. 52. S. C. adjudged.

If in a court-baron the defendant appears not upon the diſtreſs, yet the goods diſtrained are not forfeited, nor can be ſold by the bailiff, for the diſtreſs is but in nature of a pledge; and though by the courſe of the common law, where a man is attached by his goods, and appears not, they are forfeited; yet in a court-baron no (b) attachment lies, but a diſtreſs infinite only.

(b) The proceſs in a court-baron is ſummons, attachment, and diſtreſs infinite. 2 Roll. Rep. 493., *& vide* Bulſt. 53.

Courts of the Cinque Ports.

THE cinque ports are (*a*) ancient trading towns lying towards the ſea coaſts; theſe held *per baroniam*, and were repreſented in parliament by the lord warden or keeper of the cinque ports; but they did not hold by the tenure of knight-ſervice, only by ſending ſhips to ſea, *&c.*, and as they were inſtituted for the defence and ſafety of the kingdom, they had ſeveral (*b*) liberties and privileges granted them, in reſpect of their neceſſary attendance in thoſe ports.

Bract. lib. 3. f. 118. 4 Inſt. 222.

(*a*) For ancient records touching the cinque ports, *vide* 2 Inſt. 558.—At firſt the privileged ports were but three, *viz.* Dover, Sandwich, and Romney; but Haſtings and Hithe were added by William the Conqueror. 4 Inſt. 222.—To which Winchelſea and Rye were adjoined; theſe now ſend each of them their repreſentatives to parliament; and though ſeven in number, are ſtill called cinque ports. 2 Inſt. 556. 4 Inſt. 222. (*b*) To which they have a lawful title, confirmed by *magna charta*, c. 9. in theſe words, *Barones de quinque portubus & omnes alii portus habeant omnes libertates & liberas conſuetudines ſuas.* 2 Inſt. 20.——But this confirmation does not extend to pleas of the crown, with which they intermeddle as juſtices of the peace. Cro. Car. 253.

There are ſeveral courts within the cinque ports; one before the conſtable of the caſtle of *Dover*; others within the ports themſelves, before the mayors and jurats; (*c*) another which is called *curia quinque portuum apud Shepway.*

4 Inſt. 223. (*c*) Sid. 166. It is ſaid by Twiſden, that nobody knows where this court is.

There is a court of Chancery in the cinque ports, but no original writs iſſue thence, but it ſerves only to decide (*d*) matters of equity.

Sid. 166. *per curiam.* (*d*) Sid. 356. It is ſaid the great uſe of their Chancery is to relieve againſt errors in proceedings at law, which they uſed to indorſe upon the bill.

The lord warden hath two juriſdictions, 1. The (*e*) authority of an admiral, to hold plea by bill concerning the guard of the caſtle, *&c.* according to the courſe of the common law.

2 Inſt. 556. (*e*) Exempt from the admiralty of England; which juriſdiction is ſaved to him in ſeveral acts of parliament, as 2 H. 5. ſtat. 1. c. 6. 27 H. 8. c. 4. 28 H. 8. c. 15. 5 Eliz. c 5. 11 & 12 W. 3. c. 7. & *vide* 2 Jon. 66, 67. Chan. Ca. 305.

By 28 *Edw.* 1. *cap.* 7. "The (*f*) conſtable of the caſtle of *Dover* "ſhall not hold plea of a foreign county within the caſtle gate, "except it touch the keeping of the caſtle; nor diſtrain the in- "habitants of the cinque ports, otherwhere or otherwiſe than they "ought after the form of their charter for their old franchiſes, "confirmed by *magna charta.*"

(*f*) Who is always warden of the five ports. 2 Inſt. 556.

The mayors and jurats of the ſeveral cinque ports have power to hold plea, *&c.*, and (*g*) upon their judgment no writ of error lies in *B. R.* but they are examinable by bill in nature of a writ of error, *coram domino cuſtode ſeu guardiano quinque portuum apud curiam ſuam de Shepway.*

2 Inſt. 557. Dyer, 376. 4 Inſt. 224. S. P. (*g*) *Secùs*, upon the judgment of a writ of error to the cinque ports to be intended.

of the court of Shepway. Sid. 356. *Per* Twiſden; and ſo are the books which ſpeak

The

4 Inſt. 224. (a) Otherwiſe in debt, or treſpaſs tranſitory.

The juriſdiction of the cinque ports is general, as well as to (a) perſonal as (b) real and mixed actions.

Cro. Eliz. 910.—Where a ſtranger comes within the cinque ports, and does a tranſitory treſpaſs, and after goes out of their juriſdiction, he to whom the treſpaſs was done may have an action at common law, elſe he would be without remedy; for they can call none in who are out of their juriſdiction, and the privileges were granted for the eaſe and benefit, and not the prejudice, of the inhabitants. Yelv. 12. 2 Inſt. 557. (b) And they hold plea of freehold by plaint. Sid. 166. But a judgment in *B. R.* for lands there ſhall bind for ever, though ſuch judgment for lands in Wales, or a county palatine, is merely void. 2 Inſt. 557. 4 Inſt. 223. Bro. *Cinque Ports*, 24. Q. —That they cannot plead to the juriſdiction of the court of *Weſtminſter*, but muſt demand conuſance. 4 Inſt. 224.—Alſo, if an ejectment on a feigned leaſe be brought of lands within the cinque ports, the courts of *Weſtminſter* will not allow the tenant of the lands, on his prayer, to be made defendant, to plead to the juriſdiction of theſe courts, but will tie him ſtrictly to the rules of confeſſing leaſe, entry, and ouſter, and pleading not guilty; this is not like the caſe of ancient demeſne, where a recovery in the courts above makes the lands frankfee for ever.

2 Inſt. 557. Said to have been reſolved between Waes and Braines.

If a man is murdered in any of the cinque ports, his wife may have an appeal againſt the murderer, (c) directed to the ſheriff of the county, and he ſhall execute the writ (d) within the cinque ports, for the conſtable hath no juriſdiction to hold plea thereof.

Cro. Eliz. 694. S. C. adjudged. (c) Becauſe the king in a manner is concerned; for if the plaintiff is nonſuit, the defendant ſhall be arraigned at his ſuit. Yelv. 13. Cro. Eliz. 911. (d) Yet in Yelv. 13. *per* Poph. If the defendant at all times after continued within the cinque ports, ſo that he might be proceeded againſt there, no appeal would lie elſewhere.

2 Inſt. 557. Cro. Eliz. 695. 778.

So, if the defendant is *in cuſtodiâ mareſchalli*, the appeal may be againſt him by bill.

4 Inſt. 223. (e) The record muſt be certified into Chancery, and from thence by *mittimus* to the lord warden to make execution.

If a man hath judgment in any of the king's courts, and the defendant hath no lands or goods but in the cinque ports, the plaintiff may have (e) a writ to the lord warden to make execution.

And. 28. 3 Leon. 3. W. Bendl. 46.

Cro. Jac. 543. Palm. 96. S. C. adjudged. (f) Where a prohibition, *mandamus*, &c.

If a man is impriſoned at *Dover* by the lord warden, an (f) *habeas* (g) *corpus* (h) may iſſue to the lord warden, &c., for the privilege, that the king's writ runs not, muſt be intended between (i) party and party, for there can be no ſuch privilege againſt the king.

Cro. Car. 543. Palm. 55. Sid. 355. 4 Inſt. 223. 2 Lev. 86. 3 Keb. 598. Hard. 475. —Where a *certiorari*, *vide* Roll. Abr. 395. 2 Hawk. P. C. c. 27. § 24. (g) *Ad faciendum & recipiendum*; but if *ad reſpondendum* a private perſon, Q. Mod. 20. 8 Mod. 22. 12 Mod. 666. (h) But Sid. 166., it was ſaid by ſome, that it had ſcarce ever been known that a prohibition or *habeas corpus* went to the cinque ports. [But there can be no doubt, but that they will go there.] (i) A *quo minus* lieth thither. Hard. 475.

2 Inſt. 557. 4 Inſt. 223. S. P. (k) The conſtable or keeper of Dover Caſtle is alſo warden of the cinque ports, and the writs directed to him are, *Rex, &c. conſtabulario caſtri ſui de Dover & cuſtodi quinque portuum, &c.* 2 Inſt. 556. 4 Inſt. 223. (l) But writs of appeal muſt be directed to the ſheriff. Cro. Eliz. 604. Becauſe the king is in a manner concerned. *Vide* Yelv. 13. Cro. Eliz. 911. 2 Inſt. 557. (m) But if there be an indictment before juſtices of peace within the cinque ports, a *certiorari* may be immediately directed to them; for they proceed by virtue of their commiſſion, and not their ancient charters, &c. Cro. Car. 253, 254. but for this, *vide* Roll. Abr. 395.

The (k) lord warden is the immediate officer of the court, and (l) writs ſhall be directed to him (m) as in all real actions, &c., for lands within the five ports.

By the 2 *W. & M. cap.* 7. "Whereas the late lord wardens "claimed a right of nomination of one perſon to each of the "cinque ports, the two ancient towns, and their members, whom "they ought to elect to ſerve in parliament; it is declared and "enacted, that all ſuch nominations were and are againſt law, "and void."

If a murder is committed at *Sandwich*, and an appeal brought by original in *B. R.*, directed to the ſheriff of the county of *Kent*, and he brings in the defendant, who pleads that *Sandwich* is part of the cinque ports, *ubi breve domini regis non currit, &c.*, and demands judgment of the writ, this is a bad plea; for the defendant having done the murder within the cinque ports, and after flying out, if this pleading ſhould be allowed, (*a*) there would be a failure of juſtice. Yelv. 12, 13. Cro. Eliz. 910. S. C.

(*a*) For the cinque ports cannot award proceſs of outlawry, for that ought to be proclaimed in open county. Cro. Eliz. 910.

But if the defendant by his plea ſhews that at the time of the murder ſuppoſed, and at all times after, he had been an inhabitant, and commorant within the cinque ports, and ſo had given juriſdiction to the judges there, and ſhewed they might have proceeded, *&c.*, it would be a good plea. Yelv. 13.

Of the Courts of the Stannaries.

THESE courts were (*b*) inſtituted for the conveniency of tinners, that they might be encouraged in the making of tin, one of the ſtaple commodities of the kingdom; and therefore in *Cornwall* and *Devonſhire*, where the ore or mine of which it is made chiefly abounds, the workers herein were allowed the privilege of ſuing and being ſued in thoſe places. 4 Inſt. 229.

(*b*) For ancient charters, records, and acts of parliament concerning the ſtannaries, and for an expoſition of the charter of E. 1. and the ſtatute 50 E. 3. which gave great privileges to the tinners, *vide* 4 Inſt. 232., 12 Co. 10, 11., Plow. 327., Roll. Abr. 547, 548.; *& vide* 16 Car. 1. c. 15. by which their privileges are declared and circumſcribed.

The juriſdiction of the (*c*) court is guided by ſpecial laws, by cuſtoms, and by preſcription time out of mind. 4 Inſt. 229.

(*c*) For the ſtyle of the court, *vide* 4 Inſt. 299.—And that the lord warden hath juriſdiction of all the tin in Cornwall and Devon. 4 Inſt. 229.

No writ of error lies upon (*d*) any judgment in theſe courts; but the party grieved muſt be relieved by appeal in ſeveral degrees; firſt to the ſteward of the ſtannary court, where the matter lies; then to the under-warden of the ſtannaries; and from him to the lord 4 Inſt. 230. [3 Bulſtr. 183. Doddridge's Hiſt. of Cornw. 94.]

(*d*) For

any matters touching the ſtannaries; otherwiſe, upon a judgment there given upon collateral matters. 3 Bulſt. 183. *Per Coke*, Ch. Juſtice, ſaid to have been ſo reſolved upon a conference by all the judges, as is to be ſeen recorded in Chancery in the petit-bag office, Q. Ow. 8. Sid. 233.

lord warden of the ſame ſtannaries; and for want of juſtice there, to the privy council of the Prince of *Wales*, [as duke of *Cornwall*, when he hath had livery and inveſtiture of the ſame. And from thence the appeal lies to the king himſelf, in the laſt reſort.]

4 Inſt. 231. Reſolved by all the judges. *Vide* 2 Roll. Rep. 44. and the ſtatute 16 Car. 1. c. 15.

Blowers, and all other labourers and workers, without fraud or covin, in and about the ſtannaries in *Cornwall* and *Devon*, have the privilege of the ſtannaries during the time they work there.

4 Inſt. 231. Reſolved by all the judges. (*a*) But *vide* Cro. Car. 333.

All matters concerning the ſtannaries, or depending thereupon, are to be heard and determined (*a*) according to the cuſtom of the ſame time out of mind uſed.

4 Inſt. 231. Reſolved by all the judges.

Tranſitory actions between tinner and tinner, or worker and worker, though not concerning the ſtannaries, nor ariſing therein, if the defendant be found within the ſtannaries, may be brought in theſe courts, or at common law.

4 Inſt. 231. Reſolved by all the judges. (*b*) 2 Roll. Rep. 379. S. P. But it was ſaid by the chief juſtice, that after the oath taken they will for 3*d*. enter the plaintiff a tinner.

But if one party only be a tinner or worker, ſuch tranſitory actions which concern not the ſtannaries, nor ariſe therein, cannot be brought there, and in ſuch caſe the defendant by the cuſtom and uſage of that court may plead to the juriſdiction, and (*b*) ought not to be arreſted *eundo* to ſwear it, or *redeundo*.

4 Inſt. 231. Reſolved by all the judges.

There ought to be no demurrer in thoſe courts for want of form, but for matter of ſubſtance only.

4 Inſt. 231. Reſolved by all the judges. (*c*) That the plaintiff muſt ſhew that he was a tinner, and that the court was held within the juriſdiction of the ſtannaries. Fareſl. 103. (*d*) They have no court of equity, and therefore a ſuit concerning an agreement relating to mines, &c. proper here. 2 Vern. 483, 484.

They have no juriſdiction of (*c*) any local action ariſing out of the ſtannaries, and (*d*) matters of life, member and plea of land, are expreſsly excepted out of their charters.

[See further upon this ſubject *Pearce's Laws and Cuſtoms of the Stannaries.*]

Of the Court of Commiſſioners of Sewers.

BY the (*a*) common law the king uſed to grant commiſſions for inquiring into the want of reparations of ſea walls, ditches, gutters, ſewers, *&c.*

(*a*) Reg. 127. F. N. B. 113. 4 Inſt. 276.

But as theſe matters are now to be regulated according to (*b*) ſeveral acts of parliament, it will be neceſſary to ſet down the purport of ſuch as are moſtly in uſe at this day.

(*b*) As *Magna Charta*, c. 15, 16. 23. For which *vide* 2 Inſt. 29, 30. 25 E. 3. c. 4. 45 E. 3. c. 2. 1 H. 4. c. 12. 6 H. 6. c. 5. 9 H. 6. c. 5. 18 H. 6. c. 10. 23 H. 6. c. 9. 12 E. 4. c. 6. 4 H. 7. c. 1. 6 H. 8. c. 10.

The chief ſtatute relating hereto, is 23 *H.* 8. *cap.* 5. which ordains that the lord chancellor, treaſurer, the two chief juſtices for the time being, or any three of them, whereof the lord chancellor to be one, ſhall, as often as need be, direct commiſſions, and appoint commiſſioners; the form of which commiſſion is ſet forth in the ſtatute, which fully declares the duty and authority of the ſaid commiſſioners, *viz.* That they do inquire by the oaths of the honeſt and lawful men, *&c.*, through whoſe default the hurts and damages have happened, *&c.*, and who hath or holdeth any lands or tenements, *&c.*, or hath or may have any hurt, loſs, or diſadvantage, *&c.*, and all theſe perſons and every of them to tax, *&c.*, and to make and ordain ſtatutes, ordinances, *&c.*, after the laws and cuſtoms of *Rumney Marſh* in the county of *Kent*, or otherwiſe after their own wiſdoms and diſcretions.

23 H. 8. c. 5. Which *vide* at large, made perpetual by 3 & 4 E. 6. c. 8. and *vide* 1 M. § 3. c. 11. This ſtatute to extend to Glamorgan, &c.

The 25 *H.* 8. *cap.* 10. enacts, "That no perſon ſhall be compelled to take upon him the execution of any ſuch commiſſion, unleſs he be a dweller in the county wherein he is appointed commiſſioner; alſo that every perſon refuſing to take the oath of commiſſioner, as appointed by 23 *H.* 8. *cap.* 5. ſhall, as often as ſuch refuſal ſhall be certified into Chancery, forfeit five marks."

25 H. 8. c. 10.

"The 3 & 4 *E.* 6. *cap.* 6. directs in what manner the king's lands ſhall be liable, and taxed by the commiſſioners, and his tenants diſcharged and indemnified in their payments of ſuch taxes, and that every ſuch commiſſion ſhall be in force for five years from the teſte, unleſs ſuperſeded."

3 & 4 E. 6. c. 6.

"By the 13 *Eliz.* *cap.* 9. all commiſſions of ſewers ſhall continue in force for 10 years after the date thereof, unleſs they be repealed by a new commiſſion or *ſuperſedeas*; alſo by this ſtatute all laws, ordinances, and conſtitutions duly made, according to the ſtatute 23 *H.* 8. *cap.* 5. and written in parchment, indent-

13 Eliz. c. 9.

" ed under the ſeals of the commiſſioners, or ſix of them, (whereof " one part ſhall remain with the clerk of the commiſſion, and the " other in ſuch place as the commiſſioners or ſix of them ſhall " appoint,) ſhall without any certificate to be made into the " Chancery, and without the king's aſſent, continue in force, not- " withſtanding any determination of ſuch commiſſion by *ſuper-* " *ſedeas*, until the ſame laws, ordinances, and conſtitutions ſhall " be altered, repealed, or made void by commiſſioners afterwards " aſſigned: alſo, by this act there ſhall be no certificate or return " of the commiſſion, or of any of their laws, ordinances, or " doings by virtue thereof."

3 Jac. 1. c. 14. & *vide* 7 Ann. c. 9. By which power is given to the lord mayor of London to appoint commiſſioners.

"By 3 *Jac.* 1. *cap.* 14., all walls, ditches, banks, gutters, ſewers, " gates, cauſeways, bridges, ſtreams, and water-courſes within " two miles of *London*, having their fall into *Thames*, ſhall be ſub- " ject to the commiſſion of ſewers, and to all ſtatutes made for " ſewers, and to all penalties in the ſaid ſtatutes contained."

7 Ann. c. 10.

By the 7 *Ann. cap.* 10. reciting the power of the commiſſioners by former ſtatutes, as to ſelling the lands of thoſe who refuſed to pay the taxes and proportions with which they were charged, and that theſe laws did not extend to copyhold lands, it is enacted, that the commiſſioners ſhall have the like power as to copyhold lands, and that the lords of ſuch copyholds ſhall admit the ven- dees, &c. Alſo, by this act it is enacted, that it may be lawful for the commiſſioners by warrant to authorize any perſon to levy the ſums of money aſſeſſed upon the lands, &c., by diſtreſs and ſale of the goods of the party refuſing, returning the overplus.

4 Inſt. 276.

Notwithſtanding the ample powers by the above-mentioned ſtatutes given to the commiſſioners of ſewers, yet are their pro- ceedings ſtill examinable in the courts above, and accordingly we find ſeveral reſolutions in which their proceedings and ſentences have been controuled by the courts at *Weſtminſter*.

5 Co. 99. b. Rook's caſe.

As where the commiſſioners, on the finding of a jury that *J. S.* had ſeven acres of land next adjoining to a bank on the river *Thames*, and that the occupiers of thoſe ſeven acres uſed to repair, but that there were beſides 800 acres within the ſame level liable to be ſur- rounded, having taxed each of the ſeven acres at 8*s.* it was held; 1*ſt*, That the finding that the occupiers of theſe ſeven acres uſed to repair, was not material, becauſe that ſuch occupiers might have been tenants at will, whoſe acts could not bind him who had the inheritance. 2*dly*, That though theſe ſeven acres lay next the bank, yet ought the commiſſioners to tax all thoſe lands which were in danger of being damnified by the overflowing of the waters, and conſequently received benefit by the repairs; for though they are to act (*a*) according to their diſcretion, yet ſuch diſcretion muſt be governed and directed by the rules of law and reaſon.

(*a*) Hard. 146.

(*b*) *Vide* 10 Co. 137, 138. 13 Co. 35.

The commiſſioners of ſewers cannot make any (*b*) new inven- tions to charge the people; (*c*) but if there were an old wall, they may build another (if that be decayed) on the inſide, or ſome ſmall way

way diſtant, if it be neceſſary, and may compel them that repaired the former to repair it, if they have no damage by the remove. Moor, 825. Sid. 145. (c) 2 Keb. 129.

If one be bound by preſcription to repair a bank, which by ſudden violence, and without the default of him who is ſo bound to repair, is thrown down, the commiſſioners are not to charge him only with the repair, but ought to tax all others according to the advantages accruing to them from ſuch repairs. 10 Co. 139. Keighley's caſe, 5 Co. 100. a. S.P.

The commiſſioners of ſewers cannot tax a whole townſhip, but muſt proportion each man's ſhare according to the quantity of his land, &c., and, therefore, where the commiſſioners aſſeſſed a fine on the village of *D.*, and by their warrant ordered it to be levied on *J. S.*, whoſe cattle being diſtrained, he brought his action, and had judgment; and afterwards the ſaid *J. S.* refuſing to releaſe the judgment, he was committed by the commiſſioners; but upon complaint thereof the court of King's Bench committed and fined the commiſſioners, and held that by ſuch proceedings after a judgment at law, they were guilty of a *præmunire*. 2 Bulſt. 197. Cro. Jac. 336. S. P. 3 Inſt. 225. S. P.

It has been holden, that, though the commiſſioners of ſewers are not a court of record, and may thus commit for a contempt; yet that muſt be underſtood of a contempt in the face of their court, and not to impriſon a perſon for diſobeying their orders. Sid. 145.

There was a complaint of the inhabitants of *Whitechapel* at the council-board, that the commiſſioners of ſewers had taxed the ſaid inhabitants for a repair of a ſewer in *Wapping*, whereas they were not within the level; thereupon the council ordered a *certiorari* out of *B. R.*, and that the matter in queſtion ſhould be tried there; which was accordingly done, and the *certiorari* delivered; notwithſtanding which they iſſued out their warrants for putting the orders in execution, and the officers refuſing to execute the ſame were fined 10*l.* a man; thereupon a ſecond *certiorari* was delivered to return all proceedings and all orders, &c. concerning the ſame; this being alſo diſobeyed, and new orders made for fining ſome of their officers for their contempt; whereupon they appeared, and though they alleged the advice of counſel in what they did, yet they were committed for the contempt; the next day the return was brought into court, and upon the ſeveral *certioraris* the returns were ſeveral, which the court diſallowed, and ordered them to return all their proceedings upon the return of the firſt writ, and to return upon the laſt, that *ante adventum brevis* they had returned the whole matter, which was accordingly done, and filed; and after they continued a week in priſon without bail, they were fined 40 marks a piece, and diſcharged, and the matter ordered to be tried at the *B. R.* It was here moved in behalf of ſome of the commiſſioners, that theſe orders, whereby the contempt of the commiſſioners appeared, though they were returned, might not be filed upon a clauſe in 13 *Eliz. cap.* 9. which excuſes them from returning their orders, and exempts them from penalties; but it was reſolved that that, and other proviſoes in the ſame ſtatute, did only extend to the court of Chancery, to abridge the power which the court of Chancery had over the ſaid commiſſioners, and the Lev. 288. The caſe of the Commiſſioners of Sewers for Whitechapel, Raym. 186. Vent. 66. Mod. 44. 2 Keb. 635. S. C. Salk. 145. pl. 6. S. C. cited.

orders by 23 *H.* 8. *cap.* 5. and that it did not at all (*a*) reſtrain the court of *B. R.* from proceeding by *certiorari*.

(*a*) That the commiſſioners of Cambridge Fenns, by 15 Car. 2. c. 17., have an abſolute juriſdiction, and are not to return their proceedings on a *certiorari*; but if they obſerve not the ſtatute, their proceedings will be void, & *coram non judice*, and the parties may examine the ſame by an action at law. Sid. 296.

Sid. 78. Lord Dunbar's caſe.

If it be found before commiſſioners of ſewers, that ſuch a one ought to repair a bank, and he removes the proceedings into *B. R.*, the court will neither quaſh the inquiſition, nor grant a new trial, unleſs he, who is found to be the perſon that ought to repair, will firſt repair the bank; after which, if it be otherwiſe found, they will order him to be reimburſed.

2 Hawk. P. C. c. 27. § 34. Salk. 145. pl. 6. [See further for the practice of the court with reſpect to the filing of the orders, Anon. 2 Barnardiſt. 151. Rex v. Cann, 2 Str. 1263.

There is a rule in the court of King's Bench, that no order of commiſſioners of ſewers ought to be filed without notice given to the parties concerned; alſo it is every day's practice of that court, before it will ſuffer the return of a *certiorari* for the removal of the orders of ſuch commiſſioners to be filed, to hear affidavits concerning the facts whereon they are grounded; and if the matter ſhall ſtill appear doubtful, to direct the trial of feigned iſſues, and either to file the return, or ſuperſede the *certiorari*, and grant a *procedendo*, as ſhall appear to be moſt reaſonable for the trial of ſuch iſſues, and to give (*b*) coſts againſt the proſecutor of the *certiorari*, if it appears to have been groundleſs.

A *certiorari* to bring up an order for the removal of their clerk, is of common right, and not diſcretionary, 1 Str. 609. Forteſc. 374. 8 Mod. 331.] (*b*) 2 Keb. 500.

2 Str. 1127. [Q. Whether an acre-tax be a right aſſeſſment?

An order of ſewers was made for levying 9*d. per* acre on 1312 acres, to be paid to the clerk, to be applied towards defraying of charges in and about the execution of the commiſſion, which was confirmed by the court of King's Bench.

whether the right way be not to aſſeſs the particular lands according to the danger they lie in. Commiſſioners of Sewers v. Newburgh, 3 Keb. 827. Bow v. Smith, 9 Mod. 94.]

2 Str. 1127. [A rate may be made to re-imburſe charges.]

Court of Pipowders.

(*c*) Incident to every market as well as fair. 4 Inſt. 272. Keilw. 99.

THIS court is incident to every fair and (*c*) market, and is called *curia pedis pulveriſati* (*d*); becauſe for contracts or injuries done concerning the fair or market, juſtice ſhall be done as ſpeedily as the duſt can fall from the foot (*e*).

Brownl. 175. Bulſt. 55. Cro. Eliz. 773. —— That there may be a court of pipowders by cuſtom without fair or market, and a market without an owner. 4 Inſt. 272. (*d*) Mirror, cap. 1. § 3. Bract. lib. 3. fol. 334. 4 Inſt. 272. [(*e*) A more ingenious and ſatisfactory etymology is given by a learned

learned modern writer, who derives it from *pied puldreaux*, a pedlar, in old French, and therefore ſignifying the court of ſuch petty chapmen as reſort to fairs or markets. Barrington's Obſervat. on the Stat. 337.]

It is a court of record, of which the ſteward is judge, there being no ſuitors. 4 Inſt. 272. 6 Co. 12. 2 Bulſt. 23.

Its juriſdiction conſiſts herein, that the (*a*) contract or (*b*) cauſe of action be in the ſame time of the ſame fair or market, and not before, or in former; it muſt be for ſome matter concerning the ſame fair or market, done, complained of, heard and determined the (*c*) ſame day within the precinct of the ſame fair or market. 4 Inſt. 272.

(*a*) Cannot hold plea of obligations, for this court is ordained for things ariſing within the fair. Roll. Abr. 545. Moor 830. Cro. Jac. 313. 2 Bulſt. 21. (*b*) If one ſlanders another who trades in the market, in any thing which concerns his trade, as by diſparaging his goods, which he expoſes to ſale there, an action lies; *jecùs*, if the words do not concern any thing touching the market. 10 Co. 73. Hall and Jones adjudged. Cro. Eliz. 773. Moor 623. S. C. adjudged. 4 Inſt. 272. Roll. Abr. 544. S. C. cited. (*c*) The proceedings being *de horâ in horam*. 2 Inſt. 272. ——This court continues during the time of the fair, and no longer. 2 Bulſt. 23.——It may be adjourned from market to market. Keilw. 99.——The continuance may be entered by an *idem dies*, &c. Moor 459.

By the 17 *E.* 4. *cap.* 2., reciting, that divers perſons coming to fairs be grievouſly vexed and troubled in the court of pipowders, by feigned actions, and alſo by actions of debt, treſpaſſes, feats and contracts made and committed out of the time of the ſaid fair, or the juriſdiction of the ſame, contrary to equity and good conſcience, &c., it is enacted, "That no miniſter of any ſuch court "of pipowders ſhall hold any plea (*d*) without (*e*) oath made by "the plaintiff or his attorney, that the contract or other feats "contained in the declaration, was made within the fair, and "within the time of the fair, and within the juriſdiction and "bounds of the ſaid fair." Made perpetual by 1 R. 3. c. 6.

(*d*) Though ſuch oath ought to be made if the defendant will inſiſt upon it, yet it ſhall not be made part of the record.

4 Inſt. 272. (*e*) Yet this concludes not the defendant, but notwithſtanding he may plead to the juriſdiction of the court. 4 Inſt. 272. 2 Bulſt. 22.

[From this court a writ of error lies, in the nature of an appeal, to the courts at *Weſtminſter*, which are now bound by the ſtatute of 19 *Geo.* 3. *c.* 70., to iſſue writs of execution in aid of its proceſs after judgment, where the perſon or effects of the defendant are not within the limits of this inferior juriſdiction.] Howell v. Johns, Cro. El. 773.

Of the Courts in London.

THERE are ſeveral courts within the city of *London*, which exerciſe a juriſdiction according to their own ſtated rules and forms, but yet are ſubject to the controul and correction of the king's courts at *Weſtminſter*, whenever they exceed their juriſdiction; the chief of theſe are, 4 Inſt. 247.

1. The Court of Huſtings.

4 Inſt. 247. (a) My Lord Coke ſays, it is derived from the Saxon words *hus*, which ſignifies a *houſe*, *ding*, *thing*, that is, the houſe of cauſes or things. 4 Inſt. 247. [So, Sir H. Spelman in his Gloſſary *voc.* Huſtings.]—But by Forteſc. pref. to Monarchy 59. it is a pure *Saxon* word, ſignifying any council or court in general, and therefore applied to the ſupreme court of the city of *London*. The *Saxon* word, according to Junius, is borrowed from the Iſlandick.

This is the (a) higheſt and moſt ancient court of record within the city of *London*, and is always held at *Guildhall*, before the lord mayor and ſheriffs of *London* for the time being; but when any matter is to be argued and determined in this court, the recorder ſits as judge with the lord mayor and ſheriffs, and gives rules and judgments therein.

4 Inſt. 247. (b) In this court deeds may be enrolled, recoveries may be paſſed, wills may be proved, and replevins, writs of error, writs of right patent, writs of waſte, writs of partition, and writs of dower, may be determined for any matters within the city of London and the liberties thereof. Lex Lond. 105. But note, That all real actions are now grown out of uſe.

This court hath juriſdiction of (b) all pleas real, perſonal and mixt; and for this purpoſe it is diſtinguiſhed into two courts, as the judges ſit one week on real actions, and the other on thoſe which are perſonal or mixt.

4 Inſt. 247. Judgment of outlawry in the huſtings is not given by the mayor, who is coroner, or his deputy, but by the recorder, by the cuſtom of the city.

Lex Lond. 15. In this court, the lord mayor for the enſuing year, the ſheriffs, chamberlain, and bridge-maſters, are choſen.

18 E. 3. 14. Roll. Abr. 745. S. C. Bev. 309. Upon a judgment given in this court of huſtings, a writ of error lies at St. *Martin*'s (c) before certain juſtices.

2 Sand. 252. S. P. And upon a judgment of the ſaid juſtices a writ of error lies in parliament. 2 Leon. 107. (c) For their commiſſion, &c., *vide* Reg. 130. F. N. B. 23.

2. The Sheriffs Courts.

4 Inſt. 248. There are two ſheriffs of *London* and *Middleſex*, each of whom keeps a court of record for all perſonal actions within the city of *London*; theſe courts are kept at *Guildhall*, and in each court a ſteward is the judge; they have belonging to theſe courts two priſons, called *counters*, the one in *Wood-ſtreet*, the other in the *Poultry*.

(d) But for this *vide* Lex Lond. 241. &c. (e) *Vide* for this title *Cuſtoms of London*.

The (d) proceſs in theſe courts is by ſummons, arreſt, (e) foreign attachment, &c.

4 Inſt. 247, 248. From theſe courts a cauſe may be removed by *habeas corpus* to *Weſtminſter-hall*; but if an erroneous judgment be given, the cauſe may be removed by writ of error to the *Huſtings*, before the lord mayor and ſheriffs.

Skin. 105. If a plaint be levied in a counter in *London*, and a *habeas corpus* brought, it is returned by that ſheriff in whoſe counter the party is in cuſtody, and he only is to anſwer if he eſcapes.

3. The Court of Equity before the Lord Mayor, commonly called the Court of Conſcience.

The juriſdiction of this court ariſes from (*a*) a cuſtom in *London*, *viz.* that if a plaint of debt is entered in the ſheriff's court, upon ſuggeſtion of the defendant, the lord mayor may ſend for the parties, and for the record, and examine the parties upon their plea; and if he finds that the plaintiff is ſatisfied, he may award that the plaintiff ſhall be barred, but he cannot examine after judgment.

4 Inſt. 248. (*a*) That this is a reaſonable cuſtom, altho' it hath been of late abuſed. Skin. 67. pl. 13.

Judgment was given in an action in the ſheriff's court in *London*, and after it was removed to the mayor's court by *levata querela*, within which court there are four attornies, who, by an excluſive cuſtom, are the only attornies of the court; one of them was aſſigned to the plaintiff by the recorder, who refuſed to act, as did all the others, becauſe the then lord mayor was concerned in intereſt. On complaint to *B. R.* it was held, that no perſon could withdraw himſelf from the juriſdiction of the King's Bench, which had a power of obliging all officers to do their duty; that the denying juſtice in ſuch a manner was of dangerous conſequence, and might be puniſhed by information, *&c.*; that in the caſe of the abbot of *Crowland*, 20 *E.* 4. the liberties were ſeized, becauſe he had not officers; and that the attorney's refuſal in this caſe was ſufficient to forejudge him.

Hil. 26, 27 Car. 2. in B. R. Buxton v. Singleton, 3 Keb. 432. S. C.

There is alſo the court of requeſts, which is called the court of conſcience, and is held before certain commiſſioners at *Guildhall*, and was (*b*) eſtabliſhed for recovering debts under forty ſhillings.

Lex Lond. 229. (*b*) Firſt began by an act of council, 9 H. 8. but has ſince been confirmed by act of parliament, 3 Jac. 1. c. 15. which *vide*, and 14 Geo. 2. c. 10.

This court cannot grant prohibitions to ſtay proceedings in the courts at *Weſtminſter*; and therefore where *J. S.* brought debt upon an obligation of 10 *l.* for payment of 5 *l.* in *B. R.*, againſt a freeman of *London*, who cited the plaintiff in the court of conſcience, ſurmiſing that leſs than 40 *s.* was due; the plaintiff appeared there, and ſhewed the obligation; notwithſtanding which, the commiſſioners there, upon the allegation of the defendant, that leſs than 40 *s.* was due, ordered the plaintiff to accept it, and to ſtay proceedings in *B. R.*, which he refuſing, the commiſſioners ordered the regiſtrar to keep the obligation, ſo that the plaintiff could not proceed in *B. R.*; whereupon the court granted an attachment againſt the commiſſioners and regiſtrar.

3 Keb. 533.

Curteſy of England.

Dr. & Stud. lib. 1. c. 7. Co. Lit. 30. a. Cowel, tit. *Curteſy*; it began in England and Ireland in the time of H. 1. Seld. Jan. 65. and in Scotland in the time of Malcom. Macan. 56. Both by a poſitive inſtitution.

TENANT by the curteſy is he, who after his wife's death (having had iſſue by her inheritable) is introduced into her inheritance, and has an eſtate for life therein; and he is ſo called from the favour or curteſy of that law which made this proviſion for him, to which he had no natural right, nor to which any other nations, (*a*) except thoſe of *Great Britain* and *Ireland*, admitted him.

[(*a*) This is a miſtake; it was known in other countries, though not under this name. By the reſcript of Conſtantine it is eſtabliſhed, *ut hæreditatis maternæ pater uſum fructum, filii proprietatem haberent*. Crag. j. f. dieg. 22. § 40. Cod. l. 6. le. 1. And the laws of the Almains define the eſtate almoſt in the very terms uſed by the laws of England. Lindenbrog, L. Aleman. 1. 92. We find it in the feudal ſyſtem, not indeed as a neceſſary conſequence of the feudal tenure in its original purity, but ariſing from the expreſs terms of the inveſtiture. The language of the feudal law is *maritus uxori non ſuccedit in feudum, niſi ſit ſpecialiter inveſtitus*. Wright's Ten. 193. n. c.——Sir W. Blackſtone inclines to think, that tenancy by the curteſy of England was ſo called, as ſignifying an attendance upon the lord's *court* or *curtis*, (that is, being his vaſſal or tenant,) not as denoting any peculiar favour belonging to this iſland. 3 Comm. 126. The contrary, however, is maintained by one of his ſucceſſors in the Vinerian chair. 2 Wooddeſ. 18.]

Rot. Clauſ. 11 H. 3. Wright's Ten. 193. n. 9. Hale's Hiſt. C. L. 180.

[The words of this law, as they are found in a writ of 11 *H.* 3. ordaining the reception of it in *Ireland*, are, *Si aliquis deſponſaverit aliquam mulierem, ſive viduam, ſive aliam, hæreditatem habentem, et ipſe poſtmodum ex eâ prolem ſuſcitaverit, cujus clamor auditus fuerit inter quatuor parietes, idem vir, ſi ſuper vixerit ipſam uxorem ſuam, habebit totâ vitâ ſuâ cuſtodiam hæreditatis uxoris ſuæ licet ea fortè habuerit hæredem de primo viro ſuo qui fuerit plenæ ætatis.*]

(A) What Perſons may be Tenants by the Curteſy; what not.

(B) Of what Sort of Inheritances this Eſtate is allowable; of what not.

(C) What Eſtate the Wife muſt have to let in the Huſband to be Tenant by the Curteſy: And herein,

1. The deſcendable Quality of ſuch Eſtate.
2. The Seiſin of the Wife thereof.
3. When this Eſtate and Seiſin is to begin, and how long it muſt continue.

(D) Of

(D) Of the Huſband's Title being initiate by having of Iſſue, and to what Purpoſes: And herein,

1. What Sort of Iſſue this muſt be.
2. When it muſt be born.
3. What it muſt do to entitle the Huſband to be Tenant by the Curteſy.

(E) The Nature and Quality of ſuch Tenancy by Curteſy:

1. With reſpect to the Eſtate itſelf.
2. With reſpect to the Privity between him and the Heir.

(F) By what Means this Title may be prevented and deſtroyed.

(A) What Perſons may be Tenants by the Curteſy; what not.

1. THE words of this law are general, and ſeem to extend to all ſorts of perſons without diſtinction; therefore (*a*) idiots and lunaticks, and (*b*) villains, may be tenants by the curteſy.

[(*a*) But the marriage of perſons in this unhappy ſtate is merely void, by reaſon of their incapacity to contract, and one of the circumſtances neceſſary to the completion of their title to the eſtate is therefore wanted.] (*b*) The lord, if he will, may enter and hold thoſe lands againſt the villain and his iſſue for ever. Co. Lit. 118. 123. a.

2. Perſons convict only of (*c*) felony or treaſon, perſons (*d*) outlawed in any civil action, may be tenants by the curteſy.

(*c*) For they forfeit only their goods and chattels abſolutely, for of their lands the king gains but a pernancy of the profits. 5 Co. 110. Co. Lit. 92. b. 391. a. Stanf. 192. (*d*) Bro. tit. *Outlawry* 26. 36. 59. Co. Lit. 128. For ſuch proceſs of outlawry might be eaſily ſuperſeded, and thereby the king's pernancy of the profits diſcharged.

3. But perſons attainted of (*e*) felony or treaſon ſhall not be tenants by the curteſy; for they being thereby *extra legem poſiti*, and their perſons forfeited to the king, they are thenceforth become incapable of our laws in general, and, by conſequence, of this in particular, which intended to give the inheritance only to thoſe who were capable of holding it *tota vita ſua*: alſo, perſons attainted in (*f*) a *præmunire* are excluded the benefit of this law, and alſo (*g*) *aliens*, be they friends or enemies; and in theſe caſes their title ſhall never ariſe, even for the benefit of the king, but the wife's eſtate ſhall be diſcharged of it for ever.

(*e*) Bro. tit. *Curteſy*, 15. Staundf. 196. Godb. 323. (*f*) Co. Lit. 391. a. 3 Inſt. 43. (*g*) But if the *alien* be made denizen, or the perſon attainted pardoned, and have iſſue after, they may be tenants by the curteſy, in reſpect to that iſſue had after, but not in reſpect of any iſſue had before. 7 Co. 25.——Popiſh recuſants were diſabled from being tenants by the curteſy, 3 Jac. 1. c. 5. § 13.

(B) Of what Sort of Inheritance this Eſtate is allowable; of what not.

Dr. & Stud. 203. Perk. 457. 463. Dyer, 9. pl. 25. Co. 1. 123. 4 Inſt. 87.

1. OF a uſe at common law, or what is now called a truſt, it is expreſsly reſolved, that a man ſhall not be tenant by the curteſy; (*a*) and *Doctor and Student* aſſigns this as one reaſon, why ſo much land was put in uſe to prevent this title; and the 27 *H.* 8. *cap.* 10., in the preamble recites this as one of the miſchiefs that ſtatute intended to remedy; the reaſon ſeems, that of a uſe there was neither tenure nor wardſhip, nor any eſcheat nor benefit to the lord, and therefore not within the reaſon of this law; beſides that the feoffees were tenants to the lord, and the land in their hands the proper ſubject of ſuch titles, and therefore could not be double out of the ſame lands. Another reaſon may be, that the uſe conſiſting merely in privity between the feoffor and feoffees, and being in the nature of a thing in action, for which no remedy lay but by *ſubpœna* in Chancery, and therefore none could have any remedy for it but thoſe who were parties or privies to the feoffment, or within the words or plain meaning thereof, and, conſequently, the huſband could not be tenant by the curteſy, nor his wife be endowed thereof, they being ſtrangers and collaterals to the feoffment; and the denying them the rents and profits, could be no breach of truſt in the feoffees, they not being originally truſted for any ſuch purpoſe, nor compellable to account to them.

[(*a*) But curteſy of truſts is now allowed in equity, tho' dower is refuſed. Otway v. Hudſon, 2 Vern. 583. Williams v. Wray, *id.* 681. Chaplin v. Chaplin, 3 P. Wms. 229. And therefore of money to be inveſted in land. Sweetapple v. Binden, 2 Vern. 536. Cunningham v. Moody, 1 Vez. 174.]

4 Co. 22. Hob. 216. Cro. Eliz. 361.

2. A man ſhall not be tenant by the curteſy of a copyhold unleſs there be a ſpecial cuſtom to warrant it, for the freehold and inheritance being in the lord, and the copyhold being only a cuſtomary right of taking the profits time out of mind at the will of the lord, this cuſtom, like all others, muſt be a law to itſelf, and all eſtates derived thereout are ſo far good as they are warranted by that law, and no farther; if, therefore, there be no cuſtom for a man to be tenant by the curteſy, of his wife's eſtate, there is no law by which he can claim it; and if there be no law, he can have no more right than to another man's property; and this ſtatute cannot operate upon copyhold, ſince this ſtatute, like other ſtatutes, was made within time of memory, and ſo falls ſhort of any ſhare in the original conſtitution, or governing of copyholds; and for this reaſon, where ſuch cuſtom of holding by the curteſy has prevailed, it has yet been taken literally ſtrict, and not to be extended in the leaſt beyond thoſe bounds the cuſtom has allowed of.

Sir John Savage's caſe,

3. As where *J. S.* ſet forth, that within ſuch a manor there was a cuſtom, that if one took to wife any cuſtomary tenant of the ſaid manor in fee, and had iſſue by her, if he outlived ſuch wife he ſhould be tenant by the curteſy; and the caſe was, that *J. S.* married a woman, who at the time of the marriage had not any copyhold, but afterwards, during the coverture, a copyhold deſcended to her; it was adjudged, that he ſhould not be tenant by the

the curteſy by this cuſtom, for that his wife was not a cuſtomary tenant at the time of the marriage, which by the ſtrict and literal meaning of the cuſtom ſhe ought to be. 2 Leon. 109. 208. S. C. cited.

4. Of an annuity to a woman and her heirs, after a writ of annuity brought, a man ſhall not be tenant by the curteſy any more than a woman ſhall be endowed thereof, for thereby it becomes a perſonal inheritance. Co. Lit. 144. b. Poph. 87. Moor, 83.

5. A man may be tenant by the curteſy of lands held in *antient demeſne*, and a woman may claim dower of ſuch lands: alſo, of lands in *Borough-engliſh*. Alden's caſe. 5 Co. 105. Cro. Eliz. 826. [S. C. 2 And. 178. S. C.; but this point does not appear in any of the reports.]

6. Of lands in *gavelkind*, (*a*) a man may be tenant by the curteſy without having iſſue by his wife, by the cuſtom; and herewith our ſtatute has nothing to do, ſince cuſtom, a law of much longer ſtanding, had already provided for him, and preſcribed the terms of his enjoying of it. Co. Lit. 30. a. Dav. 50. L.P.R. 627. [(*a*) But of ſuch lands of the wife the tenancy by curteſy extends only to a moiety, and it ceaſeth if the huſband marries again. This at leaſt is the cuſtom of gavelkind in Kent. Robins. Gav. b. 2. c. 1.]

7. There are ſome kinds of inheritances whereof a man may be tenant by the curteſy; though a woman, in ſuch caſe, ſhall not be endowed; as if lands holden of the king by knight's ſervice deſcend to a woman, and after office found ſhe intrudes and taketh huſband, and hath iſſue, in this caſe the huſband ſhall be tenant by the curteſy; yet if the heir male, after office found in the like caſe, intrudeth, and taketh a wife, ſhe ſhall not be endowed, by the expreſs proviſion of *Prærogat. regis, cap.* 13. But this ſtatute doth not alter or abridge the ſtatute that gives a man a title by the curteſy. Prærog. Regis, c. 13. 4 Co. 55.

8. So, if a man marry the nief of the king, by his licenſe, (which amounts to an enfranchiſement, at leaſt during the coverture,) and after lands deſcend to the wife, and the huſband hath iſſue by her, and then ſhe dies, the huſband ſhall be tenant by the curteſy: but if a woman marry the villain of the king, by his licenſe, ſhe ſhall not be endowed; for notwithſtanding the licenſe, he ſtill remained a villain to the king, who may enter at his pleaſure, and defeat the wife's title of dower by his own title paramount. Co. Lit. 30. b.

9. A man ſhall be tenant by curteſy, of a caſtle, of a (*b*) houſe that is *caput baroniæ*, or *comitatûs*, becauſe able to defend the realm, and of a common without number; but of theſe a woman ſhall not be endowed. Co. Lit. 30. b. (*b*) But for this *vide* head *Dower*, and that by a late reſolution, a woman ſhall be endowed of ſuch a houſe.

10. Of offices of profit a huſband ſhall be tenant by the curteſy. Plow. 379. My Lord Coke cites ſome ancient records, wherein tenancy by the curteſy was allowed of dignities and offices of honour, as to carry a ſword before the king at his coronation, to be his carver upon that day; and to the Earl of Saliſbury by the curteſy; but theſe being offices, as appears, annexed to particular dignities, or being dignities themſelves, and capable of being entailed, may without any inconvenience be allowed the privilege of this law. Co. Lit. 29. But ſee note (1.) in the 13th edit.

[11. Where

Roberts v. Dixwell, 1 Atk. 607.

[11. Where a teſtator directed his truſtees to convey a fourth part of his freehold lands to the uſe of his daughter for her natural life, ſo as ſhe alone ſhould take the rents, her huſband not to intermeddle therewith; and after the performance of ſeveral other truſts, in truſt for the heirs of the body of the daughter; Lord *Hardwicke* held, that in this caſe the truſt was merely executory, that the wife took an eſtate for life only, and therefore the huſband was not entitled to be tenant by the curteſy.]

(C) What Eſtate the Wife muſt have to let in the Huſband to be Tenant by the Curteſy.

Lit. § 35. Dyer, 148. 6 Co. 41. 8 Co. 36. Co. Lit. 227. 8 Co. 34. Leon. 167. Pain's caſe. Co. Lit. 30. a.

1. *Littleton* acquaints us, that it muſt be an eſtate either in fee-ſimple or fee-tail general, or where the wife has it as heir of the ſpecial tail (*a*); and my Lord *Coke* ſays, for the huſband to be tenant by the curteſy is one of the incidents to an eſtate-tail, which to reſtrain by condition, were repugnant, *&c.*; and therefore if a woman, tenant in tail general, marries and hath iſſue, which iſſue dieth, and then the wife dies, ſo that the eſtate is thereby determined, yet the huſband ſhall be tenant by the curteſy; the ſame law if the limitation had been to the woman and the heirs of her body, upon condition, that if ſhe die without iſſue then to remain to another; for this is not a condition but a limitation, and no more than what the law ſaith. Co. Lit. 183. a.]

[(*a*) But the wife muſt be ſole tenant both of the freehold and the inheritance.

Co. Lit. 30. a. note (2), 13th edit.

2. So, if one, ſeiſed of a rent in fee, makes a gift in tail general, or if a rent *de novo* be granted in tail general to a woman, who marries and hath iſſue, the iſſue dieth, and then the wife dieth without other iſſue, yet the huſband ſhall be tenant by the curteſy, of the rent, though the eſtate-tail therein be determined and ſpent; for this being an incident to ſuch an eſtate at the time of its creation, whenever the huſband has iſſue, his title is initiate, and ſhall not be loſt after by failure of iſſue, which, being the act of God, ought not to turn to his prejudice; and this is within the words of our law *hæreditatem habentem*, without fixing its continuance.

[As the ſtatute *de donis* does not extend to huſbands claiming curteſy, or wives claiming dower, it is for this reaſon, probably, that a huſband may have curteſy, and a wife dower of a rent reſerved upon a gift in tail. For though as between the donor and his heirs, and the donee and his heirs, the rent is incident to the reverſion in conſequence of the ſtatute *de donis*, yet, as againſt a huſband claiming curteſy, or a wife claiming dower, the donor muſt, to warrant the poſitions of Lord Coke, have a rent in groſs, that is diſtinct from any eſtate, as he had before the ſtatute *de donis*. Preſton on Eſtates, c. 6. note.]

[So, of eſtates determining by a *ſpringing* or *ſhifting uſe*, the huſband, by the latter opinion, ſhall have his curteſy, notwithſtanding the determination of the eſtate of his wife. And of this opinion was *Anderſon*. If a feoffment, ſaid he, be made to the uſe of *J. S.* and his heirs, until *J. D.* hath done ſuch a thing, and then unto the uſe of *J. D.* and his heirs, the thing is done, and *J. S.* dieth, his wife ſhall be endowed. In this caſe the eſtate of *J. S.* was a determinable fee in point of quality, but it is not on that account that

1 Leon. *ubi ſupra.* Preſton on Eſtates, *ubi ſupra.*

that the wife was entitled to dower, but becauſe the eſtate of *J. D.* took effect by *ſpringing* or *ſhifting uſe*. And this opinion of *Anderſon* has been followed by a deciſion to the ſame effect in the caſe of an executory deviſe. Thus *Joſeph Sutton* deviſed his eſtate to truſtees, upon truſt to pay the rents and profits for the maintenance and education of *Mary Barrs*, till ſhe arrived at twenty-one or was married; and from and after the ſaid *Mary Barrs* ſhould have attained her age of twenty-one years, or ſhould be married, he gave and deviſed all the ſaid land and premiſes to the ſaid *Mary Barrs*, her heirs and aſſigns for ever. But in caſe the ſaid *Mary Barrs* ſhould happen to die before ſhe arrived at the age of twenty-one years, and without having iſſue of her body lawfully begotten, then, from and after the deceaſe of the ſaid *Mary Barrs*, without iſſue as aforeſaid, he gave and deviſed all his ſaid eſtates unto his grandſon *Walter* for life, with ſeveral remainders over. *Mary Barrs* married *Solomon Hanſard*, and had iſſue a ſon, who died in her life; and afterwards *Mary Barrs* died under twenty-one. In this caſe, the court of King's Bench were unanimouſly of opinion, that on the deceaſe of *Mary Barrs*, her huſband became entitled to be tenant by the curteſy for his life, and that, ſubject thereto, the deviſees over became entitled by way of executory deviſe.] Buckworth v. Thirkell, Tr. 25 G. 3. Co. Lit. 241. a. note 4. 13th edit. 1 Collect. Jurid. 332.

But to underſtand the nature of the wife's eſtate, we muſt conſider farther,

1. The Deſcendible Quality of ſuch Eſtate.

1. The rule herein to be obſerved is, that the iſſue of ſuch huſband may by poſſibility inherit. This rule ſeems to have been formed after the ſtatute *de donis*, and by virtue thereof; for our ſtatute requires no ſuch property in the inheritance, neither did the common law; but for this *vide* 2 Inſt. 336. 8 Co. 35, 36. Co. Lit. 29 b. Perk. 465.

2. Therefore if lands are given to a woman and the heirs male of her body, and ſhe has iſſue a daughter, and dies, the huſband ſhall not be tenant by the curteſy; the ſame law if it hath been given to her and the heirs female of her body, and ſhe had iſſue a ſon. 8 Co. 35. Co. Lit. 29. b.

3. But if a woman ſeiſed in fee marries, and hath iſſue, and then the huſband dies, and ſhe takes another huſband, and hath iſſue by him and dies; though the firſt iſſue be living, yet the ſecond huſband ſhall have it by the curteſy, becauſe his iſſue, by poſſibility may inherit; as if the firſt iſſue die without iſſue, whereby it comes to the uncle, *&c.* Bro. tit. *Curteſy*, 8. Perk. 466. 8 Co. 34. Lit. § 52.

[It is eſſential to this eſtate, that the iſſue ſhould take as heir to the wife; that they ſhould take by deſcent; for if they take by virtue of a remainder over, their birth will not entitle the huſband.] 8 Co. 34. Summers v. Partridge, 2 Atk. 47.

2. The Seiſin of the Wife thereof.

1. That the wife muſt be *ſeiſed* of the eſtate, is required by the very words of the law, which ſays, *aliquam hæreditatem habentem*, ſo that there muſt be a poſſeſſion of ſuch inheritance by the very words Dr. & Stud. lib. 2. c. 15. Perk. 464. Co. Lit. 29. a. 90.

3 Co. 34. 36. F. N. B. 143. Keilw. 2. a. Bro. tit. *Curteſy*, 7. * Perk. 470.

words of the law; and therefore if a man die ſeiſed of lands in fee-ſimple or fee-tail general, and thoſe lands deſcend to his daughter, and ſhe marry, and have iſſue and die, before any entry made by her and her huſband, or any other for them, the huſband ſhall not be tenant by the curteſy; but here we muſt underſtand ſeiſin in a two-fold ſenſe, *viz.* ſeiſin in fact and ſeiſin in law; and where a ſeiſin in fact may be had, as in the above caſe, there, a ſeiſin in law will not do; nay, though the huſband doth all he can to get poſſeſſion in his wife's life-time, and as ſoon as he heareth of her father's death, goeth towards the land to take poſſeſſion, and before he can come there the wife dies, yet he ſhall not be tenant by the curteſy, and therefore one * book ſays, he ſhould have ſpoken to ſome neighbour, being near the lands, to have entered for his wife, as in her right, immediately after the father's death; and the reaſon of this is from the words of the law, which require that the wife ſhould have actual poſſeſſion of the inheritance; and of things lying in livery the wife hath not actual poſſeſſion till the entry of the huſband (*a*).

[(*a*) But entry is not always neceſſary to give ſeiſin in fact; for if the land be in leaſe for years, curteſy may be without entry, or even receipt of rent, the poſſeſſion of the leaſe for years being deemed the poſſeſſion of the huſband and wife. De Grey v. Richardſon, 3 Atk. 469.]

Co. Lit. 29. Perk. 468, 469. 7 Ed. 3. 66. Keilw. 104. Co. 97. 6 Co. 68. F. N. B. 149. Bro. tit. *Curteſy*, 5. 9. 2 Sid. 110.

2. But now of ſuch inheritances, whereof there cannot poſſibly be a ſeiſin in fact, a ſeiſin in law is ſufficient; and therefore if a man ſeiſed of an advowſon (*b*), or rent in fee, hath iſſue a daughter, who is married and hath iſſue, and he dieth ſeiſed, and the wife dieth likewiſe before the rent becomes due, or the church becomes void, this ſeiſin in law in the wife ſhall be ſufficient to entitle her huſband to be tenant by the curteſy, becauſe, ſay the books, he could not poſſibly attain any other ſeiſin, as indeed he could not, and then it would be unreaſonable he ſhould ſuffer for what no induſtry of his could prevent; but the true reaſon is, that the wife hath theſe inheritances which lie in grant, and not in livery, when the right firſt deſcends upon her; for ſhe hath a thing in grant when ſhe hath a right to it, and nobody elſe interpoſes to prevent it.

[(*b*) But if the advowſon be appendant to a manor, and the wife die before entry into the manor, Lord Hale thought the huſband would not be entitled to be tenant by the curteſy of the advowſon. Hal. MSS. Hargr. notes on Co. Lit. 29. a.]

Caſborne v. Scarfe, 1 Atk. 603. Vin. Abr. Curteſy, E. pl. 23. S. C. more fully reported.

[So, of lands mortgaged in fee by the wife previouſly to the marriage, the huſband ſhall be entitled to be tenant by the curteſy. For his neglect in not paying off the mortgage, is not ſimilar to the caſe of laches in a huſband, *viz.* as in a caſe where entry is requiſite, becauſe it is nothing near ſo eaſy to pay off a mortgage as to make an entry; and an objection of this kind holds equally ſtrong in the caſe of a truſt eſtate, for a huſband may more eaſily get a decree for his truſtees to convey, than a decree to redeem a mortgage, which is attended with many delays.

Ewer v. Aſtwike, 1 Anderſ. 192. Moor, 272.

In copyholds where the cuſtom allows of this eſtate, the entry of the huſband in the right of his wife in her life-time, though ſhe dies before admittance, will, it ſeems, be a ſufficient ſeiſin.

Hearle v. Greenbank, 3 Atk. 695. 1 Ves. 298.

With reſpect to truſts or equitable eſtates, the wife muſt have ſuch an intereſt that her huſband may have a ſeiſin or poſſeſſion in nature of a ſeiſin in her right. Therefore, where a father deviſed

viſed eſtates to truſtees in truſt to apply the profits for the ſole and ſeparate uſe of his daughter (a feme covert) during her life, and not to be ſubject to the debts or control of her huſband, with power to diſpoſe of them by will, notwithſtanding the coverture; Lord *Hardwicke* held, that the huſband had no ſeiſin either in law or in equity, and therefore was not entitled to be tenant by the curteſy: that the legal eſtate was in the truſtees: that the father had made the daughter a *feme ſole*, giving her the profits for her life, but not ſubject to the control of her huſband; the huſband then had no ſeiſin in equity during the coverture: and further, the tenancy by curteſy in this caſe would be directly contrary to the intent of the teſtator.]

See Mr. Preſton's obſervations on this caſe in his chapter upon this title. Preſt. on Eſtates.

3. When the Eſtate and Seiſin is to begin, and how long it muſt continue.

1. The eſtate and ſeiſin of the wife ought to begin ſome time during the coverture; ſo the words of the law import, *ſi aliquis deſponſaverit aliquam hæreditatem habentem, &c.*, and therefore if a woman be diſſeiſed and marry and die, leaving iſſue before any re-entry made, the huſband ſhall not be tenant by the curteſy; for here ſhe had no inheritance, but only a right to an inheritance, which is out of the words of this law; but if the huſband or wife had entered during the coverture, there, after the wife's death, he ſhould have it by the curteſy, becauſe ſhe had *hæreditatem* during the coverture.

Co. Lit. 29. a. 30. a. Perk. 458.

2. If a woman ſeignoreſs intermarry with the tenant, and have iſſue and die, the huſband ſhall not be tenant by the curteſy of the ſeignory, becauſe by the intermarriage the ſeignory was in ſuſpence, and ſo ſhe could not be ſaid to have it, or if ſhe had, it is like the ſeiſin of an inſtant, whereof a woman ſhall not be endowed.

3 Leon. 347. Perk. 460. Co. Lit. 29. b.

3. A woman tenant in tail, *apres* poſſibility, *&c.* takes huſband, and hath iſſue, and the fee-ſimple deſcends upon the wife, be it before or after marriage, the huſband ſhall be tenant by the curteſy, becauſe by the deſcent of the fee the other eſtate was merged and gone, and ſhe became tenant in fee-ſimple executed.

Bro. tit. Curteſy, 4.

4. In treſpaſs, the defendant ſays, that one *A.* was ſeiſed of thoſe lands in her demeſne as of fee, and that he took her to wife, and they had iſſue between them, and after *A.* died, and he held himſelf in as tenant by the curteſy, and (*inter alia*) it was moved, that he did not ſhew that after the marriage he was ſeiſed in his demeſne as of fee in right of his wife; and though it was anſwered, that his ſhewing that *A.* was ſo ſeiſed, and that he took her to wife was ſufficient, ſince it could not be intended but that the defendant was ſeiſed in fee, as in right of his wife; yet, ſays the book, the defendant *videns opinionem curiæ* amended his plea according to the exception taken by the plaintiff.

Keilw. 2. which plainly ſhews, that ſeiſin, in the wife ſome time during the coverture, is eſſential to make the huſband tenant by the curteſy.

5. If a woman ſeiſed in fee makes a leaſe for life, or endows her mother, and after has iſſue and dies, leaving the leſſee or mother, the huſband ſhall not be tenant by the curteſy of the reverſion.

But in the caſe of the leaſe, if a rent were reſerved to her and her heirs, Q. if the huſband ſhall not have the rent during its continuance, and after the death of

of the leſſee, the land itſelf, as tenant by the curteſy; and *vide* Perk. 467. Co. Lit. 29. a. Bro. tit. Curteſy, 10. Co. Lit. 15. a. 32. a. Keilw. 104. pl. 12.

Bro. tit. Curteſy, 121.

6. In a *quare impedit* by the king againſt divers, the defendant makes title that the advowſon deſcended to three coparceners, who made partition to preſent by turns, the eldeſt to have the firſt, the middle the ſecond; and that he married the youngeſt, and had iſſue by her, and ſhe died, and the church became void, and ſo it belonged to him to preſent, and doth not allege that ever his wife preſented; yet he was allowed tenant by the curteſy by the ſeiſin of the others; the reaſon of which caſe ſeems to be, that the advowſon being in its nature entire and indiviſible, and deſcending upon all the daughters as coheirs, though they agree to ſhare the fruits of it in ſuch proportions among themſelves, yet the inheritance remains entire in them all, and they all have a ſeiſin in law before preſentment by either, which, according to the rules before laid down, is ſufficient to entitle the huſband to be tenant by the curteſy.

2 Sid. 110. 117. Dethick v. Bradburn. In this caſe no judgment is given, but the opinion of Glyn, Ch. Juſt. was, that he ſhould; for though this begins *in futuro*, yet it is grantable over preſently, which proves it to be *in eſſe*, and then ſhe may be well ſaid *habere hæreditatem*, and the ſeiſin is not material, eſpecially in the caſe of a rent.

7. A rent-charge is granted to a woman and her heirs, payable at two feaſts of the year, the firſt payment to begin at ſuch of the two feaſts as ſhall happen after the death of *J. S.* The feme takes huſband, and hath iſſue and dies; then *J. S.* dies; and one queſtion was, if the huſband ſhould be tenant by the curteſy of this rent.

The time when this eſtate and ſeiſin in the wife is to begin, whether before or after marriage, is not material; and therefore if a woman marries, and hath iſſue, which dies, and after lands deſcend to the wife, and the huſband enters, and then the wife dies without other iſſue, yet the huſband ſhall be tenant by the curteſy, for the time of the deſcent is not material, ſo it be during the coverture. The ſame law is, if lands had been conveyed to the wife *mutatis mutandis*.

Co. Lit. 40. a. 351. a. Bro. tit. Curteſy, (3.) But Q. If in this caſe after iſſue had, the feme had been attainted of treaſon, if the huſband's initiate title ſhall prevail againſt the king? Q. Alſo, in the caſe of the felony, if the huſband may enter preſently upon the attainder during the wife's life, who is thereby *civiliter mortua*, as he might, if the wife had abjured the realm, which is one kind of attainder; for which *vide* Co. Lit. 133. And that the abjuration is an attainder, *vide* Co. Lit. 13. a. 390. b.

As to the continuance of this eſtate and ſeiſin in the wife, in ſome caſes it is neceſſary it ſhould continue in her till iſſue had, and in ſome not; and in ſome caſes continuance both before and after will not ſerve: for the firſt, if a woman ſeiſed in fee of lands hath iſſue, and after commits felony, and is attainted thereof, yet the huſband ſhall be tenant by the curteſy, in reſpect of the iſſue had before, and which by poſſibility might have entered; *aliter*, if the wife had been attainted before iſſue: but in the other caſe, the huſband's title, by the having of iſſue was ſo far initiate, that the lord might avow upon him for homage without the wife, and then her crimes after ſhall not defeat him of it; beſides, this is within the letter of our law, *&c.*

In

In ſome caſes it is not neceſſary that the ſeiſin ſhould continue till iſſue; and therefore if a man, ſeiſed of lands in fee in right of his wife, is diſſeiſed before iſſue, and afterwards he hath iſſue, and the wife die before any re-entry made, yet the huſband may re-enter and hold the land as tenant by the curteſy, for the diſſeiſin left a right in him to be tenant by the curteſy, if he had iſſue, as it did in the wife and her heirs to the inheritance. Perk. 472. Co. Lit. 30. a.

So, in ſuch caſe, if a recovery had been had againſt the baron and feme by erroneous proceſs, or by falſe ſwearing, and after execution ſued thereof they have iſſue, and the wife dieth, yet the huſband ſhall have error or attaint, and upon reverſal ſhall enter and hold as tenant by the curteſy, for being party to the record he may well have theſe writs, and when the recovery is reverſed, it is ſo *ab initio* as to him. Perk. 475.

In ſome caſes continuance of ſeiſin before and after iſſue will not do, therefore, if a woman makes a gift in tail, reſerving rent in fee, and marries and hath iſſue, and then the donee dies without iſſue, and then the wife dies, the huſband ſhall not be tenant by the curteſy of the rent, for that is determined and gone, but he ſhall have the land. Co. Lit. 30. a.

If a woman marries and hath iſſue, and lands deſcend to the wife, and the huſband enters, and after the wife is found an idiot, by office, the land ſhall be ſeiſed for the king; for when the title of the king and a common perſon begin at one inſtant, the title of the king ſhall be preferred; a *fortiori*, in this caſe, if the woman had lands before iſſue, and after iſſue had been found an idiot. Plow. 263. Co. Lit. 30. b. 55. But *qu.* of this caſe, becauſe the king's title can continue no longer than during the idiot's life.

If a daughter inheritrix marries and hath iſſue, and after a ſon is born, who enters upon the huſband and wife, and then the wife dies, the huſband's title is defeated; but if after the ſon had died without iſſue, and the huſband had re-entered, it ſeems he ſhould be tenant by the curteſy, whether he had iſſue by his wife after or not, and though ſuch firſt iſſue was dead before his re-entry: ſo, if the daughter in ſuch caſe after iſſue had endowed her mother, and after the mother dieth, and the huſband re-enters, and his wife dieth without other iſſue, yet it ſeems reaſonable the huſband ſhould have it by the curteſy: otherwiſe, in theſe caſes, if the ſon or the mother had not died till after the death of the wife, for their title in both caſes was paramount the wife's, and diſaffirms her title *ab initio* from the death of the father; but when the ſon or the mother dies, living the wife, then the eſtate comes to her again, and whether it come before or after iſſue, ſo there be an entry made, is not material, as before appears. Bro. tit. *Curteſy*, (10. 13.)

If a woman tenant in tail generally makes a feoffment in fee, and takes back an eſtate in fee, and marries, and hath iſſue and dies, yet the iſſue may recover in a *formedon* againſt his father and then he ſhall not be tenant by the curteſy; for the eſtate-tail he cannot have, that being diſcontinued during the whole coverture; the fee he cannot have, that being defeated and gone, and the iſſue reſtored to his right *per formam doni*; and as the eſtate of the Co. Lit. 29. b.

wife, during the coverture, was tortious, ſo muſt the huſband's be too after her death, and liable to be defeated by the iſſue.

(D) Of the Huſband's Title being initiate by the having of Iſſue, and to what Purpoſes: And herein,

1. What Sort of Iſſue this muſt be.
2. When it muſt be born.
3. What it muſt do to entitle the Huſband to be Tenant by the Curteſy.

8 Co. 35. Pain's caſe, Co. Lit. 29 b. S. P.

AS to the firſt, if a woman be delivered of a monſter, which hath not the ſhape of mankind, this is no iſſue in law; but however deformed it may be, or if it be born deaf and dumb, or an idiot, yet this is ſuch iſſue as will entitle the huſband to be tenant by the curteſy.

8 Co. 35. Co. Lit. 29. b.

2dly, It muſt be born during the life of the wife; therefore if the wife die in child-bed, and the iſſue is ript out of her womb, the huſband ſhall not be tenant by the curteſy, becauſe he hath no iſſue during the marriage, and therefore he cannot be ſaid *ex eâ prolem habere*, and in pleading he muſt allege that he had iſſue during the marriage.

8 Co. 34. Co. Lit. 29. b. Dyer, 25. pl 159. Bendl. 21. Peak. 471. Keilw. 2. a. But in Scotland they require that the child ſhould cry.

3dly, The ſtatute ſays, *cujus clamor auditus fuerit*; but this is put but for an inſtance; for if it be born alive, though dumb, and could not cry, it is within the meaning of this ſtatute; and there are other ſigns of life beſides crying, as motion, *&c.*, but ſome books ſeem to incline, that it ought to be baptized, and if it be not, through the huſband's neglect, he ſhall not be tenant by the curteſy; but the ſtatute requires no ſuch thing, and therefore it ſeems no eſſential part of his title.

Co. Lit. 30. a. 67. a. 2 Inſt. 145.

As to what purpoſes this title is initiate in the huſband by the having of iſſue, it appears before, that after iſſue had he ſhall do homage alone, and receive homage alone during the life of his wife, and avowry ſhall be made only upon him; for the ſtatute ſays *ſi ex eâ prolem habuerit, &c. habebit tota vita ſua cuſtodiam hæreditatis*; but homage done by the huſband before iſſue ſhall not bind the wife.

17 Ed. 3. 51. Co. Lit. 30. a. 183. a. accord. 2 Roll. Abr. 90. Co. Lit. 183. a. *cont.*

Therefore if an eſtate be made to two women, and the heirs of their two bodies, and one of them marry, and have iſſue and die, the huſband ſhall be tenant by the curteſy of her moiety; for this ſtatute ſevers the jointure between them by giving the huſband the cuſtody of it in the life of the wife; but if ſuch limitation had been to two men in this manner, their wives ſhould not be endowed, for the jointenancy takes place of the dower.

Co. Lit. 30. a. 326. a. Dyer, 363. pl. 26.

If the huſband, after iſſue, makes a feoffment in fee, and the wife dies, the feoffee ſhall hold it during the life of the huſband, and the heir of the wife ſhall not, during his life, avoid it by *ſur-*

cu-

cui in vitâ, for it could not be a forfeiture, becauſe the eſtate of tenant by the curteſy was but initiate, and not conſummate; and now ſince 32 *H.* 8. *cap.* 28. the iſſue ſhall not enter in ſuch caſe till after the huſband's death, which ſhews, that in this feoffment his intereſt and title to be tenant by the curteſy is involved, and paſſes by it to the feoffee, though not to ſuch purpoſe to make him tenant by the curteſy, which none but the huſband himſelf can be; for the ſame reaſon, it ſeems, that after iſſue he may leaſe the lands for his own (*a*) life. 8 Co. 72. (*a*) But *Q.* if ſuch feoffment or leaſe before iſſue ſhall be made good for his life by iſſue had after.—[In anſwer to this queſtion, another may be aſked, *viz.* who is to avoid the leaſe, if the tenant chooſes to hold the land?]

Baron and feme have iſſue, and after join in ſuffering a recovery, the feme was within age and appeared by attorney, yet after her death it ſeems the heir could not aſſign this for error till after the huſband's death. Hob. 324. Darcy v. Lee.

(E) The Nature and Quality of ſuch Tenancy by Curteſy.

1. With reſpect to the Eſtate itſelf.
2. With reſpect to the Privity between him and the Heir.

AS to the firſt, this eſtate, in ſeveral reſpects, is looked upon as a continuance of the eſtate of the wife, and therefore if three coparceners are of an advowſon, and they agree to preſent by turns, the eldeſt firſt, and ſo on, and the eldeſt die, her huſband, tenant by the curteſy, ſhall preſent as ſhe ſhould have done; and ſo of any of the other ſiſters. 3 Co. 22. Co. Lit. 166. b. 186. a. 2 Inſt. 365. Cro. Eliz. 19. F. N. B. 34. Bro. tit. *Curteſy*, (2.)

So, a writ *de partitione faciendâ* lies againſt tenant by the curteſy, becauſe he is in in continuance of the eſtate of coparcenary, though not being a coparcener in fact he cannot have ſuch writ. Co. Lit. 174. b. 175. a. Keilw. 118.

If baron ſeiſed of an advowſon in right of his wife preſents, and after hath iſſue, and the wife dies, and then the church becomes void, the huſband ſhall not have aſſiſe *de darrein preſentment*, becauſe he is in of another eſtate than that upon which he preſented before; for before he had no eſtate but in right of his wife, and now he is ſeiſed for his own life, as tenant by the curteſy. 2 Roll. Abr. 38. Keilw. 118. *Q.* But it ſeems clear, if the firſt preſentment had been after iſſue, he ſhould have had this writ.

The wife's heir ſhall not be in ward during the life of tenant by the curteſy, becauſe by his continuance of his wife's eſtate, the deſcent to the heir is interrupted. F. N. B. 143.

If a woman, tenant in tail, acknowledge a ſtatute and marry, and have iſſue and die, the land may be extended in the hands of her huſband, tenant by the curteſy. Dyer, 51. *in margine.*

So, the entry of the diſſeiſee is congeable of the tenant by curteſy, but not on the heir after his death. 9 H. 7. 24.

If tenant by the curteſy alien in fee, in tail, or for life of the leſſee, he in the reverſion ſhall have a writ of entry *in caſu conſimili* preſently, by the ſtatute of *Weſtm.* 2. *cap.* 24. 2 Inſt. 309.

Hob. 21. 2 Jones, 8. Roll. Abr. 167. 3 Co. 23. 9 Co. 142. 11 Co. 83. 4 Co. 62. Co. Lit. 54. 2 Inſt. 301. F.N.B. 56. Cro. Car. 430. Dr. & Stud. lib. 2. c. 1.

If tenant by curteſy grant his eſtate with warranty, and come in as vouchee, he ſhall have aid of him in the reverſion for the weakneſs of his eſtate; ſo, if he himſelf be empleaded.

As to the privity between him and the heir, this is ſo inſeparable, that at common law, although both had, as it were by conſent, granted away their eſtates, yet no action of waſte lay againſt any other than the tenant by the curteſy, nor againſt him by any other than the heir at law; but now by the ſtatute of *Glouceſter*, *cap.* 5. remedy is provided for the grantee of the reverſion againſt tenant by the curteſy, ſo long as he continues his eſtate, or againſt his aſſignee, if he aſſign it over; but ſtill ſo long as the heir keeps the reverſion, tenant by the curteſy is liable to his action of waſte notwithſtanding any aſſignment, that ſtatute having provided no remedy for this caſe; and the ſame law of tenant in dower.

(F) By what Means this Title may be prevented and deſtroyed.

Bro. tit. *Curteſy*, (6.) Co. 111. Hob. 338. Moor, 31, 32. But Q. as to the firſt caſe, becauſe the feoffment being before iſſue, the huſband hath not title either initiate or conſummate, but his title began wholly afterwards by the having of iſſue, and then the wife was in actual ſeiſin by the remitter.

IF the huſband before iſſue make a feoffment in fee, and retake an eſtate to him and his wife, by which the wife is remitted, and after he have iſſue, and the wife die, yet he ſhall not be tenant by the curteſy, for the law gives him *cuſtodiam hæreditatis*; and if he part with it in fee, ſo that it is once out of him, there is no law that gives it to him again, ſince he hath extinguiſhed it by his unjuſt alienation; *a fortiori*, if after iſſue he hath made this feoffment.

Co. Lit. 30. b.

So, if after iſſue he make a feoffment in fee upon condition, and re-enter for the condition broken, and then the wife die, yet he ſhall not be tenant by the curteſy, for that title was incluſively paſt and given away by the livery, and the condition was not annexed to his title but to the feoffment; and yet if ſuch feoffment were before iſſue, one (*a*) book makes a *q.* of it; but it ſeems clear in this caſe he ſhall not, becauſe, upon his re-entry for the condition broken, he is not in of an eſtate in right of his wife, but of the tortious eſtate gained upon the diſcontinuance of his wife's right.

(*a*) Perk. 474.

Bro. tit. *Curteſy*, (1.)

A woman, tenant in tail general, marries; ſhe and her huſband levy a fine, and take back an eſtate to them and the heirs of their two bodies, and have iſſue, the huſband dies, ſhe marries another, and hath iſſue and dies, and the huſband claims to be tenant by the curteſy, upon pretence, that by the eſtate taken back upon the fine his wife was remitted to her general tail, and ſo every iſſue inheritable, and he tenant by the curteſy; but *optima opinio*, that as his wife was eſtopped, ſo ſhall the ſecond huſband who claims by her.

Cro. Jac. 482. Cro. Eliz. 128. Charnock

Baron and feme ſeiſed of lands in right of the feme (whereof the huſband was entitled to be tenant by curteſy) levy a fine, which was after reverſed as to both, for the nonage of the feme, the

the huſband ſhall have it again, as tenant by the curteſy, becauſe the fine was utterly avoided.

[The huſband leaving his wife, and living with another woman, does not forfeit his tenancy by the curteſy.

If by articles previous to marriage a woman grants to her intended huſband, during their joint lives, the intereſt of her money, and the rents of her eſtate, to maintain the houſe, &c., this does not abridge his legal rights, but he is entitled to curteſy both in ſuch real eſtates as ſhe had at the time of the marriage, and in what came afterwards.]

and Worſley, adjudged. 3 P. Will. Rep. 269. 276, 277. Steadman v. Palling, 3 Atk. 423.

Cuſtoms.

(A) Of the Commencement and Length of Time neceſſary to eſtabliſh a Cuſtom.

(B) What Perſons are affected with, or bound by a Cuſtom.

(C) Of ſuch Cuſtoms as are againſt the Rules of the Common Law, yet, not being unreaſonable in themſelves, are good, and, from the Conveniency of them, bind in particular Places.

(D) Where, from the Benefits accruing from them, they ſhall bind.

(E) Where, from the Certainty or Incertainty of them, they ſhall be deemed good, or void.

(F) How to be conſtrued; and to what Things a Cuſtom ſhall be ſaid to extend.

(G) Cuſtom, how deſtroyed.

(H) Of the Manner of alleging and pleading a Cuſtom.

(A) Of the Commencement and Length of Time neceſſary to eſtabliſh a Cuſtom.

Co. Lit. 110. b. Dav. 32.

THE frequent repetition of an act, which at firſt was (*a*) aſſented to by the people of a certain place (*b*) for their mutual convenience and advantage, is called a cuſtom, and every ſuch cuſtom, being certain and reaſonable in itſelf, and commencing time immemorial, and always continuing without interruption, has obtained the force of a law, and in ſuch places ſhall prevail, though (*c*) contrary to the general laws of the kingdom.

(*a*) That all laws bind by the aſſent of the people, and ſuch aſſent may be expreſſed as well by facts as by writing or word. 44 E. 3. 19. Dav. 32. (*b*) The difference between cuſtom and preſcription is, that cuſtom is local, as prevailing in a certain province, county, hundred, &c. but preſcription is for the moſt part perſonal, being made in the name of a certain perſon and his anceſtors, or thoſe whoſe eſtate he has, or of a body politick, and their predeceſſors. Co. Lit. 13. b. 6 Co. 60. 8 Co. 62. & *vide* 2 Bulſt. 206. Roll. Rep. 46. [But a preſcription may be laid by way of cuſtom, where the neceſſity of the caſe requires it; as, in caſe a copyholder claims a right of common out of the manor, he muſt lay a preſcription in the lord; but where he claims common in the waſte of the lord, as he hath ſtrictly no inheritance in the land, but is only tenant at will, and as a preſcription muſt always be laid by way of a *que eſtate*, which he cannot allege, not being tenant in fee, for in ſtrictneſs the fee-ſimple is in the lord; therefore, the law allows him to allege it as a cuſtom in the occupiers of ſuch an eſtate. 6 Co. 60. b. Ca. temp. Hardw. 293. So, where a man claims only a diſcharge in his own ſoil, or a mere eaſement in the ſoil of another, he may lay it by way of cuſtom. *Ibid.* So, matters of perſonal privilege or exemption may be laid generally to expreſs the nature and extent of ſuch privileges; either as having reſpect to place, as, all the citizens of London, Hob. 86. or to condition, as all ſerjeants at law, all attornies, &c. 1 Ventr. 386.——Another difference to be remarked between cuſtom and preſcription, is, that the latter muſt always have a legal origin; it muſt be of ſuch things as may be created by grant, reſervation, or deed: whereas it is not always neceſſary that the cauſe or conſideration on which the former is founded ſhould appear. 6 Co. 60. b. 1 Ventr. 387. Cowp. 47. Dougl. 126. Hence, the corporation of London having a cuſtomary duty on corn imported, it was holden to be a good cuſtom, that factors free of the corporation ſhall receive to their own uſe that part of the duty which ariſes from corn conſigned to them as factors; though neither the commencement, nor conſideration of ſuch cuſtom could be traced. Cockſedge v. Fanſhawe, B. R. Dougl. 119. affirmed in the Exchequer-chamber, and afterwards in the Houſe of Lords. Printed caſes of the lords, 15th June 1783.] (*c*) *Conſuetudo ex certa cauſa rationabili uſitata privat communem legem.* Lit. § 37.——[But no man can allege a cuſtom or preſcription againſt an act of parliament; as, that every pound of butter ſold in a particular market ſhall weigh eighteen ounces. Noble v. Durell, 3 Term Rep. 271. However, a man may preſcribe againſt an act of parliament, when his preſcription or cuſtom is ſaved or preſerved by another act of parliament. Co. Lit. 115. a. And Lord Coke makes a difference between acts in the negative and in the affirmative: for a ſtatute made in the affirmative, without any negative expreſſed or implied, doth not take away the common law. 2 Inſt. 200. And he obſerves a difference likewiſe between ſtatutes that are in the negative, for if a ſtatute in the negative be declarative of the antient law, a man may preſcribe or allege a cuſtom againſt it, as well as he may againſt the common law. Co. Lit. 115. a. See Mr. Hargrave's annotations on this part of Lord Coke's commentary. See alſo 2 Mod. 39.]

Co. Lit. 110. b.

Time and uſage are eſſential parts of a cuſtom, and therefore no cuſtom is (*d*) allowable but ſuch as hath been uſed by title of preſcription, *viz.* time out of mind.

(*d*) The continuance of an uſage from the reign of *R.* 1. which being the time of a limitation of a writ of right, is ſaid to be a good title of preſcription. Co. Lit. 113. That laying a cuſtom for forty years is naught though it was ſaid that it might have been for more years, and ſo time out of mind. Skin. 108. pl. 8. 109.—That cuſtoms may be time out of mind, though not coeval. Salk. 203. pl. 1.

46 E. 3. 16. Bro. Eſtray. 5 Co. 109. Co. Lit. 114.

Hence it is, that though a lord of a manor may have waifs and ſtrays by preſcription, yet he cannot have the *bona felonum & fugitivorum* without grant from the king; becauſe no man can preſcribe for them, for every preſcription muſt be immemorial, and the goods of felons and fugitives cannot be forfeited without record (*e*), which preſuppoſes the memory of that continuance.

[(*e*) This doctrine is controverted by a late writer. 2 Wooddeſ. 51.]

(B) What Perſons are affected with, or bound by a Cuſtom.

THE king only, by his prerogative, can make a corporation, conſervator of the peace, *&c.*, therefore in theſe, or in other things which (*a*) highly touch the king's prerogative, no title can be gained by cuſtom or preſcription, as conuſance of pleas, to have a ſanctuary, to make a corporation, coroner, conſervators of the peace, *&c.* Co. Lit. 114. Roll. Abr. 566.

(*a*) A cuſtom that exalts itſelf above the king's prerogative is void. Dav. 33. [The objection to a cuſtom, that it interfered with the king's prerogative, was grounded on the maxim "*nullum tempus occurrit regi*," and as that maxim is now abrogated by ſt. 9 Geo. 3. c. 16. the objection ſeemeth to be at an end.]

But treaſure trove, waifs, eſtrays, wreck, to hold pleas, courts-leet, hundreds, infangthef, outfangthef, a park, warren, royal fiſh, fairs, markets, frankfoldage, keeping of a gaol, toll, *&c.*, may be claimed by preſcription, without any matter of record; and a county palatine may be claimed by preſcription, and, by reaſon thereof, *bona felonum*, *&c.* Alſo, a corporation may be by preſcription. Co. Lit. 114. b.

Alſo, cuſtoms that bind private perſons do not extend to the king; therefore, if lands in gavelkind deſcend to the king and his brother, the king ſhall take one moiety, and his brother the other; but if the king dies, his moiety ſhall deſcend to his eldeſt ſon, and not according to the rules of deſcent in gavelkind; for the king was ſeiſed of his moiety *jure coronæ*; therefore it ſhall attend the crown, and conſequently go to the eldeſt ſon. Plow. 205. a. Co. Lit. 15. b. Raym. 77. Sid. 138.

So, the cuſtom of *London*, as to retaining goods mortgaged till ſatisfaction be made of the money lent on them, extends not to the king's jewels. 35 H. 6. 26. Dav. 33. b. Roll. Abr. 566. 2 And. 152.

So, if a man hath toll, or wreck, or ſtrays, by preſcription, this extends not to the king's goods. Dav. 33. b.

A cuſtom may extend to and give an (*b*) infant a power of doing that which by the rules of the common law he could not do, as an infant at the age of fifteen may make a (*c*) feoffment of lands of the nature of (*d*) gavel-kind; but this, like all other cuſtoms, is to be conſtrued ſtrictly, and in ſuch manner as that no prejudice may accrue to the infant thereby; and therefore ſuch feoffment muſt be for (*e*) valuable conſideration; muſt be made in (*f*) perſon, and not by attorney; cannot be with (*g*) warranty; muſt be of lands which (*h*) deſcended to him in gavelkind, and not of lands by purchaſe; and muſt be of lands in (*i*) poſſeſſion, not in remainder or reverſion. (*b*) Dr. & Stud. 21. 5 H. 7. 41. Fitz. Cuſtom, 9. 9 Co. 76. a. (*c*) By the cuſtom of a town an infant may bind himſelf apprentice. 9 H. 6, 7, 8. Bro. Cuſtom, 63.

(*d*) Lamb. 624. (*e*) And. 193. Lamb. 625. (*f*) Lamb. 628. (*g*) Roll. Abr. 568. (*h*) Bendl. 33. pl. 52. Lamb. 627. (*i*) Bendl. 33. pl. 52. Lamb. 627.

It is a good cuſtom in a copyhold manor, that a feme covert, with or without the conſent of her huſband, may deviſe her (*k*) copyhold land to her huſband, or whom ſhe pleaſes. Moor, 123. pl. 268. Godb. 14. 143.

3 Leon. 81. 83. 2 Brownl. 218. [*Vide ſupra*, Vol. I. 726.] (*k*) But of ſuch a cuſtom as to freehold lands, Q. & *vide* 4 Co. 61. b. And. 152. Roll. Abr. 563. pl. 6.

(C) Of ſuch Cuſtoms as are againſt the Rules of the Common Law, yet, not being unreaſonable in themſelves, are good, and, from the Conveniency of them, bind in particular Places.

Dav. 32. b. *Vide* of the Cuſtoms of Gavelkind, Borough-Engliſh, Copyholds, Regulation of Corporations, Commons, chuſing conſtables, church-wardens, &c. the ſeveral heads.

EVERY cuſtom ought to appear to have had a reaſonable commencement, and that at firſt it was voluntarily agreed to, for the better promoting of trade and commerce, the ſuppreſſion of fraud, the greater ſecurity of men in their eſtates and poſſeſſions, *&c.*, and in ſuch caſes, though the cuſtom be contrary to the common law, or againſt the intereſt of a particular perſon, yet it ſhall be good.

21 E. 4. 28. Bro. Cuſtom, 51. Roll. Abr. 560. Dav. 32. b. S. C. 5 Co. 84.

As a cuſtom that a man, in ploughing his own ground, may turn the plough on the ground of his neighbour; for this is for the general good, being in favour of huſbandry and tillage, although a particular perſon receive prejudice thereby.

So, a cuſtom to dry nets upon the land of another; for this is in favour of fiſhing and navigation.

Dav. 32. b. Dyer, 60. b.

So, a cuſtom to build bulwarks on the lands of another for the ſafety of the kingdom, is good.

Dav. 32. b.

So is a cuſtom to pull down the houſe of another, to prevent the ſpreading of fire.

Wiggleſworth v. Dalliſon, Dougl. 201.

[It is a good cuſtom, that tenants, whether by parol, or deed, (*a*) ſhall have the away-going crop after the expiration of their term; for it is for the benefit and encouragement of agriculture.

(*a*) For the cuſtom in ſuch caſe does not alter or contradict the agreement in the deed: it only ſuperadds a right which is conſequential to the taking. *Ibid.* In Doe v. Snowden, 2 Bl. Rep. 1225. it is ſaid by the court, that if there is a taking from old Lady-day (5th April), the cuſtom of moſt countries would entitle the leſſee to enter upon the arable at Candlemas (2d Feb.), to prepare for the Lent corn, *without any ſpecial words for that purpoſe* in the leaſe.

Lewis v. Harris, *Cor.* Skynner, C. B. Hereford, Summer Aſſizes 1778. Beavan v. Delahay, 1 H. Bl. 5.

So, a cuſtom that the tenant may leave his away-going crop in the barns, *&c.*, of the farm for a certain time after the expiration of the leaſe, and his quitting the eſtate, is good.

Eaſtcourt v. Weekes, 1 Lutw. 799.

A cuſtom, that the executors and adminiſtrators of every cuſtomary tenant for life, if he ſhould die between *Chriſtmas* and *Lady-day*, ſhall hold over till the *Michaelmas* following, ſeemeth to be good.]

Mod. 202. Vaugton and Atwood, 2 Mod. 56. S. C.

It is a good cuſtom in a manor, that the homage have uſed yearly to chuſe two ſurveyors, to take care that corrupt victuals are not ſold within the manor, and to deſtroy ſuch as they find expoſed to ſale there; for the preſervation of men's health is deſigned thereby, and it is at the peril of the ſurveyors if they deſtroy any meat that is not ſo.

Cro. Jac. 555. Wallis's caſe, *V.*

A cuſtom in *Ipſwich* to chuſe yearly two burgeſſes, who uſed yearly to make a feaſt, and to fine thoſe who refuſed to make a feaſt,

feaſt, and to impriſon them till paid, was allowed a good cuſtom, upon an *habeas corpus*, and the priſoner remanded. 1 Bur. 239.

It is a good cuſtom, that every man of the town, that hath an houſe next adjoining, and abutting to the high ſtreet, may ſell all merchandizes in his ſhop within the ſaid houſe in the time of the market, which is held in the high ſtreet. Roll. Abr. 560. But *vide* 8 Co. 127.

A cuſtom in *Exeter*, that every woman taken in adultery ſhould be (*a*) whipped, is good. 8 Co. 126. [No mention is made

of ſuch cuſtom in the book referred to.] (*a*) That a ſkimington, or riding, where a woman cuckolds her huſband, is a cuſtom againſt law, *vide* 3 Keb. 578. Raym. 401. And note that ſuch riding has been held by Holt, C. J. a libel, *vide* tit. *Libel*.

A cuſtom, that a feoffment by tenant in tail with warranty ſhall not be a diſcontinuance, is good; although this is againſt the (*b*) rule and maxim of the common law. 30 Aſſ. pl. 47. (*b*) So, that a woman ſhall

not have dower where ſhe received, during the coverture, part of the money for the ſale of the land. Bro. Cuſtoms, 53. ——So, that a widow who marries ſhall not have dower. Roll. Abr. 562.——But a cuſtom that the wife of a tenant in fee ſhall not have dower, is void. Dav. 46. b.—— So, that the wives of Iriſh lords ſhall, during coverture, have the ſole property of certain goods, to diſpoſe of them without the aſſent of the huſband. Dav. 50. b. Roll. Abr. 563.

But every cuſtom which appears to have been unreaſonable in (*c*) itſelf, as being againſt the good of the commonwealth, or injurious to a multitude, though beneficial to a particular perſon; or to owe its commencement to the arbitrary will and oppreſſion of a powerful lord (*d*) and not to the voluntary agreement of the parties, is void; nor can any continuance of ſuch a cuſtom give it a ſanction, or make that good which was void in its creation. Dav. 32. b. 6 Mod. 124. Salk. 203. (*c*) That a cuſtom againſt the law of reaſon, is void. *vide* Moor, 588. Bridg.

11, 12. 1 Leon. 217. 314. 3 Leon. 41. [(*d*) Upon this principle, a cuſtom for the lord of a manor, or the tenants of his colleries who had ſunk pits, to throw the earth and coals upon the land near ſuch pits, ſuch land being cuſtomary tenement, and parcel of the manor, there to continue, and to lay and continue wood there, for the neceſſary uſe of the pits, and to take coals ſo laid away in carts, and to burn and make into cinders coals laid there, at their pleaſure, was adjudged to be void. It was alſo adjudged void for uncertainty the word *near* being too vague and looſe to ſupport ſuch a claim. Wilkes v. Broadbent, 1 Wilſ. 63. 2 Str. 1224.]

A cuſtom within a pariſh, that all lambs fallen and bred upon one tenement in the ſame pariſh, though belonging to ſeveral owners, ſhall be reckoned together, as if but one man's, and the tenth, ſo counted together, paid for tithes, is void and unreaſonable; for by this means it might happen that a man might have but one lamb, and that ſhould be taken for tithe; and he that had more ſhould pay nothing. Hob. 329. Barker and Cocker, adjudged.

A cuſtom to elect a ſupernumerary before any vacancy, to be admitted upon the death of the next prebendary, is ridiculous and void. Skin. 45. pl. 17. 2 Jon. 199. S. C.

A cuſtom that no commoner ſhall put his cattle into the land before the lord, is void; for a cuſtom that leaves it to the arbitrary will of the lord, whether the tenant ſhould ever enjoy any benefit by the common, or not, can never be preſumed to have had a reaſonable commencement. Roll. Abr. 560. Dav. 32.

So, a cuſtom that the lord of the manor ſhall detain a diſtreſs taken upon the demeſnes till a fine at his will is paid for the damage, is void. Lit. § 46. Dav. 33. a.

A cuſtom,

Lit. § 209. (*a*) But that every tenant (though his perſon be free) that holds in bondage, the freehold being in the lord, ſhall pay ſuch fine, is good. Co. Lit. 140. a.

A cuſtom, that every tenant of a manor that marries his daughter without the licence of the lord, ſhall pay a fine, is againſt reaſon, and void; for every (*a*) freeman may marry his daughter to whom he pleaſes.

Co. Lit. 59. b. But for this *vide* tit. *Copyhold.*

If the lord of a copyhold by cuſtom claims to have a fine of the copyholder, upon every alteration of the lord, be it by alienation or otherwiſe, this is a void cuſtom as to the alteration or change of the lord, by the act of the lord himſelf; for by ſuch means the copyholders might be oppreſſed by the multitude of fines by the act of the lord.

Palm. 211. White and Sayer, adjudged.

A cuſtom, that the lord ſhall have common in all the lands of his tenants for life or years lying freſh, is void, for it is againſt law that the leſſor ſhall have common againſt his own leaſe, becauſe it is part of the thing demiſed; *aliter*, of an heriot, which is collateral.

Roll. Abr. 561. 2 And. 153. (*b*) So, where the cuſtom was laid, that if the tenant hath none, or the beſt beaſt is eſloined, the lord has uſed to take the beſt beaſt levant and couchant upon the land. Moor 16. N. Bendl. 112. adjudged.—But that the cattle of a ſtranger may be diſtrained for an heriot, but not ſeiſed, *vide* N. Bendl. 302. pl. 294. Daiſ. 61. Ow. 146. March 165. (*c*) A cuſtom that the lord ſhall have the beſt beaſt of every perſon dying within his manor, which is found there, is naught; for between the lord and a ſtranger it could have no lawful commencement, though between the lord and his tenants it may be good. Cro. Eliz. 725. adjudged. Roll. Abr. 266.

A cuſtom, that the lord of the manor ſhall have (*b*) the beaſt of a (*c*) ſtranger, levant and couchant upon the land of the tenant, is not good.

43 E. 3. 32. 2 Inſt. 56. (*d*) But if this cuſtom had extended itſelf into many towns it had been good. 43 E. 3. 32. Roll. Abr. 559.

A cuſtom, in a town, for a lord to enter into the (*d*) lands of his tenant till an agreement made for the arrears, when the tenant ceaſes for two years, is not good; for it is an ill uſage to ouſt a man of his inheritance without action or anſwer.

Roll. Abr. 561. Dav. 33. (*e*) So, of a cuſtom, that if a tenant makes a reſcous, or drives his cattle off the land when the lord comes to diſtrain that he ſhall be amerced by the homage, &c. Godb. 135.

A cuſtom, that the lord of the manor ſhall have 3 *l.* for every pound breach, of every ſtranger, is not good; (*e*) but it is good againſt the tenants of the manor.

Cort v. Birkbeck, Dougl. 218.

[A cuſtom, that the inhabitants of a manor ſhall grind all their corn, grain, and malt, which by them, or any of them, ſhall be uſed or ſpent ground within the manor—at certain mills, is good. But if it were, that they ſhould grind—all their grain whatſoever by them ſpent or ſold—at certain mills, it would be void.

Fryer v. Johnſon, 2 Wilſ. 28.

A cuſtom in a pariſh, that every pariſhioner ſhall bury his relations in the church-yard as near as poſſible to their anceſtors, is bad.]

Roll. Abr. 564. Cro. Eliz. 385.

As to particular cuſtoms relating to the proceedings in inferior courts, ſuch as have prevailed time out of mind, and are in furtherance of juſtice, ſeem to be good; but ſuch as are in delay of juſtice, and tend to oppreſſion and injuſtice, and are againſt the general rules of law and reaſon, have always been held void.

Hence it is, that a cuſtom in an inferior court, that when any man comes to the grand diſtreſs in any plea, and it is returned that he is diſtrained by his goods, & *quod nihil habet ulterius per quod diſtringi poteſt*, that his goods ſhall be delivered to the plaintiff, finding ſecurity, that if the ſuit paſſes for the defendant, that he ſhall have again his goods; and that if it paſſes for the plaintiff, that he ſhall have them, has been held good. Roll. Abr. 564. in Maidſtone in Kent.

So, a cuſtom in the county palatine of *Cheſter*, that if judgment be given in a baſe court there, and thereupon a writ of error be brought before the chief juſtice there, and he reverſe the firſt judgment, coſts ſhall be given to him at whoſe ſuit it is reverſed, is good. Roll. Abr. 564.

So, it is a good cuſtom in an inferior court, that in an action of debt, if the defendant does not deny the debt, but *petit quod inquiratur de vero debito ſecundum conſuetudinem*, that a jury may be returned that ſhall try it, and if they find it to be a true debt, that the plaintiff ſhall have judgment thereupon. Roll. Abr. 564. Cro. Eliz. 894. Roll. Rep. 193. Mod. 96. S. P. adjudged.

and ſaid by Hale, Ch. Juſt. that this cauſe prevented a ſuit in Chancery.

But a cuſtom in an inferior court, upon a judgment in the ſame precept, in the nature of a *capias ad ſatisfaciendum*, to give a warrant to the bailiff to take the principal in execution, if he may be found, and in his default to take the bail, is not good; for it is (*a*) againſt law to take the bail before a *capias* returned againſt the principal, and (*b*) a *ſcire facias* againſt the bail. Roll. Abr. 563. (*a*) For this reaſon a cuſtom in an inferior court, which is not within the ſtatute of 32 H. 8. to grant a *tales de circumſtantibus*, is void. Roll. Abr. 463. 564.—So, to award a *capias* in debt before any ſummons. Roll. Abr. 563. 780. (*b*) That the cuſtom of London to take the bail without a *ſcire facias*, is void. Cro. Car. 561. Palm. 567. Cro. Eliz. 185. 2 Leon. 29.

A cuſtom in an inferior court to try iſſues by ſix jurors, is not good, though many courts have uſed it, and many judgments depend thereupon. Roll. Abr. 564. Tredinwick and Peryman,

adjudged, in a writ of error upon a judgment in Bodmyn in Cornwall. Cro. Car. 259. S. C. adjudged; and ſaid by Jones, that although in ſome parts of Wales there be ſuch trials by ſix only, it is by reaſon of the ſtatute of 34 & 35 H. 8. c. 26. which appoints, that trials may be by ſix only, where the cuſtom hath been ſo. 1 Sid. 233. S. P. *per Cur.*

A cuſtom in a leet, that if the petit jury make any (*c*) falſe preſentment, and it is found falſe by the grand inqueſt, that the petit jury ſhall be amerced, is void; for this is againſt common right and extortion. 9 H. 6. 44. b. (*c*) But a cuſtom that, if they conceal any

thing that ought to be preſented, they ſhall be amerced, is good. 9 H. 6. 44. Roll. Abr. 560.

If there be a cuſtom in an inferior court, that if a man brings an action againſt another there, and the defendant appears and pleads to iſſue, and, at the day of trial, the defendant, being ſolemnly called, does not appear, nor find pledges *qui eum manucapere voluerint*, to have his body from court to court, at every court there after to be held, till the plea be determined, as he ought by the cuſtom, but in contempt of the court *receſſit & defaltam fecit*; and judgment is thereupon given; yet this is not a good cuſtom, but utterly unreaſonable; but they ought according to law to take the inqueſt by default; for if he had appeared and Roll. Abr. 564. Burges and Spark, adjudged; and ſuch judgment given in Plymouth reverſed accordingly.

ſtaid

ſtaid in priſon without finding pledges, yet they ought not to have given judgment againſt him if he would have pleaded to iſſue.

Moor, 603. pl. 834. Paramour and Veral, 2 And. 151. S.C. & *vide* Moor, 588. Palm. 56. 2 Inſt. 204. Sid. 355.

It is no good cuſtom in *Sandwich*, that, if the goods of a freeman of *Sandwich* come into the hands of a freeman of *London*, the mayor of *Sandwich* ſhall write to the mayor and aldermen of *London*, to call the party before them, and take order for the reſtitution; and if they refuſe, or return no anſwer to the mayor and jurats, the mayor of *Sandwich* ſhall write *alias & pluries*, and after give judgment of *Withernam* againſt the mayor and commonalty of *London*; which ſhall be ſignified to the mayor of *London*; and if he make not reſtitution in fifteen days, then thoſe of *Sandwich* may retain the body of any *Londoner* that comes there, till reſtitution.

Cro. Jac. 357. adjudged.

A cuſtom in an inferior court, to give a day to one that hath (*a*) made default, is void and againſt law.

(*a*) So, a cuſtom to give judgment in a perſonal action upon four defaults before appearance, is void. Style 124.

(D) Where from the Benefits accruing from them they ſhall bind.

6 Mod. 124.

WHerever the party bound by a cuſtom has ſome benefit by it, or the party, who claims the advantage of it, is at ſome charge thereby, the cuſtom is good.

Cro. Eliz. 569. Moor, 355. Roll. Abr. 559. S. C.

Hence it is, that a cuſtom, that the parſon of the pariſh ſhould find a bull and a boar for the uſe of the pariſh, and in conſideration thereof ſhould have the tenth of the increaſe, has been held good.

Cro. Eliz. 203. Sir George Farmer and Brook, adjudged. Leon. 143. S. C. debated. Owen, 67. S. C. adjudged. *cont.* 8 Co. 125. 3 Bulſt. 61. 2 Bulſt. 195. Roll. Abr. 559. S. C. cited.

So, a cuſtom, that whereas *J. S.*, is ſeiſed in fee of the manor of *T.*, and all the tenements in the ſaid town are held of the ſaid manor, that he and all thoſe, *&c.*, have had, time out of mind, *&c.*, a bakehouſe, parcel of the ſaid manor, maintained at their charge, and that this bakehouſe was ſufficient to bake bread for all the inhabitants, and for all paſſengers through the ſaid town; and the bread there baked had uſed, *&c.*, to be ſold at reaſonable prices, and that no other perſon within the ſaid town had uſed to bake any bread to ſell to any perſon; this is a good cuſtom, (*b*) though it reſtrains other men to exerciſe their trades within a certain place, for this might have a reaſonable beginning to bind his own tenants, as it only does.

(*b*) A cuſtom in Wincheſter, that none ſhall exerciſe a trade there who is not free of the city, or brought up apprentice there; *Q.* if good. Salk. 203. pl. 2. & *vide* 8 Co. Wagonner's caſe. * It may be good if founded on ſome conſideration. *Vide* Mo. 342. Sti. 111. 2 Lev. 210. 3 Lev. 241. —— A cuſtom, which reſtrains trade *ſub modo*, may be good: and therefore the cuſtom of foreign bought, and foreign ſold, whereby a man not free of a city, &c. will be reſtrained from buying or ſelling goods to other foreigners within ſuch city, *&c.* is good. Dy. 279. b. R. Jon. 162. Adm. 2 Roll. Abr. 202. c. 45. —— A cuſtom, that none ſhall uſe a trade there, unleſs he be free of the guild. R. in London, 8 Co. 125. Dub. Whether good in another city. 1 Salk. 204. Mod. Ca. 21. ——[In the caſe of the city of Oxford, it was ruled, upon the authority of Wagonner's caſe, 8 Co. 25. b. that a cuſtom in that city, by which every perſon not being a freeman of the city, who expoſes goods to ſale in the city, except in fairs or markets, is liable to a penalty, is good, notwithſtanding there were no exception of victuals; and that a cuſtom to diſtrain for the penalty was alſo good. Moir v. Munday, Say. Rep 181.] —— A by-law, that no one ſhall uſe a trade in a borough, not free there, where the by-law is founded upon a *cuſtom* to ſuch intent, though the cuſtom be not confirmed by parliament, is good. Adm. Lut. 564. Adm. Godb. 254. 8 Co. 125. a. Now every day's experience warrants this doctrine. *

A cuſtom,

A cuſtom, that every inhabitant of an antient meſſuage held of the biſhop in the city of *S.*, have ground at the biſhop's mill all their grain ſpent in their houſes, and that the biſhops, in conſideration thereof, have time out of mind kept ſervants to grind and carry, *&c.*, is good, becauſe mutual conſiderations and mutual actions will lie. Roll. Abr. 559. 2 Bulſt. 195, 196. Hard. 67. Lev. 15. Vent. 168. 2 Sand. 117. Carth. 193. Roll. Abr. 561. But for this *vide* F.N.B. 271. Reg. 153. Hob. 189. Moor, 887. Style, 421. 2 Lev. 27.

A cuſtom, that the corporation of *Litchfield* have had a market there time out of mind, *&c.*, and that the corporation ought to repair the way to it, and to appoint a bellman, who ought to ſweep the market-place, and in recompence thereof, the ſaid bellman, time out of mind, *&c.*, from thoſe that brought their grain to the ſaid market, and untied their ſacks there to ſell it, had uſed to take a pint of grain if it was but one buſhel or under, but if it was above a buſhel, then a quart, to the uſe of the ſaid corporation; this is a good cuſtom, for the men that are charged by it have a reaſonable benefit thereby. 2 Bulſt. 201. 206. Roll. Rep. 1, 2. 44. 46. Roll. Abr. 561. Hill and Hawks, Moor, 835. S. C. adjudged, and that the cuſtom was good, though the corn was not ſold, but brought in to be ſold. S. C. adjudged.

It is no good cuſtom, that the city of *Norwich* hath time out of mind maintained a quay for unlading goods brought up the river to the city, and that every veſſel paſſing through the river by the quay had paid a certain ſum; for the veſſels that unlade not at the quay or other place in the city, have no benefit from the maintenance of the quay. reaſon for it, if it had appeared that they cleanſed the river. Vent. 71. Mod. 47. Haſpart and Wills, S. C. that there would have been ſome Sid. 454.

If a lord of a manor, which extends itſelf upon the banks of part of a river only, hath time out of mind maintained a quay for the lading and unlading of goods, and kept a buſhel within the manor for the meaſuring, and other merchandizes, he cannot preſcribe *ratione inde* for a buſhel of ſalt, of every ſhip ſailing in the river, for the repairing of the quay; and keeping a buſhel within the manor, cannot warrant the taking of toll out of the manor, for goods not brought to the quay within the manor, though brought to another place within the ſame river. 2 Lev. 96, 97. Prideaux and Warn, Raym. 232. Mod. 104. S. C. adjudged. See 2 Stra. 1228. 1 Wilſ. 91. *infra* (E).

It is a good cuſtom, that the mayor and commonalty of *London* have had of every maſter of a ſhip 8*d. per* tun, in the name of weighage, for every tun of cheeſe brought from any place in *England* to the port of *London*; for the liberty of bringing it into the port, which is a place of ſafety, is a ſufficient conſideration; and the mayor and commonalty have the view and correction of the river *Thames*. 3 Lev. 37.

The lord of a manor may preſcribe to keep and repair a wharf within the manor, & *ratione inde* to have toll of all goods landed within the manor, though not upon the wharf; for the landing upon the ſoil is an eaſement; and all the lands in the manor were the lord's originally, and this is in nature of a (*a*) toll traverſe. 3 Lev. 424. [Criſp v. Bellwood, Colton v. Smith, Cowp. 47. S. P.]

(*a*) For this *vide* 2 Roll. Abr. 522.

[The corporation of *Malden* in *Eſſex* preſcribed in a *que eſtate* "that they and all thoſe, *&c.*, time whereof, *&c.*, had uſed to repair Cited by Holt, C. J. 1 Ld. Raym. 386.

" pair the port, in conſideration whereof, they had uſed time " whereof, *&c.*, to receive for all lands ſold within the precinct of " the borough, a certain rate of 10*l.* in the pound out of the pur- " chaſe money:" it was adjudged a good cuſtom; and this is what they call *land-cheap*; for the land-holder reaps a benefit by the trade coming to the town, by reaſon of the port.]

3 Lev. 307. Simpſon and Bithwood, adjudged.

It is a good cuſtom within a manor adjoining to the ſea, that in caſe of any ſhipwreck of any ſhip caſt upon the manor *inter fluxum & refluxum maris*, the lord ſhall take care of the ſick and wounded, and burial of the dead, and keep the goods there caſt for the uſe of the proprietors; and in conſideration thereof, ſhall have the beſt anchor and cable of the ſhip; for though charity obliges the lord ſo to do, yet it is not unreaſonable that he ſhould have a recompence of his charity and charge:—But Q.

Hil. 34 Car. Bear and Ballingſham, 3 Lev. 85. S. C. (*a*) That a cuſtom alleged by a lord, that whoever broke his pound ſhould pay him 3*l.*, is a void cuſtom as to ſtrangers; for this, among other reaſons: becauſe there is no proportion betwixt the damage and the recompence.

For where in trover the jury found a ſpecial verdict, that within the manor of *Beeching* in *Suſſex*, adjoining upon the ſea, there was this cuſtom, that if any ſhip navigating and floating upon the ſea ſhould happen to ſtrike upon the land, parcel of or within the manor, and ſhould there happen to periſh, or if a ſhip ſo ſtriking ſhould happen to get off, that in both caſes the lord of the ſaid manor uſed to have the beſt anchor and cable belonging to the ſaid ſhip; and the cuſtom was held unreaſonable in both caſes; for there is no conſideration to ground ſuch a cuſtom upon; for if there be a treſpaſs upon the lord's ſoil, it is involuntary, and by the act of God, where it is by ſtreſs of weather; and therefore not to be puniſhed as a voluntary treſpaſs; as if the houſe of my tenant for years be burnt with lightning, I ſhall never have an action of waſte againſt him, for it is the act of God, which does no man an injury; but beſides, it is very unreaſonable for ſo (*a*) ſmall a damage done to the lord, as ſtriking upon his ſoil, that he ſhould have ſo great a ſatisfaction as the beſt cable and anchor*.

11 H. 7. 13. 14. 21 H. 7. 40.——But a cuſtom alleged in Bucks, that if any ſwan cometh upon the land of any man adjoining upon the Thames, or upon any water running into the Thames, and there lays and hatches cignets, that the owner of the land ſhall have one, was held a good cuſtom; and yet the damage which the owner of the land ſuſtains is but very ſmall. 2 R. 3. 15, 16. 7 Co. in the caſe of ſwans.——* This caſe is very different from the preceding.

Carth. 357. Vinkinſton v. Ebden, adjudged. 5 Mod. 359. Salk. 248. S. C. pl. 4.

By ſpecial verdict it was found, that by a cuſtom in *Newcaſtle*, time out of mind, *&c.*, a toll of five pence for every chaldron of coals there ſhipped off, was due to the corporation, in conſideration of their charge in maintaining the port, which they were bound to do, and had done time out of mind; and that the cuſtom was to diſtrain (for non-payment of this duty) any goods of the owner of ſuch ſhips, which were diſtrainable by law; and it was held, that the charge of maintaining a port was a ſufficient conſideration, and that the finding that the corporation are bound to repair, *&c.* was ſufficient, without finding that it was then in repair.

(E) Where, from the Certainty or Incertainty of them, they ſhall be deemed good, or void.

EVERY cuſtom ought to be certain, or ſuch as may be reduced to a certainty, for an uncertain thing cannot be ſuppoſed to have had a reaſonable commencement; alſo the uncertainty of a cuſtom deſtroys the ſuppoſition of its continuance and duration time out of mind. Roll. Abr. 565. Dav. 33. Skin. 249.

Hence it is, that a cuſtom that when an infant is of ſuch an age that he can count twelve pence, or meaſure an ell of cloth, that he may make a feoffment, is void for the uncertainty. Dav. 33. a. 4 Leon. 82. Hob. 225. S. C. cited, and ſaid, that ſuch cuſtom is not good, but that it ought to be at a certain age, that it may appear to be an age of diſcretion.

So, a cuſtom, that the tenant of the manor who firſt comes to ſuch a place, *&c.*, ſhall have all the windfalls there, is void for uncertainty. Roll. Abr. 565. Dav. 33. a.

So, of the cuſtom of *tanniſtry* in *Ireland*, which was, that the lands of that nature of which a man died ſeiſed, ſhould deſcend *ſeniori & digniſſimo viro ſanguinis & cognominis* of him that died ſo ſeiſed; and it was held void, both for the uncertainty of the perſon and the eſtate. Dav. 28. b. to 42.

So, a cuſtom alleged and found by verdict to pay ten pence to *the vicar at the uſual time of churching women*, was held void for uncertainty. Fitzgib. 55. 2 Ld. Raym. 1558.

So, of a cuſtom for 24 pariſhioners, *&c.*, to make a rate, and a certain proportion to be levied on ſuch an hamlet. 2 Stra. 1145.

[A cuſtom for *poor and indigent houſeholders* living in *A.*, to cut and carry away rotten boughs and branches in a chaſe in *A.* is bad, the deſcription of *poor houſeholders* being too vague and uncertain. Selby v. Robinſon, 2 Term Rep. 758

A cuſtom, that "when a tenant took a farm, in which there was any open field, more or leſs, for an uncertain term, it was conſidered as a holding from three years to three years," was holden to be void for uncertainty, becauſe the quantity of open ground was not aſcertained, and one rood might determine the tenure of 100 acres of land incloſed. Roe v. Lees, 2 Bl. Rep. 1171.

But a preſcription for ſo much money for ſetting up a ſtall in a fair; and for ground *near* the ſtall, is certain enough, for the quantity of ground near a ſtall may be determined by the uſage of the fair. Bennington v. Taylor, 2 Lutw. 1517. See Wilkes v. Broadbent, *ſupra*.

So, a preſcription to take "three *Wincheſter* buſhels of barley *cut of and* for every ſhip's cargo of barley brought upon a quay to be exported *in any ſhip*," is ſufficiently certain, for the word *cargo* is a mercantile term, and very intelligible when referred to a ſhip.] Sargent v. Read, 2 Str. 1228. 1 Wilſ. 91. The preſcription in Mr. Nolan's MSS. report, omits the words in italicks. See Nolan's edit. of Sir J. Strange's Reports.

(F) How to be conſtrued; and to what Things a Cuſtom ſhall be ſaid to extend.

Roll. Abr. 567, 568. 11 Mod. 160. *Vide* tit. *Gavelkind.*

EVERY particular cuſtom, that is derogatory from the common law, is to be conſtrued ſtrictly, becauſe as far as the particular cuſtom hath not derogated from the law, the general cuſtom of the whole kingdom ought to prevail; and we are not to preſume that the particular cuſtom goes further than by notorious facts may appear.

Roll. Abr. 567. Cro. Eliz. 434. Moor, 411. S. C. adjudged.

If the inhabitants upon a common have uſed time out of mind, *&c.*, to dig clay in the ſaid common of their lord, for the reparation of their houſes ſtanding upon the ſaid common, and a ſtranger digs clay in the common, the inhabitants cannot take this clay from him, for this is not (*a*) within their cuſtom.

(*a*) Where inhabitants have uſed to have common to their houſes, this extends not to a new houſe. Owen 4.

Roll. Abr. 568. Cro. Eliz. 789. Yelv. 1. Noy, 42. Raym. 404.

If the cuſtom of a manor be, that if any copyholder in fee ſurrenders out of court, and he to whoſe uſe it is ſurrendered, does not come in at the court to take his copyhold after three proclamations made, that then the lord may ſeize the copyhold as forfeited; and a copyholder in fee ſurrenders to the uſe of another for life, the remainder over in fee, and the tenant for life does not come into court to take his copyhold after three proclamations made, according to cuſtom, upon which the lord ſeiſes the copyhold as forfeited; and after *ceſtui que uſe* for life dies, he in the remainder ſhall not be bound by the not coming in of the leſſee; for the cuſtom being in deſtruction of an eſtate ſhall be taken ſtrictly, and ſhall be intended of tenant in fee in poſſeſſion, and not of him in remainder, as in this caſe.

2 Leon. 109. 2 Leon. 208. S. C. cited to have been adjudged, becauſe the cuſtom extended only where the wife was a copyholder at the time of the marriage.

If there be a cuſtom within a manor, that if a man takes to wife any cuſtomary tenant of the manor, and has iſſue, and overlives his wife, he ſhall be tenant by the curteſy; and a man marry one, to whom during the coverture a cuſtomary tenement deſcends, and have iſſue by her, and ſhe die, yet he ſhall not be tenant by the curteſy.

Cro. Eliz. 803. adjudged.

If there be a cuſtom in *London*, that none ought to intermeddle with the art of a weaver there, but only thoſe who are free of the guild; if a ſtranger receive ſilk in *London*, and carry it to *Hackney*, and weave it there, and then bring it back again to *London*, and receive his pay for it, this is not any intermeddling in *London* againſt the cuſtom, though the contract was made in *London*.

Style, 409. debated, but no reſolution; & *vide* Roll. Abr. 609.

If there be a cuſtom in the town of *Newcaſtle*, that the owners of houſes there, but not tenants in tail, may deviſe them by parol, and a man be ſeiſed of an houſe there in tail, remainder to himſelf in fee-ſimple, he may deviſe the remainder; for the word *owner* is general, and comprehends all ownerſhips.

If

If there be a cuſtom within a manor, that the wife ſhall be endowed of the moiety of all ſuch copyhold lands as her huſband was ſeiſed of, and a copyholder die, and his wife be endowed of a moiety, and his ſon and heir having the other moiety die, the wife of the ſon ſhall be endowed of the moiety of this moiety; for this is directly within the cuſtom. Raym. 58. Baker and Berisford.

If there be a cuſtom within a town to have 2*d.* for every hide of every ſheep, cow or ox, that is killed or ſold within the ſaid town, and for non-payment thereof to ſeize the hides, *&c.*, the party that is to have the 2*d.* cannot by this cuſtom juſtify the tanning the hides and converting them into leather. Cro. Eliz. 783. Roll. Abr. 569.

**General* cuſtoms may be extended to *new things*, which are *within the reaſon* of thoſe cuſtoms. Ld. Raym. 499. 12 Mod. 271. 5 Co. 82. See 2 Jon. 204.

It is a general rule, that cuſtoms are *not to be enlarged beyond the uſage*, becauſe it is the uſage and practice that makes the law in ſuch caſes, and not the reaſon of the thing.* 11 Mod. 160. Fitzgib. 243.

(G) Cuſtom, how deſtroyed.

A Title gained by preſcription or cuſtom cannot be loſt by interruption of *poſſeſſion* ten or twenty years, unleſs there be an interruption of the *right*, as by unity of poſſeſſion of right or common, and the land charged therewith of an eſtate equally high and perdurable in both. Co. Lit. 114. b.

If gavelkind lands are held in ſocage, and the tenure is after changed into knights ſervice, yet the cuſtom is not altered, for that goes with the land, and not with the tenure. Dalſ. 23. Sid. 138. Style, 476.

Lands in *Kent* were diſgavelled by 31 *H.* 8. *cap.* 3. and a private act made 2 & 3 *E.* 6. enacted, that the lands of Sir *Henry Iſles* amongſt others, ſhould be from thenceforth to all intents, conſtructions, and purpoſes, as lands at the common law, any cuſtom to the contrary notwithſtanding; and the queſtion was, whether theſe lands loſt by theſe ſtatutes all their other qualities or cuſtoms belonging to gavelkind, as well as their partibility; and it was reſolved that they loſe only their partibility. Raym. 59. 76, 77. Sid. 77. 135. Lev. 79. 2 Keb. 388. Hard. 325. Cotton and Wiſeman. For the reaſons hereof, *vide* tit. *Gavelkind.*

If lands of the nature of gavelkind, or borough engliſh, eſcheat to the crown, and be enjoyed in ſeveral deſcents, and are afterwards granted out by the crown in knights ſervice, yet they deſcend in gavelkind or borough engliſh; for the law of thoſe places cannot be controlled by the king's charter, or altered without an act of parliament.

(H) Of the Manner of alleging and pleading a Cuſtom.

A Cuſtom of deviſing lands, borough engliſh or gavelkind, may be alleged in a city, borough, or manor, but not in an upland town, that is neither city nor borough; but a cuſtom to have a Co. Lit. 110. b. But as to the manner of laying a

cuſtom, and the difference between alleging a thing by way of cuſtom, or by way of preſcription, *vide* 6 Co. 60. Hob. 113. Cro. Eliz. 441. Poph. 201. Style 477. Lev. 176. Vent. 386. 3 Lev. 160. Carth. 192. 4 Mod. 342. 2 Lutw. 1317. *Supra* (A.)

way to the church, and to make by-laws for the reparation of the church, and well ordering of the commons, and ſuch like things, may be alleged in an upland town, that is neither city nor borough.

Sid. 237. Keb. 836. * The former way would do in a declaration. The latter is proper in a plea, &c.

A cuſtom for a way was laid *quod talis habetur conſuetudo quod quilibet inhabitans haberit, &c.*, and the court held it naught, for it ſhould be laid by way of fact triable, *viz. tempore cujus contrarium, &c., uſi fuerunt habere**.

Co. Lit. 175. b. (*a*) But as to ſuch cuſtoms as are no part thereof, but merely collateral, they muſt be ſhewn in pleading, as that the lands are deviſable. Lev. 80. Raym. 77. Sid. 77. 138. Cro. Car. 562.——So, if a man would entitle himſelf to be tenant by the curteſy, without having iſſue, or a woman to have dower of a moiety, it ought to be ſhewn ſpecially, that time out of mind, &c. Sid. 77. 2 Sid. 154.

The law takes notice of the (*a*) cuſtoms of gavelkind and borough engliſh, and therefore it is ſufficient to allege generally that the lands are of the nature of gavelkind, &c. But other private cuſtoms muſt be ſet forth in pleading, that the judges may be apprized of them, and where they obtain, and ſo give their deciſions with a proper regard to them.

Godb. 183. 2 Mod. 104. But for this *vide* Roll. Abr. 568, 565. Yelv. 215. Bulſt. 115. 8 Co. 127. Cro. Car. 432. Jones 375. [(*b*) One cuſtom may be pleaded to another without a traverſe, where the latter is not inconſiſtent with, but only a qualification of the former. Kenchin v. Knight, cited 2 Wilſ. 101.]

One preſcription or cuſtom may be pleaded againſt another, where they are not inconſiſtent, but a preſcription pleaded againſt another is not good without a traverſe (*b*).

9 Co. 59. 2 Ld. Raym. 869. 2 Ld. Raym. 1134, 1135.

If one preſcribes to have a way over the land of *B.*, to his freehold, *B.* cannot preſcribe to ſtop it.

* A cuſtom ought not to be laid in the negative.

In an action brought upon a cuſtom, it *ſhould be ſhewn what the cuſtom is*, otherwiſe it is not maintainable.*

Cuſtoms of London.

8 Co. 127.

THE ancient city of *London* being the metropolis and chief town for trade and commerce within the kingdom, it was neceſſary that it ſhould have certain cuſtoms and privileges for its better government; which, though derogatory from the general law of the realm, yet, being for the benefit of the citizens, and for

for the advantage of thoſe who trade to, and therefrom, have not only been allowed good by the judgments and reſolutions in the ſuperior courts, but (*a*) have alſo been confirmed by ſeveral acts of parliament *.

(*a*) *Magna Charta*, c. 2. 7 Rich. 2. &c.—* On a *certiorari* to the mayor and aldermen to certify a cuſtom, the recorder (in his purple cloth robe, faced with black velvet) certifies *ore tenus*, and then, on motion, delivers in the *certiorari*, with a written copy of the return annexed; the writ is filed, and the return recorded. Plummer v. Bentham, 1 Bur. 248.—If it is not ſurmiſed in the pleadings, that a cuſtom ought to be tried thus, it ſhall be tried by the county. *Ibid.* [When a cuſtom has been once certified by the recorder, the courts muſt take notice of it. They cannot have it certified over again. *Per* Lord Mansfield, Dougl. 380. However, if they are diſſatisfied with a certificate, they may ſend it to be re-conſidered. 2 Vez. 592. As the recorder certifies the return *ore tenus*, he is, of courſe, not bound to ſign the copy of it. 3 P. Wms. 17. If the certificate be falſe, an action lies againſt the mayor and aldermen, and not againſt the recorder; for it is their certificate by the recorder. Hob. 87.

As theſe cuſtoms are of various and different kinds, I ſhall conſider them under the following diviſion.

(A) Of the Cuſtoms of *London* in general.

(B) Of the Cuſtom of *London* in reſpect to Orphans.

(C) Of the Cuſtom of *London* in reſpect to a Freeman's Eſtate: And herein,

1. What ſhall be eſteemed ſuch an Eſtate as will be ſubject to the Cuſtom, and what Diſpoſition a Freeman may make thereof.
2. Of the Childrens Part, and herein of Survivorſhip, Advancement, and bringing into Hotchpot.
3. Of the Wife's Part, and what ſhall bar her thereof.
4. Of the Legatory, or dead Man's Share.

(D) Of the Cuſtom of *London*, as it relates to Feme Coverts.

(E) As it relates to Maſters and Apprentices.

(F) As it relates to Landlords and Tenants.

(G) Of the Cuſtoms of *London* which are in furtherance of Juſtice, and for the more ſpeedy Recovery of Debts.

(H) Of the Cuſtom of Foreign Attachment: And herein,

1. Of the Nature of the Debt or Duty which may be attached.
2. In whoſe Hands, and at what Time the Attachment may be made.
3. Of the Form of the Proceedings in a Foreign Attachment.

(A) Of the Cuſtoms of *London* in general.

Vent. 115. The City of London and Coates, adjudged. (*a*) Cuſtom to commit for refuſing

IF a freeman foreſtalls fiſh coming to a market within the city, and upon complaint to the court of aldermen, he appears there and confeſſes the fact, and they order that he ſhall deſiſt, and he will not promiſe to obey, *&c.* they may (*a*) commit him until he ſignifies to the court that he will conform; and this is a good cuſtom.

to ſerve on the livery good. 2 Lev. 200. Raym. 447. Mod. 10. 2 Keb. 555. 5 Mod. 156. 319. ——[So, a cuſtom to exhibit an information by the common ſerjeant for opprobrious words ſpoken of an alderman, and on conviction to fine and impriſon, is good. 1 Ventr. 327. 2 Lev. 200. 2 Salk. 425. 2 Ld. Raym. 777. 7 Mod. 28. But a cuſtom to commit in ſuch caſe in the firſt inſtance, is void. Cro. El. 689.] So, a cuſtom to diſfranchiſe for contemptuous words ſpoken of an alderman, is void. 2 Lev. 200. 2 Salk. 426.——To impriſon for diſturbing the election of a warden of a company, and for not promiſing not to diſturb again. Style 78. *dubitatur.*——To impriſon until he takes the oath of an alderman of London, a good cuſtom. March 179.

Roll. Abr. 556. Several caſes to this purpoſe. Moor, 136. 8 Co. 127. S. P.

By the cuſtom of *London*, a freeman or citizen might, even before the ſtatute of wills, deviſe his lands and tenements, of which he was ſeiſed in fee-ſimple, to whom he pleaſed, and may at this time deviſe the ſame in mortmain, notwithſtanding the ſtatute of mortmain, *&c.*

7 H. 6. 32. b. Roll. Abr. 557. S. C. S. P. C. 180. letter C. Fitz. Coron. 411.

By the cuſtom of *London*, no attaint lies for a falſe verdict given in *London*.

A citizen of *London*, upon an appeal, brought by him, ſhall not be obliged to wage battle.

Roll. Abr. 557. *& vide* Moor, 871. Chamberlain and Thorp; but *vide* Cro. Eliz. 186. and Leon. 130. S. C. [where Gawdy, J. held the cuſtom not good, becauſe it extended as well to ſtrangers as to citizens.]

It is a good cuſtom in *London*, that the mayor of *London* may take recognizances of any perſons, being of full age, or women unmarried, (*b*) (for he is a judge of record,) although the debt was contracted out of *London*.

(*b*) And the courts above will take notice hereof. Leon. 284.

Roll. Abr. 557. (*c*) A cuſtom that all foreigners ſhall weigh at the city beam good.

It is a good cuſtom in *London*, that they, time out of mind, have had the (*c*) meaſuring of coals *infra portum London*, which (*d*) extends from *Staines* bridge to *London* bridge, and from thence to *Graveſend*, and from thence to *Yenland* and *Yendale*.

Lev. 14, 15.——And a by-law founded on the cuſtom of London, which directs that no freeman ſhall under a certain penalty, ſell his goods unleſs weighed at the city beam, is good. Salk. 352. pl. 13. 5 Mod. 156. 6 Mod. 123. 177. 1 Ld. Raym. 498. (*d*) For this *vide* 4 Inſt. 250. Sid. 148.

Roll. Abr. 550. (*e*) Note, that it hath been often adjudged of late, that calling one

By the cuſtom of *London* whores are to be carted, and therefore if a perſon calls a woman (*e*) whore (*f*) in *London*, an action on the caſe lies in reſpect to the puniſhment they are ſubject to by the cuſtom; but the party (*g*) cannot be proceeded againſt in the ſpiritual court for defamation; for that would be puniſhing him twice for the ſame offence.

baſtard, or ſon of a whore, or calling the huſband cuckold, was, by implication, calling the mother or wife a whore. (*f*) If laid in London, when ſpoken elſewhere, the defendant may plead the words were ſpoke at, &c., and traverſe the ſpeaking in London; and if the plea is refuſed, may have a prohibition. Lev. 116.——That the action muſt be brought in the courts in London. Carth. 75. (*g*) Whether in ſuch a caſe a prohibition may be granted after ſentence? Carth. 213. [It cannot, unleſs the want of juriſdiction

juriſdiction appear on the face of the proceedings. Blacquiere v. Hawkins, Dougl. 378. In the caſe of Argyle v. Hunt, the court could not judicially take notice of the cuſtom in London, for an action to lie for the word "whore;" probably, becauſe it had never been certified by the recorder. And in Stainton and wife v. Jones, which came on to be tried before Lord Mansfield, at the ſittings after M. 23 G. 3. at Guildhall, in an action on this cuſtom for calling Stainton's wife a whore, the plaintiffs were nonſuited, not being able to prove the cuſtom to cart whores in London. A book from the town clerk's office was produced, but it contained no account of ſuch cuſtom. Lord Mansfield ſaid, that he could not take notice of the cuſtom unleſs proved. It was ſtated on that occaſion, that the cuſtom had never been proved in ſuch a manner as to maintain an action in Weſtminſter Hall; that in the city court, the action is maintained, becauſe they take notice of their own cuſtoms without proof. Doug. 380. notes (95, 96.)]

There (*a*) is a cuſtom in *London*, that when a chaplain keeps any woman in his chamber ſuſpiciouſly, a man may come to his chamber with the beadle of the ward, and enter the chamber and ſearch.

2 H. 4. 12. b. Roll. Abr. 557. S. C. (*a*) The cuſtom of London,

that if a villain abides in London for a year and a day, that he ſhall not be taken nor put out by writ *de nativo habendo*, nor by any proceſs thereupon iſſuing, is good. 7 H. 6, 32. 8 H. 6, 3. Roll. Abr. 557. S. C. Moor, 2. pl. 4. S. P. adjudged.

By the cuſtom of *London*, if a man commit a horſe to an hoſtler, and he eat out the price of his head, the hoſtler (*b*) may take him as his own, upon the reaſonable appraiſement of four of his neighbours; which is a cuſtom ariſing from the abundance of traffick with ſtrangers, who could not be known to charge them with actions.

Moor, 876. 3 Bulſt. 271. Yelv. 67. Roll. Rep. 449. (*b*) But if a man leaves ſeveral horſes

with an inn-keeper in London, and takes them all away except one, the inn-keeper cannot retain the horſe ſo left till he is ſatisfied for the keeping of the other horſes, unleſs there was an agreement to that purpoſe. Bulſt. 207. ——So, if *A.* commit the horſe of *B.* to an hoſtler in London, and he eat out his head, yet cannot the hoſtler ſell him; for all cuſtoms being derogatory to the common law, are to be taken ſtrictly; and there is no cuſtom of London that hath gone ſo far as this caſe, to authorize one man to ſell and convey the property of another. 2 Roll. Abr. 85.

It was (*c*) anciently inſiſted upon, that by cuſtom all indictments and proceedings for any cauſe, except felony, ſhould be tried and determined in *London*, and not elſewhere; but (*d*) it ſeems to be now admitted, that a *certiorari* lies to remove any indictment from *London*; but (*e*) it is ſaid, that by the (*f*) city charters, the tenor of the indictment only ſhall be removed, and not the indictment itſelf.

(*c*) Cro. Car. 128. (*d*) Raym. 74. 3 Mod. 230. Hard. 409. 6 Mod. 246. & *vide* 5 & 6 W. & M. c. 11.

(*e*) Keb. 252. Sid. 155. (*f*) That by the city charters the mayor ſhall be a principal in every commiſſion. 3 Inſt. 72. 2 Rich. 3. 11. a.

Beſides theſe and ſeveral other cuſtoms, there is a general cuſtom which is uſually ſet forth by the city, when any of their proceedings is called in queſtion, *viz.* That (*g*) if any of their cuſtoms heretofore uſed prove hard or defective, or if any thing newly ariſing within the city where remedy was not before provided, ſhould need amendment, in either of theſe caſes, the mayor and aldermen for the time being, with the aſſent of the commonalty, may ordain a fit remedy thereunto, ſo as ſuch ordinance be profitable to the king, for the profit of the citizens, and agreeable to reaſon.

(*g*) What ordinances, by-laws, &c. made by virtue of this cuſtom, are good, &c. *vide* 8 Co. 126. Waggoner's caſe, Skin. 371., &c. —That none but

a freeman ſhall exerciſe a trade, and that a freeman bred up to one trade, may exerciſe another of the ſame nature, *vide* Cro. Car. 516. Roll. Rep. 10. Sand. 311. Sid. 427. 4 Mod. 145. *Vide* tit. By-

*By-Laws**.——* By various charters the citizens of London are free from toll, &c. throughout the kingdom, are excuſed from juries, &c out of the city. [But this exemption from toll can be claimed by *reſident freemen* only. Rex v. Hanger, 3 Bulſt. Hargr. Law Tracts, 128. Corporation of London v. Corporation of Lynn, 4 Term Rep. 130.] And a jury of citizens may waive their privilege, and conſent to be ſworn on a trial at bar in Middleſex. Lockyer v. Eaſt India Company. 2 Wilſ. 136.——As to the erection of edifices. A man may heighten his old meſſuage, or houſe, or re-build on the old foundation to what heighth he pleaſes, but of no other erection or building, ſo as to ſtop his neighbours lights. Plummer v. Bentham. 1 Bur. 248.——[And he cannot ſtop ancient lights by an erection upon a new ſoil, or beyond the old foundation. Priv. Lond. 56. For the repair of his houſe, a man may, by cuſtom in London, ſet his poles and ladders upon the ſoil, or houſe of another adjoining. But he cannot break the houſe or ſoil. *Id.* 59.]——As to the buildings ſee further 11 Geo. 1. c. 28. & 14 Geo. 3. c. 78.——[The former ſtatute is confined to party-walls between houſes, and does not extend to party walls between ſtables. Rex v. Pratt, 4 Burr. 2298.]——With reſpect to trade. It is a good cuſtom that the porterage of corn, roots, &c., belongs to the city from Staines Bridge to Yendal in Kent, and the by-law is good, that none but the company of free porters ſhall carry it, on penalty of 20*s*. Fazakerly v. Wiltſhire. T. 7. G. Ludlam v. Bradley, P. 13 G. in C. B. Robinſon v. Webb, T. 2 G. 2. *B. R.* 1 Stra. 462.——It is a good cuſtom, that perſons to be admitted to the freedom be obliged to ſwear on the *New Teſtament*. Rex v. Boſworth, 2 Stra. 1112.

(B) Of the Cuſtom of *London* in reſpect to Orphans.

Hob. 247. Roll. Abr. 550. S. C.

IF any freeman or freewoman die, leaving orphans under age unmarried, the cuſtody of their bodies and (*a*) goods, by the cuſtom of *London*, belongs to the city, and their executors or adminiſtrators muſt exhibit true inventories of all their goods and chattels, and muſt (*b*) bind themſelves to the (*c*) chamberlain to the uſe of the orphans, to account for the ſame upon oath; which if they refuſe to do, they may be committed: alſo, (*d*) if the eccleſiaſtical court will compel them to account there, againſt this cuſtom, a prohibition lies.

(*a*) Though given them as a legacy by other freemen. Hutt. 30. —Or in a foreign county. Vent. 180.

(*b*) Although they have already acknowledged a judgment at common law for the ſecuring, &c. Roll Abr. 550. Hutt. 30. S. P.—— So, although they have given ſecurity in the prerogative court, yet they may be compelled to give new ſecurity to the chamber of London. Roll. Abr. 550. (*c*) For which purpoſe he is a corporation, and ſuch ſecurities ſhall go to his ſucceſſor, who may ſue the ſame. Cro. Eliz 464. (*d*) 4 Inſt. 249. S. P. But an infant may waive the benefit of ſuing in the court of orphans, and file a bill againſt one for the diſcovery of the perſonal eſtate. March 107.

Roll. Rep. 316. Sid. 250. Vent. 180. Mod. 80.

If a freeman of *London* leaves *London*, and reſides in the country, yet his children, though born out of *London*, ſhall be orphans, and ſubject to this cuſtom. 2 Vern, 110. S. P.

Sid. 250. Raym. 116. Lev. 162.

If ſuch orphan is taken out of the cuſtody of ſuch perſon, to whom he is committed by the court of orphans, they may impriſon the offender till he produces the infant, or is delivered by courſe of law.

2 Lev. 32. The King and Harwood. 1 Vent. 178. S. C. 1 Mod 77. 79. S. C.

Alſo, by this cuſtom, if (*a*) any one without the conſent of the court of aldermen, marry ſuch orphan (*b*) under the age of twenty-one, though out of the city, they may fine and impriſon him for non-payment thereof; for if the cuſtom ſhould not extend to marriages out of the city their power would be but in vain.

(*e*) Though not a freeman. Vent. 178. Mod. 79., and the above authorities. (*f*) Whether the marriage was before or after twenty-one, the huſband is fineable, and may be committed if he had not the licence of the court of orphans. Preced. Chan. 537.

The

The orphans money in the chamber of *London* is not a mere *depoſitum*, but in nature of a debt, or choſe in action, which does not veſt in the huſband by the marriage of ſuch orphan, nor can he bequeath it by will. 2 Vent. 340. [The chamberlain pays intereſt for the money.

1 Ch. Ca. 182. S. C.] Preced. Chan. 209. S. P. adjudged.

(C) Of the Cuſtom of *London* in reſpect to a Freeman's Eſtate: And herein,

What ſhall be eſteemed ſuch an Eſtate as will be ſubject to the Cuſtom, and what Diſpoſition a Freeman may make thereof.

HERE it is neceſſary in the firſt place to take notice, that by the cuſtom of *London*, if a freeman of *London* dies, leaving a widow and children, his perſonal eſtate, after his debts paid, and the cuſtomary allowance for his funeral, and the widow's chamber being firſt deducted thereout, is by the cuſtom of the ſaid city to be divided into three equal parts, and diſpoſed of as follows, *viz.* One third part to the widow, another third part to the children unadvanced by him in his life-time, and the other third part ſuch freeman may diſpoſe of by his will as he pleaſes; but if a freeman of *London* has no wife, but has children, the half of his perſonal eſtate belongs to his children, and the other half the freeman may diſpoſe of; ſo if the freeman has a wife and no children, half of his perſonal eſtate belongs to his wife, and the other half he may diſpoſe of. F.N.B. 122. 2 Inſt. 33. Lit. Rep. 324. 2 Lev. 130. Chan. Ca. 285. Hetl. 158. Godb. 49. Latch. 134. 2 Leon. 29. Cro. Eliz. 185. Abr. Eq. 150. 2 Salk. 426. [In the caſe of Biddle v. Biddle, 18th March 1718, before Lord Parker, it was ſaid, that the widow is entitled to the furniture of her chamber; or in caſe the eſtate exceeds 2000 *l.* then to 50 *l.* inſtead thereof. Vin. Abr. tit. *Cuſtoms of London*, (B. 2. p. 2.)]

This cuſtom extends only to the perſonal eſtate of the freeman, for when it firſt begun, the citizens of *London* had no regard at all to a real eſtate, for they did not ſuppoſe any freeman of *London* would purchaſe ſuch eſtate, but would employ his whole fortune and ſtock in trade, for the benefit of commerce. Abr. Eq. 150.

But if a freeman of *London* has a mortgage in fee, this ſhall be counted part of his perſonal eſtate, and will be ſubject to the cuſtom. Chan. Ca. 285. [A mortgage ſhall be paid out of the perſonal eſtate, in preference to the cuſtomary or orphanage part; becauſe the cuſtom of London cannot take place till after the debts are paid. 2 P. Wms. 335.]

But a leaſe for years waiting on the inheritance ſhall not be reckoned part of a freeman's perſonal eſtate, but ſhall, together with the inheritance, deſcend to the heir at law. 2 Chan. Ca. 160. Vern. 2. 104. S. P. decreed.

[Neither ſhall receipts in chemiſtry, phyſick, &c. be reckoned part of his eſtate.] 1 Vern. 61.

Alſo, if a freeman of *London* agrees to lay out money in the purchaſe of lands, and to ſettle the ſame on his eldeſt ſon, &c. this ſhall not be reckoned part of the freeman's perſonal eſtate. Vern. 345. 2 Chan. Ca. 118. S. C. 2 Vern. 665. S. P. adjudged; for by the agreement the money is to be looked upon as lands in equity, and therefore not ſubject to the cuſtom.

On

Abr. Eq. 151. between Grice and Gooding, decreed.

On the marriage of *B.*'s daughter with *A.*, a freeman of *London*, *B.*, the father, ſettles a term for years in truſt, that *A.*, the huſband ſhall receive the rents and profits till ſuch time as *D.* and *E.*, or the ſurvivor of them ſhould otherwiſe appoint, and then ſuch perſons as they ſhould appoint; and for want of ſuch appointment, for ſuch perſons as the ſaid *A.* by will ſhould appoint; and for want of ſuch appointment, then in truſt for the executors and adminiſtrators of *A.* The truſtees having made no appointment, the queſtion was, Whether this term ſhould go according to that appointment, or be looked on as part of *A.*'s perſonal eſtate, who was a freeman of *London*, and ſo go according to the cuſtom? and the court was of opinion, that it was not to be looked upon as part of *A.*'s perſonal eſtate, becauſe it was never in him, but was ſettled by his wife's father, and therefore not ſubject to the cuſtom.

Chan. Ca. 310. *per* Lord Chancellor.

If a freeman of *London* is made both executor and reſiduary legatee, and he dies before he has made his election, whether he will take as executor or legatee, yet the legacy muſt be conſidered as ſuch, and will be ſubject to the cuſtom of *London*.

Lev. 227. 2 Vern. 277. Chan. Ca. 199.

By this cuſtom a freeman could (*a*) not by will diſpoſe of ſuch part of his perſonal eſtate as belonged to his wife or children; and (*b*) even diſpoſitions by him in his life-time have been holden void, eſpecially, when they appeared to have been made in fraud of the cuſtom, and with a view to defeat it.

(*a*) It is ſaid that this cuſtom of the city of London, that a man could not give away any part of his eſtate without the conſent of his children, is the remains of the old common law, and is ſo taken notice of in *Bracton*; but it being found extremely inconvenient and hard, it was by the tacit conſent of the whole nation abrogated and grown into diſuſe; for what law has ever been made to repeal it? but in the city of London, where the mayor and aldermen had the care of orphans, they by that ſole authority and power had preſerved this part of the common law in *London*, which is diſuſed every where elſe. Preced. Chan. 596. (*b*) But for this *vide* 2 Lev. 130. 2 Vern. 98. 202. 612. 685. Lev. 227. Preced. Chan. 17. 50. Abr. Eq. 152.

[(*b*) If there were iſſue of the firſt marriage living at the time of the ſecond, the death of ſuch iſſue afterwards will not prevent the cuſtom from attaching, and bar the widow from claiming under it. Danſen v. Hawes, Ambl. 276.]

But now by the 11 *Geo.* 1. *cap.* 18. § 17. it is enacted, "That it "ſhall and may be lawful to and for all and every perſon and "perſons, who ſhall, at any time from and after the firſt day of "*June* 1725, be made or become free of *London*, and alſo to and for "all and every perſon and perſons, who are already free of the ſaid "city, and on the ſaid firſt day of *June* 1725 ſhall be unmarried, "and not have iſſue by any former marriage, (*c*) to give, deviſe, "will, and diſpoſe of his and their perſonal eſtate and eſtates, to "ſuch perſon and perſons, and to ſuch uſe and uſes, as he or "they ſhall think fit.

Provided nevertheleſs, "That in caſe any perſon, who ſhall, at "any time or times from and after the ſaid firſt day of *June* "1725, become free of the ſaid city, and any perſon or per-"ſons who are already free of the ſaid city, and on the ſaid firſt "day of *June* 1725, ſhall be unmarried, and not have iſſue by "any former marriage, hath agreed, or ſhall agree by any writ-"ing under his hand, upon or in conſideration of his marriage, "or otherwiſe, that his perſonal eſtate ſhall be ſubject to, or to "be

" be diſtributed, or diſtributable, according to the cuſtom of the " city of *London*; or in caſe any perſon ſo free, or becoming free " as aforeſaid, ſhall die inteſtate, in every ſuch caſe the perſonal " eſtate of ſuch perſon ſo making ſuch agreement, or ſo dying " inteſtate, ſhall be ſubject to, and be diſtributed and diſtri- " butable according to the cuſtom of the ſaid city; any thing " herein contained to the contrary in any wife notwithſtand- " ing."

[*A.* being about to marry an orphan of the city of *London*, agreed with the court of aldermen, in conſideration of the marriage, and of their giving their conſent thereto, to take up his freedom within a certain time, which time he ſurvived, but died without performing his agreement. It was decreed, that he was in equity to be taken as a freeman, and therefore his perſonal eſtate was to be diſtributed according to the cuſtom, notwithſtanding he had by will made a different diſpoſition of it. It was ſaid by the chancellour, that the agreement being entered among the orders and proceedings of the court of aldermen, and that court being a court of record, it became matter of record.

Frederick v. Frederick, 1 P. Wms. 710. 4 Br. P. C. 7. S. C.

If a freeman diſpoſes of his property in ſuch manner as not to take place till after his death, it is a fraud upon the cuſtom, and the property ſhall be ſubject to it.

Smith v. Fellows, 2 Atk. 62. 377.

So, if, ſeveral years before his death, he purchaſes a leaſehold eſtate for 40 years, in the joint names of himſelf and wife, it is a fraud upon the cuſtom, and the eſtate ſhall be applied as the reſt of his property.

Coomes v. Elling, 3 Atk. 676.

A freeman of very advanced age, ill of the gout, two days before his death, by deed of the ſame date with his will, aſſigned part of his perſonal eſtate in truſt for the ſeparate uſe of his daughter, and directed that ſhe ſhould not have power to give it to her huſband. She had married without conſent, but the father had been reconciled to her and her huſband. The deed was not delivered to the daughter. Lord *Hardwicke* held it to be a teſtamentary diſpoſition in fraud of the cuſtom, and that it was competent to the huſband to diſpute it; but he would not allow him to take the wife's cuſtomary part, without making a ſettlement upon her.]

Tomkins v. Ladbroke, 2 Vez. 591.

2. Of the Children's Part; and herein of Survivorſhip, Advancement, and bringing into Hotchpot.

It has been already obſerved, that the children of a freeman of *London* are entitled to the third part of his perſonal eſtate, in caſe he dies leaving a wife, and to a moiety in caſe he dies leaving no wife, but (*a*) this cuſtom does not extend to grand children; and, therefore, if a freeman of *London* has two ſons, and the eldeſt dies, leaving a ſon, the grandchild, though in law a repreſentative of the ſon, ſhall have no part by the cuſtom.

(*a*) 2 Salk. 426. Vern. 397. S. P.

But a poſthumous child ſhall come in with the reſt of the children for a cuſtomary ſhare of a freeman of *London*'s perſonal eſtate.

Abr. Eq. 154.

If

If a city orphan dies before twenty-one, his orphanage part ſurvives to the other orphans, and he can make (*a*) no diſpoſition (*b*) by will to contradict it; but if he dies after twenty-one, at which time he might by will have diſpoſed of it, there, though he die inteſtate, it ſhall go according to the ſtatute of diſtributions, between his mother and ſurviving brothers and ſiſters.

(*a*) 2 Salk. 426. Preced. Chan. 207. So certified by the recorder. Preced. Chan. 537. S. P.——2 Vern. 559. S. P. See 3 Will. Rep. 318. in a note S. C. cited. Although he deviſes it away at the age of 17. (*b*) But if a man marries an orphan, who dies under twenty-one, her orphanage part ſhall not ſurvive to the other children, but ſhall go to the huſband. Vern. 88. But *vide* Preced. Chan. 537. *cont.*——[If a man marries an orphan, and dies; his repreſentatives are not entitled to any part of what was his wife's cuſtomary ſhare, but the whole belongs to the wife. Vin. Abr. tit. *Cuſtoms of London*, (B. 10.) 18.]

But if a freeman of *London* dies, leaving two daughters and a wife, and one of the daughters dies before twenty-one, though after a diviſion and partition of the perſonal eſtate, yet the ſurviving ſiſter ſhall have the whole of the orphanage part.

Abr. Eq. 156. pl. 8. Locſſes and Lewen, Gilb. Eq. Rep. 32. Prec. Chan. 370. 372.

But this cuſtom of ſurvivorſhip holds only with reſpect to the orphanage part belonging to ſuch child; and therefore if he by ſurvivorſhip hath the part of any other brother or ſiſter, ſuch part ſhall go according to the ſtatute of diſtributions.

Preced. Chan. 537.

If the daughter of a citizen of *London* marries in his life-time, againſt his conſent, unleſs the father be reconciled to her before his death, ſhe ſhall not have her orphanage ſhare of his perſonal eſtate; and it would be unreaſonable to take the cuſtom to be otherwiſe.

Vern. 354. Said by Lord Chancellor. Yet in Hill v. Blacket, Caſes temp. Finch. 248., it is ſaid, the recorder certified that there was no ſuch cuſtom.

By the laws and cuſtoms of the city of *London*, if any freeman's child, male or female, be married in the life-time of his or her father, by his conſent, and not fully advanced to his or her full part or portion of his or her father's perſonal or cuſtomary eſtate, as he ſhall be worth at the time of his deceaſe, then every ſuch freeman's child, ſo married as aforeſaid, ſhall be excluded and debarred from having any further part or portion of his or their ſaid father's perſonal or cuſtomary eſtate, to be had at the time of his deceaſe, except ſuch father, by his laſt will and teſtament, or ſome (*c*) other writing by him written, and ſigned with his name or mark, ſhall declare and expreſs the value of ſuch advancement (*d*); and then every ſuch child, after the deceaſe of his or her ſaid father, producing ſuch will or other writing, and bringing ſuch portion ſo had of his or her father, or the value thereof into hotchpot, ſhall have as much as will make up the ſame a full child's part or portion of the cuſtomary eſtate his or her ſaid father had at the time of his deceaſe, notwithſtanding ſuch father ſhall, by any writing under his hand and ſeal, declare that ſuch child was by him fully advanced (*e*).

Abr. Eq. 154, 155. Certified accordingly in the caſe of Chace and Box, 1 Ld. Raym. 484. S. C. Vern. 61. 89. 216. 2. Salk. 426. S. P. Preced. Chan. 269.

[(*c*) It is ſaid to be ſufficient, if the father declare the ſame by any writing under his hand, although it be in an almanack, or elſewhere. Green's Privil. of Lond. 53. In Dean v. Delevar, cited in 1 P. Wms. 642. it is ſaid to be ſufficient; though written *by the father's book-keeper, or ſervant*. But the reporter adds a *quære*. (*d*) The ground of requiring the value of the advancement to appear in this manner, is, partly by reaſon of the difficulty of taking an account after ſuch a length of time, but principally becauſe it cannot be known, what is to be brought into hotchpot; and if it does not appear what the ſum was, the other children may be wronged. *Per* Lord Hardwicke, 1 Ves. 16. (*e*) Where the huſband and his wife, who was a city orphan, in conſi-

deration

deration of 100 *l.* executed a releaſe of their cuſtomary ſhare to the father, it was holden, that they were barred from demanding any further ſhare, and that this releaſe was no writing under the father's hand ſignifying the advancement. Preced. Chan. 594.——[So, where the daughter only, being of full age, had, upon her marriage, for a valuable conſideration, releaſed her cuſtomary ſhare. Lockyer v. Savage, 2 Str. 947.——So, if the wife be under age, and the huſband and ſhe, in conſideration of a marriage portion, covenant to releaſe her orphanage ſhare, the huſband's covenant is conſidered in equity, on a bill againſt the huſband and wife for a ſpecifick performance of the articles, as an abſolute releaſe, and will extinguiſh the wife's right. By an old law in the city, called Jud's law, a huſband is authorized to agree with the wife's father, though ſhe be under age. Medcalfe v. Medcalfe, 2 Atk. 63. But the releaſe extorted by a father from his ſon, merely for the ſake of maintenance, and not for his advancement in marriage or trade, is abſolutely void, as a fraud upon the cuſtom. Heron v. Heron, 2 Atk. 160. So, if a father who has children, ſome of age, ſome under age, take a releaſe from thoſe who are of age, the releaſe is void, for if the infants do not conſent when they come of age, they may engroſs the whole orphanage part in excluſion of the reſt. Morris v. Boroughs, 1 Atk. 399, Where a daughter accepts a legacy of 10,000 *l.* left her by her father, who recommended it to her to releaſe her right to her orphanage part, which ſhe does accordingly; if the orphanage part be much more than her legacy, though ſhe was told ſhe might elect which ſhe pleaſed, yet, if ſhe did not know ſhe had a right, firſt to inquire into the value of the perſonal eſtate, and the *quantum* of the orphanage part before ſhe made her election, this is ſo material that it may avoid her releaſe. Puſey v. Deſbouvrie, 3 P. Wms. 316.

A freeman of *London* having advanced his daughter with a portion, and intending to exclude her from any farther ſhare (on ſome diſpleaſure taken againſt her) made his will, and thereby recites, that he had advanced her with 300 *l.* and (*a*) upwards, gives her 5 *s.* and no more, and died; yet after his death, the daughter on a bill brought to have the ſaid 300 *l.* made up a moiety of his eſtate (he having no other child, and the cuſtom not extending to grandchildren) had a decree accordingly; for the words, *and upwards*, are *certum in incerto*, and not to be regarded, though it was objected it might be 1000 *l.* or 2000 *l.* or any other ſum above 300 *l.*

Abr. Eq. 155. Bright and Smith, decreed. [Where a child, tho' an only child, is advanced, and the *quantum* of the advancement does not appear, he ſhall be deemed *fully* advanced. Cleaver v. Spurling, 2 P. Wms. 527. Fawkner v. Watts, 1 Atk. 406. Elliot v. Collier, 3 Atk. 526. 1 Vez. 15. S. C. 1 Wilſ. 168. S. C. And advancement in marriage with a firſt huſband who died in the father's life time, is a bar to a ſecond huſband. 1 Atk. 406.]

(*a*) Where the father by his will declared that he had given 1000 *l.* to one of his children, 1000 *l.* to another, &c. in full of their orphanage part by the cuſtom, ſuch declaration is ſufficient to let them into their full cuſtomary ſhares, on bringing theſe ſums into hotchpot; but it ſeems that the parties concerned are not ſo far concluded by this declaration, but may give in evidence that more was received by the children than thus expreſſed. Preced. Chan. 470. 471.——[Parol evidence of the father's declarations with reſpect to the advancement, can in no caſe be received: but declarations of the huſband, or of the wife during the coverture of the firſt huſband, are admiſſible. 1 Atk. 407.]

A (*b*) ſettlement of a (*c*) real eſtate on a child, is no advancement, nor to be brought into hotchpot.

Chan. Ca. 160.

(*b*) A deviſe of the real eſtate to a child, does not bar ſuch child of the cuſtomary ſhare. 2 Vern. 753. [But where a freeman by will charged 1500 *l.* on his real eſtate for his daughter; and gave her a ſhare of his perſonal eſtate; the court would not allow her to take the ſum charged on the real eſtate, and alſo claim an orphanage, but put her to abide entirely by the will, or by the cuſtom. Cowper v. Scot, 3 P. Wms. 119.]——(*c*) Or money agreed to be laid out in the purchaſe of lands. Vern. 345. 2 Chan. Ca. 118. Abr. Eq. 153.

If upon a marriage treaty *A.* a freeman of *London*, covenants to leave his wife 2000 *l.* at his death, 2000 *l.* to his eldeſt ſon, and 1000 *l.* a-piece to his younger children, and dies, leaving ſeveral younger children; the 1000 *l.* a-piece to the younger children being due only by covenant, is a debt on the perſonal eſtate, and not being to be paid till after the father's death, is no proviſion or advancement within the cuſtom of *London*, to bar them of their cuſtomary or diſtributory ſhares.

Abr. Eq. 250. Feaſt and Feaſt.

Car v. Car, 2 Atk. 277. [If a freeman by will gives 200*l.* to his ſon, and in his life pays him 200*l.*, and takes a receipt in full for what was intended him by the will, this ſhall be conſidered as an advancement, and brought into hotchpot.

Weyland v. Weyland, 2 Atk. 632. Where a father, upon the marriage of his ſon, ſettled 5000*l.* S. S. annuities upon himſelf for life, remainder to his wife for life, remainder to his ſon for life, remainder to his ſon's wife for life, remainder to the iſſue of the marriage; it was holden, that the ſon, to entitle himſelf to a ſhare of the father's perſonal eſtate, muſt bring the whole 5000*l.* and not the value of his eſtate in it for life only, into hotchpot.

Cowper v. Scot, 3 P. Wms. 119. If a man makes an executor in truſt, and deviſes his perſonal eſtate among his ſeven children, and four of them are advanced by him in his life-time, and one of them dies before the teſtator; the children advanced ſhall have their ſhare of this ſeventh part, without bringing what they have received into hotchpot.]

Vern. 345. 2 Vern. 281. 2 Salk. 426. S. P. If a freeman of *London* advances a child in part, by a portion which is to be brought into hotchpot, ſuch portion or advancement muſt be brought into the orphanage part only.

2 Vern. 234. 630. and 2 Vern. 754. S. P. For if it were to be brought in, it muſt fall again into the child's part. And therefore if there be but one child, who has been in part advanced by the father in his life-time, ſuch child ſhall not bring his part into hotchpot, there being none in equal degree with him.

[2 P. Wms. 526. Ambl. 189. S. P. See City v. City, 2 Lev. 130. *ſemb. contr.* But ſee alſo Lord Hardwicke's remark on that caſe in 2 Vez. 595.]

Morris v. Burroughs, 1 Atk. 399. [Sums of money, however ſmall, if given as advancement, muſt be brought into hotchpot; but trivial ſums given as preſents ſhall not.

Hender v. Roſe, 3 P. Wms. 317. So, ſmall ſums given occaſionally, or maintenance-money or allowance, at the univerſity or for travelling, ſhall not be deemed part of a child's advancement, nor ſhall money given with him as apprentice.

Elliot v. Collier, 3 Atk. 526. 1 Vez. 15. A gold watch, or wedding clothes, are no advancement, nor a gift of 50*l.* in money, where the orphanage ſhare is conſiderable. Neither is conſent to a daughter's marriage any bar to her, where the *quantum* does not appear under the father's hand.

Hume v. Edwards, 3 Atk. 450. Where a freeman had two daughter's, *A.* and *B.*, and on *A.*'s marriage gave 2000*l.* and a bond for 2000*l.* more at his death, and afterwards gave her 428*l.* to buy a houſe, which was done; and *B.* married without his conſent, but he was afterwards reconciled to her, often ſtayed weeks with her, and gave her preſents from time to time to about 500*l.* but no advancement; it was decreed, that *A.*'s 2000*l.* and 2000*l.* ſhould be brought into hotchpot, but not her 428*l.* nor *B.*'s 500*l.*

Norton v. Norton, 3 P. Wms. 317. note O. If a father buy an office, though but at will, or a commiſſion, it is an advancement.

Hearne v. Barber, 3 Atk. 213. In this caſe So, if, ſome years after the marriage of a freeman's ſon, the parents on both ſides meet, and agree to advance 200*l.* a-piece to lie by till they can purchaſe a commiſſion in the army for him,

him, this is an advancement, and bars him of his orphanage ſhare.] it was ſaid, that Judd's law which was an act of common council in the time of Henry the 6th, does not make it a bar unleſs it was an advancement upon marriage.

3. Of the Wife's Part, and what ſhall bar her thereof.

The widow of a freeman of *London*, by the cuſtom, is entitled to her widow's chamber, and to a moiety of his perſonal eſtate if he leaves no children, and to a third part in caſe he leaves any child or children. Hetl. 158. Vern. 132. Abr. Eq. 156.

But if a woman, upon her marriage, accepts a ſettlement out of the (*a*) freeman's perſonal eſtate, (*b*) ſuch compounding, as it is called, ſhall (*c*) bar her cuſtomary ſhare. Preced. Chan. 325, 326., &c. Abr. Eq. 157. (*a*) Although the compoſition or ſum to be paid her was part of her own fortune. Preced. Chan. 327. (*b*) Though no notice was taken of the cuſtom. Abr. Eq. 159. (*c*) Where ſhe ſhall take by the cuſtom, and likewiſe by her huſband's will. 2 Vern. 110. But *vide* Preced. Chan. 353.

But though ſuch compoſition ſhall bar the wife of her cuſtomary ſhare, yet ſhe is not thereby precluded from demanding the benefit of any gift or deviſe the huſband may think fit to make her. Abr. Eq. 159.

Alſo, if a freeman, whoſe wife has been thus compounded with, dies inteſtate, his widow ſhall have ſuch part of the legatory, or dead man's ſhare, as ſhe is entitled to under the ſtatute of diſtributions, eſpecially, if there were no expreſs words in the agreement to exclude her. Preced. Chan. 327.

If a freeman of *London* makes a jointure on his intended wife, and the ſame is expreſſed to be in bar only of her dower, or thirds of lands, tenements, and hereditaments, this ſhall not bar her of her cuſtomary ſhare of his perſonal eſtate. Abr. Eq. 158, 149. decreed in Chancery between Atkins and Waterſon.

[But if a freeman, before marriage, ſettles ſome part of his perſonal eſtate upon his intended wife, to take effect after his death, this will bar her of her cuſtomary part, though no mention be made of the cuſtom. Lewin v. Lewin, 3 P. Wms. 15.

If a wife be divorced *a menſâ et thoro* for adultery, ſhe forfeits her right to her moiety and widow's chamber under the cuſtom.] Pettifer v. James, Bunb. 16.

4. Of the Legatory, or dead Man's Share.

The legatory or dead man's ſhare is the third part of a freeman's perſonal eſtate, in caſe he has a wife and (*d*) children, which the freeman might always have diſpoſed of by will, and which for want of ſuch diſpoſition is under the direction of the ſtatute of diſtributions, and not at all under the control of the cuſtom of *London*. 2 Salk. 426. Vern. 6. 2 Vern. 559. Skin. 41. pl. 11. Preced. Chan. 499. (*d*) But where there are no children the cuſtom of London gives no directions, therefore the perſonal eſtate muſt be wholly governed by the ſtatute of diſtributions. But the cuſtom of the province of York extends to give ſuch moiety to the next of kin to the inteſtate. Preced. Chan. 327. 328. But note, that the cuſtom of the city of London in the diſtribution of an inteſtate's eſtate, ſhall prevail againſt the cuſtom of York. 2 Vern. 48. ——— As if a freeman of London dies in York, his heir ſhall come in for a ſhare of the perſonal eſtate, though by the cuſtom of York he is debarred thereof, for the cuſtom of London, which follows the perſon, ſhall be preferred to that of York, which is only local. 2 Vern. 82.

If

Abr. Eq. 160. & *vide* 2 Vern. 111. 754. S. P.

If a freeman of *London* makes his will, and deviſes legacies to his children more than their orphanage part would amount unto, without taking any notice whatſoever of the cuſtom; theſe legacies ſhall be a ſatisfaction of their orphanage ſhares, to which they were entitled by the cuſtom in the nature of a debt, and the legacies ſhall not come (*a*) out of the teſtamentary or dead man's part, for it would be unreaſonable that they ſhould take both by the will and the cuſtom.

(*a*) Where it was holden, that 100 *l.* deviſed for mourning ſhould come out of the teſtamentary, and not out of the whole perſonal eſtate. 2 Vern. 420.

Abr. Eq. 160. *per* Lord Chancellor; but in this caſe he ſent it to the recorder to certify the cuſtom.

But if ſuch legacies are leſs than their orphanage ſhares, they ſhall not *pro tanto* be a ſatisfaction, but in ſuch caſe the legatees ſhall take both, eſpecially if none of the deviſes in the will are thereby diſappointed.

Wilſon v. Philips, Bunb. 195.

[So, if he deviſe no more than his teſtamentary part, the children ſhall have both their legacies, and their cuſtomary ſhares; but if he deviſe his whole eſtate, they muſt make their election.

Morris v. Burroughs, 2 Atk. 627.

If a freeman deviſe all his eſtate, orphanage and teſtamentary, and ſome of the children abide by the cuſtom, others by the will, the ſhares of the latter ſhall not go among the others, but ſhall accrue to the teſtator's eſtate, and go according to the will.

Harvey v. Deſbouverie, Ca. temp. Talb. 130. See alſo Hanbury v. Lord Bateman, 2 Atk. 63.

Although neither the father, nor the orphan, can deviſe either the orphanage part or contingency of the benefit of ſurvivorſhip, or the part which accrued by ſurvivorſhip; yet if the father make a diſpoſition by his will inconſiſtent with the cuſtom, the children muſt make their election to abide by the will or the cuſtom; for they cannot abide by the will in part, and have the benefit of the cuſtom alſo.]

Preced. Chan. 409. decreed between Read and Duck, although it was certified that there was no cuſtom in London which directed how ſuch loſs ſhould be borne.

If a loſs happens to a freeman of *London*'s eſtate by the inſolvency of his executors, ſuch loſs ſhall be borne out of the teſtamentary part of his eſtate only, and not out of the whole perſonal eſtate, for the wife and children of a freeman are in the nature of creditors, and ſhall have two parts in three of the perſonal eſtate he died poſſeſſed of, although his legatees are thereby defeated of their legacies.

[2 Ld. Raym. 1328. S. C. by the name of Redſhaw v. Braſier.] Vin. Abr. tit. *Cuſtoms of London.* (B. 9.) pl. 4. S. C. [But the funeral expences of a child dying after his father, ſhall be paid out of the orphanage ſhare. 3 Atk. 676. And if a father maintains his daughter after her huſband's death, his executor ſhall be conſidered as a creditor for ſo much as the maintenance amounted to, which ſhall be deducted out of the daughter's cuſtomary ſhare. 3 Atk. 526. 1 Vez. 15.]

1 Atk. 64.

[Where the wife's right to the orphanage part is extinguiſhed by the releaſe of the huſband, the eſtate is left as if it had never been charged with it, and it is conſidered as part of the teſtator's general perſonal eſtate, and does not go wholly to the executor of the father, as part of the dead man's ſhare.]

(D) Of the Cuſtom of *London* as it relates to Feme Coverts.

BY the cuſtom of *London*, if a feme covert, the wife of a freeman, (*a*) trades by herſelf in a trade, with which her huſband does not (*b*) intermeddle, ſhe may (*c*) ſue and be ſued as a feme ſole, and the huſband ſhall be named only for conformity; and if judgment be given againſt them ſhe only ſhall be taken in execution. Cro. Car. 69. Metl. 9. Lit. Rep. 31. S. C. Leon. 131. 2 Brownl. 218. S. P.

(*a*) Need not be in a ſhop. Show. Rep. 184. (*b*) But if the wife uſes the ſame trade that her huſband does, ſhe is not within the cuſtom. Mod. 26. (*c*) But it muſt be in the courts of the city. Moor 135, 136. Cro. Eliz. 409. [4 Term Rep. 361. S. P.]

If the wife of a freeman, who is a ſole trader, contracts a debt and dies, and afterwards the huſband promiſes to pay it, yet ſuch promiſe is not ſufficient to maintain an *aſſumpſit* againſt the huſband, for as he was not originally liable, the ſubſequent promiſe was without any conſideration. Show. Rep. 183. Fabian v. Plant.

A recovery ſuffered by baron and feme of the lands of the feme ſhall as effectually bind the right of the feme by the cuſtom of *London*, as a fine at common law. Roll. Abr. 556.

(E) Of the Cuſtom of *London*, with reſpect to Maſters and Apprentices.

AN infant unmarried, and above the age of 14, may (*d*) bind himſelf apprentice to a freeman of *London* by indenture with proper covenants, which covenants by the cuſtom of *London* ſhall be as (*e*) binding as if he were of full age. Moor, 135. pl. 28. 2 Bulſt. 192. 2 Roll. Rep. 305. Palm. 361.

Mod. Rep. 271. pl. 22. 2 Keb. Rep. 687. pl. 14. 2 Vern. 472. pl. 445. (*d*) Cuſtom of London to put over an apprentice to another, is good. March 3. (*e*) And for a breach an action may be brought in any other court as well as in the courts in the city. Moor 136.

If the indentures be not enrolled before the chamberlain within the year, upon a petition to the mayor and aldermen, *&c.* a *ſcire facias* ſhall iſſue to the maſter to ſhew cauſe why not enrolled; and if it was through the maſter's default, the apprentice may ſue out his indentures; otherwiſe, if through the fault of the apprentice, as if he would not come to preſent himſelf before the chamberlain, *&c.* for it cannot be enrolled unleſs the infant is in court and acknowledges it. 2 Roll. Rep. 305. Palm. 361. *& vide* Mod. 271. Boh. Priv. Lond. 175. 338.

This cuſtom does not extend to one bound apprentice to a waterman under 21, for the company of watermen are but a voluntary ſociety, and being free of that does not make one free of *London*. 6 Mod. 69. 12 Mod. 415.

(F) As it relates to Landlords and Tenants.

2 Sid. 20. BY the cuſtom of *London* a tenant at will under the yearly rent of 40*s.* ſhall not be turned out without a quarter's warning; and ſuch tenant paying above 40*s.* yearly rent, ſhall not be turned out without half a year's warning.

Moor, pl. 827. Palm. 212. But a cuſtom that tenant for years ſhall hold for half a year after his term ended, is not good.

(G) Of the Cuſtoms of *London*, which are in furtherance of Juſtice, and for the more ſpeedy Recovery of Debts.

Hob. 86. Vent. 29. 5 Mod. 93. & *vide* Roll. Abr. 555. BY the cuſtom of *London* a creditor may, before the day of payment, arreſt his debtor, and oblige him to find ſureties to pay the money on the day it ſhall become due.

Cro. Eliz. 409. Noy, 53. Roll. Abr. 557. If a contract be entered into by two citizens, and one of them, who is thereby obliged to pay a ſum of money, die inteſtate, his adminiſtrator ſhall be obliged to pay it in the ſame manner as if it were a debt by obligation.

Leon. 166. Moor, 136. S. P. If *A.* and *B.* are bound as ſureties for and with *C.* to *D.*, and *D.* recovers againſt *A.* in *London*, and has execution againſt him, *A.* may there ſue *B.* for contribution *ut uterque eorum oneretur pro rata* according to the cuſtom of *London*, and therefore where ſuch action was removed in *B. R.* by writ of privilege, the ſame was remanded, becauſe otherwiſe the plaintiff would be without remedy, for by the courſe of the common law no action lies.

(H) Of the Cuſtom of Foreign Attachment: And herein,

1. Of the Nature of the Debt or Duty which may be attached.

(*a*) Roll. Abr. 551. (*b*) Carth. 25. (*c*) For the year and day *diſtrationare debitum*, *vide* Cro. Eliz. 713. Leon. 52. BY the (*a*) cuſtom of *London*, if *A.* is indebted to *B.*, and *C.* is indebted to *A.*, *B.* upon entering a plaint againſt *A.*, may attach the debt due from *C.* (who is called the garniſhee) to *A.*, and this (*b*) cuſtom of foreign attachment is to no other purpoſe but to compel an appearance of the defendant in the action; for if he appear within (*c*) a year and a day, and put in bail to the action, the garniſhee is diſcharged.

Roll. Rep. 106. Roll. Abr. 551.

Roll. Abr. 551. Cro. Eliz. 598. 830. The garniſhee may plead this cuſtom of foreign attachment to an action brought againſt him by his creditor, but then the plaintiff

tiff may traverſe the cauſe thereof, and that he was not indebted to him who attached it.

Such goods cannot be attached, of which the party had no property at the time of the attachment. 17 E. 4. 7. b. Roll. Abr. 551. S. C.

So, if *A.* be indebted to *B.*, and *J. S.* a ſtranger, takes by tort certain goods of *A.* as a treſpaſſer, *B.* cannot by the cuſtom attach theſe goods in the hands of *J. S.* for the debt of *A.*, becauſe the property is out of *A.* at the time, and he had only a right in him.

A legacy cannot be attached in the hands of an executor by foreign attachment; becauſe it is uncertain whether, after debts paid, the executor may have aſſets to diſcharge it. Roll. Abr. 551 Noy, 115. S. P.

If *A.* be indebted to *B.* by obligation, and *B.* be indebted by contract to *H.*, and *B.* die, and his adminiſtrator demand the debt upon the obligation of *A.*, who promiſes him that, if he will forbear him for a month, he will pay him then, but he does not pay him accordingly, and after *H.* bring debt in *London* againſt the adminiſtrator upon the contract (as he may there by the cuſtom) the debt of *A.* due by the obligation may be attached in the hands of the adminiſtrator; for notwithſtanding the promiſe broken, yet the debt continued due by the obligation, and a recovery upon the obligation will be a bar of the action upon the promiſe, in which all ſhould be recovered in damages. Roll. Abr. 551. Spink and Tenant. Roll. Rep. 106. S. C.

If *A.* lends *B.* 100*l.* to be repaid him upon the death of his father, and after the death of the father of *B.* this 100*l.* is attached by force of a foreign attachment, and after *A.* brings an action upon the caſe againſt *B.* for this money, this foreign attachment will be a good bar thereof, though the cuſtom be to attach debts, and this is an action upon the caſe, in which damages only are to be given, becauſe this is a debt, and he might have an action of debt thereupon; and therefore, inaſmuch as this is well attached, he ſhall not defeat it by bringing an action upon the caſe. Roll. Abr. 552. Hals and Walker, adjudged upon a foreign attachment in Exeter, where the cuſtom is the ſame as in London.

If *A.* ſells certain ſtockings to *B.* upon a contract, for which *B.* is to give 10*l.* to *A.*, and if he ſells the ſtockings again before *Auguſt*, after that he ſhall give twopence more for every pair of the ſtockings, the 10*l.* is attachable by foreign attachment, becauſe an action of debt lies for it, but the twopence for every pair of ſtockings is not attachable, becauſe this reſts only in damages, to be recovered by an action upon the caſe, and not by action of debt, becauſe it is made payable upon a poſſibility. Roll. Abr. 552. Read and Hawkins.

If there are ſeveral accounts, *&c.* between *A.* and *B.*, and *A.* dies, and his executor and *B.* ſubmit to the award of *J. S.*, and he awards that the executor ſhall deliver certain goods, of which *A.* died poſſeſſed, to *B.*, and that *B.* ſhall pay the executor 300*l.* this money cannot be attached in the hands of *B.* for the debt of *A.*; for upon the matter the executor being liable to *deva-ſtavit*, ought to have remedy in his own right for the ſum awarded. Vent. 112. Horſam and Target. Lev. 306. S. C.

If *A.* is indebted to *B.*, who is indebted to *C.*, and *B.* aſſigns the debt of *A.* to *C.* in ſatisfaction of his debt; now the debt due from 2 Jon. 222. Lewis and Wallis.

from *A.* is become the right and property of *C.*, and *B.* hath nothing but in truſt for *C.*, and therefore it ought not to be attached for any debt of *B.*, and upon the ſpecial matter ſhewn the lord mayor ought to give relief.

Roll. Abr. 553. (*a*) But if the value of the tobacco had been averred in the record of the attachment, the debt might have been well attached in this action. Roll. Abr. 554. *& vide* Jon. 406.

In an action of debt for tobacco, in the detinet, a debt cannot be attached within the cuſtom, in ſatisfaction thereof, becauſe it does not (*a*) appear of what value this tobacco was, ſo that it might appear that the debt is but a ſatisfaction to the value, which cannot be ſupplied by a plea in bar made in another action againſt him, in whoſe hands the debt was attached.

Roll. Abr. 552. 4 Leon. 240. Cro. Eliz. 63. Leon. 29, 264. (*b*) After iſſue joined in an action of debt in *B. R.* the debt for which the action was brought cannot be attached in London, for the inferior court cannot attach a debt in a ſuperior court. Roll. Abr. 552.—So, after imparlance to an action of debt in *B. R.* Roll. Abr. 552. Cro. Eliz. 157. 3 Leon. 232.—So, if a writ returnable in *B.* be purchaſed before the attachment. Cro. Eliz. 101. 593. 691. 3 Leon. 210. Roll. Abr. 552. [So, a ſum of money directed to be paid by *A.* to *B.*, by the maſter's *allocatur*, cannot be attached in *A*'s hands. Coppell v. Smith, 4 Term Rep. 312. So, a ſum of money awarded under a rule of court cannot be attached. Grant v. Hawding, E. 7 G. 3. *B. R. ibid.*] (*c*) So, if levied upon a *fieri facias*, and in the ſheriff's hands. 1 Leon. 30. 264.—So, if a ſuit be begun in equity, the effect thereof ſhall not be prevented by a foreign attachment. 2 Chan. Ca. 233.

A debt due by ſpecialty may be attached by the cuſtom of *London*, becauſe the attachment may be pleaded if an action be brought for it in the courts at *Weſtminſter*, but a debt (*b*) recovered in any court in *Weſtminſter* by (*c*) a judgment cannot be attached by the cuſtom of *London*, becauſe the party has then no time to plead it.

Cro. Eliz. 593. Lewknor and Huntly, 712, 713. S. C. reſolved alſo upon a writ of error, though the judgment was reverſed for another reaſon.

If *A.* is indebted to *B.*, and *C.* is indebted to *A.*, and *B.* brings debt in *B. R.* againſt *A.* pending this action, *B.* may affirm a plaint in *London* againſt *A.* for the ſame debt, *&c.* and attach the debt in the hands of *C.*; for though a debt in *London*, for which there is a ſuit depending in *B. R.* cannot be attached, yet he that hath brought an action in *B. R.*, may, notwithſtanding according to cuſtom, attach the debt of the party, for the debt in queſtion in *B. R.* is not touched by this attachment.

Carth. 344. Maſters and Lewis. Ld. Raym. 56. Skin. 516. pl. 6. 5 Mod. 75, 92, S. C. 2 Jon. 165, 204. *& vide* Roll. Abr. 551, 906. Cro. Eliz. 410, 598. Noy, 53. Dyer, 247. 3 Wilſ. 297.

A. is indebted to *B.*, and *C.* is indebted to *A.* by ſimple contract; *A.* dies inteſtate, and *B.* enters a caveat againſt his widow's taking out adminiſtration; pending which, he enters a plaint in the ſheriff's court of *London* againſt the archbiſhop of *Canterbury*, and thereupon attaches the debt due from *C.*, after which the widow has adminiſtration granted to her, who brings an action againſt *C.*, who inſiſted on the matter *ſupra*; it was holden, that this pretended cuſtom, in this caſe, was unreaſonable and void, becauſe the archbiſhop had no right to the debt, nor any means to recover it; beſides, hereby every creditor would be his own carver, and the goods of the inteſtate waſted without any remedy.

2. In

2. In whoſe Hands, and at what Time, the Attachment may be made.

If *A.* recovers a debt againſt *B.* in *London*, *B.* may attach this debt in his (*a*) own hands for ſo much due to him. Roll. Abr. 554. Cro. Eliz. 186.

(*a*) Whether a debt owing to a company is attachable, for the debt of the company. Mod. 212. *dubitatur.*

By this cuſtom a debt contracted without the juriſdiction of the city may be attached, if the debtor is found within the juriſdiction, for every debt follows the perſon of the debtor. Carth. 25, 26. Vent. 236. *& vide* Roll. Abr. 554.

An obligee before the debt is due by obligation cannot by the cuſtom attach a debt for it, becauſe he cannot affirm a plaint for the firſt debt before it is due. Roll. Abr. 553. 3 Leon. 236. S. C.

But if *B.* is indebted to *A.*, and *C.* is bound to *B.*, but the day of payment is not yet come, *A.* may attach this debt in the hands of *C.* (*b*) before it is due to *B.* Roll. Abr. 553. 3 Leon. 236. *& vide*

Cro. Eliz. 184. Roll. Rep. 105. Cro. Eliz. 713. Noy 68. (*b*) But the cuſtom ſo to do muſt be ſpecially alleged. Roll. Abr. 553. Noy 68.—And the judgment ſhall be, that he ſhall be paid when it becomes due. Roll. Abr. 533. Sid 327.

So, if *A.* lends money to *B.* to be repaid upon the death of the father of *B.*, and after, an action is brought by *C.* againſt *A.* and after, the father of *B.* dies, the money due by *B.* to *A.* may after be attached in the hands of *B.*, though it was not due at the time the plaint commenced againſt *A.*, inaſmuch as it became due before the time that by cuſtom the proceſs is to be granted againſt him in whoſe hands it is attached. Roll. Abr. 553.

If in debt upon an obligation of 100*l.* conditioned for the payment of 50*l.* at a day, the defendant pleads, that before the day of payment of the 50*l.* it was attached in his hands by a creditor of the plaintiff, *&c.* and that after the day upon a *ſcire facias* againſt him according to cuſtom he paid it; this is a good bar of the (*c*) whole, becauſe the attachment being made before the day of payment, it became a debt to the creditor, and the obligee could take no advantage of a breach of the condition afterwards. Sid. 327. Robbins and Standard. (*c*) If the attachment had been of 20*l.* only, it might have been pleaded in bar of ſo much. Sid. 327. *& vide* Godb. 196. Owen, 2. Moor, 598.

3. Of the Form of the Proceedings in a Foreign Attachment.

By this cuſtom the plaintiff muſt ſwear that the debt is *bonâ fide* due to him; but it is not ſufficient to allege that he ſwore that the debt was a true one by himſelf, or his attorney; for the attorney's ſwearing is not according to the cuſtom. Roll. Abr. 554. Cro. Eliz. 713. Jon. 406.

If *A.* affirms a plaint againſt *B.* and upon *nihil* returned, it is ſurmiſed that *C.* hath money in his hands due to *B.* *&c.* and the money is attached in the hands of *C.*, who appears upon the attachment, and pleads that he owes nothing to *B.*, though this be found againſt *C.*, and thereupon there is judgment againſt him, yet he ſhall not pay any coſts, for there are no coſts recoverable in a foreign attachment. Cro. Eliz. 172. Leon. 321.

Roll. Abr. 555. [But the defendant muſt be ſummoned, or have notice, though it hath been alleged, that the cuſtom in the city-court is to give no notice,) elſe the judgment againſt the garniſhee will be erroneous, and the money paid or levied in execution of it will not diſcharge the debt from tha garniſhee to the defendant. Fiſher v. Lane, 3 Wilſ. 297.]

By this cuſtom, if *A.* ſues *B.* in *London*, *&c.* and *C.* is indebted to *B* in the ſame ſum, and *C.* is condemned there to *A.* according to the cuſtom, and judgment given againſt him accordingly, yet, if no execution be ſued againſt *C.*, *A.* may reſort to have judgment and execution againſt *B.* his principal debtor, and *B.* may ſue *C.* for his debt, notwithſtanding the unexecuted judgment.

Roll. Abr. 555. 22 H. 6. 47. (*a*) Godb. 401. Latch. 228. (*b*) A cuſtom for a foreign attachment before ſome default in the defendant is naught. Vent. 236. (*c*) Moor, 570. pl. 779. like point.

In bar of an action brought in *B. R.* if the defendant pleads a judgment in a foreign attachment in bar, and alleges the cuſtom to be, that if the plaintiff in the court hath proceſs againſt the defendant, and upon a *nihil* (*a*) returned makes a ſurmiſe that *B.* is indebted in ſo much to the defendant, and upon his prayer to attach it in his hands by proceſs, and he does it accordingly; and if (*b*) the defendant makes default at four courts after, that by the cuſtom, at the laſt of the ſaid four courts the plaintiff may pray proceſs againſt *B.* to come in and ſhew cauſe wherefore the judgment ſhould not be againſt him at the next court after, and when he comes to apply this cuſtom to his caſe, he ſhews that there were four defaults, and that at the fourth default the plea was continued for ſeveral courts, and then proceſs went againſt *B.*, and then after judgment againſt him, (*c*) this is not warrantable by the cuſtom, inaſmuch as he ſhews by the cuſtom, it ought to be at the next court after the four defaults.

Carth. 282. Lawrence and Atherton, adjudged. [Foreign attachment may be given in evidence on the original iſſue.]

If in debt the defendant pleads that *J. S.* entered a plaint, *&c.* againſt the plaintiff in *London*, and upon proceſs againſt him *non eſt inventus* was returned, and thereupon a ſuggeſtion was made that he had ſo much money in the hands of the defendant, and that the defendant was attached by the ſaid money; this is an ill plea, for it ought to have been that the plaintiff was attached by ſo much money in the defendant's hands; for ſo is the cuſtom.

Carth. 25.

After a *dilatur* entered by the garniſhee in the ſheriff's court, which is in nature of an imparlance, he cannot plead to the juriſdiction of the ſheriff's court.

12 Mod. 213.

It was ruled, That if *A.* brings debt in *London* againſt *B.*, and *attaches goods of* B. *in the hands of* C., from whoſe poſſeſſion the *goods* are *not removed*; and *B. by* certiorari *brings the cauſe into* K. B. *and put in bail*, the attachment is at an end, and *C.* ought to deliver the goods to *B.*, which if he do not, *B.* may have *trover* or *replevin*.

Damages.

DAMAGES are a compenſation given by the jury for an injury or a wrong done the party (*a*) before the action brought. Co. Lit. 257. 10 Co. 116.

(*a*) The expences the party has been at in obtaining his right, ſuch as the moderate fees of counſel, attornies, &c., are termed coſts; and theſe are given by the court, and taxed by their officer. For the difference between damages and coſts, *vide* Salk. 209. 6 Mod. 157. Gilb. Eq. Rep. 195. 199. Barnes 306. tit. *Coſts*.

(A) In what Actions the Party ſhall recover Damages.

(B) What Perſons are entitled to, or ſhall recover Damages.

(C) Againſt whom Damages ſhall be recovered.

(D) Of aſſeſſing the Damages: And herein,

1. Of the *Quantum* of the Damages the Jury may give.
2. Whether they may give more than the Plaintiff has declared for.
3. Muſt be aſſeſſed purſuant to the Plaintiff's Right, or the Injury he has received: And herein of aſſeſſing entire Damages.
4. Where to be aſſeſſed jointly or ſeverally, where there are ſeveral Defendants.

(E) Where the Court may encreaſe or mitigate the Damages.

(F) Of the Manner of aſſeſſing and recovering Damages.

(A) In what Actions the Party ſhall recover Damages.

AT common law no damages were recovered in any real action; for the detention of the poſſeſſion, *&c.* being the cauſe of damages, till the right to the land was determined, the party could not be ſaid to ſuffer any wrong: alſo, the burden of the feudal duties lay upon the tenant in poſſeſſion, and, conſequently, 10 Co. 116. a. 2 Inſt. 284. Co. Lit. 257. 19 H. 6. 27. 2 Roll. Abr. 550.

11 Co. 51. For recovering the meſne profits

he was to receive the meſne profits until ſome other made out a better right, who after recovery might have maintained an action of treſpaſs.

in ejectment, replevin, and treſpaſs, *vide* the ſeveral heads; and where the courts of equity will oblige the tertenant to account for the meſne profit, tit. *Account*.

8 Co. 50. a. 10 Co. 116. a. (*a*) But in a writ of

But in an aſſize, which is (*a*) a mixed and compendious action, the diſſeiſee not only recovered his poſſeſſion, but alſo the meſne profits in damages.

entry there were no damages; for ſuch writ only demanded the freehold, and was not mixed with the perſonalty. 2 Inſt. 289. Booth 175. Nor in a writ of admeaſurement of paſture. 2 Inſt. 368.

For the expoſition of this ſtatute, *vide* 2 Inſt. 287, 288.

"By the ſtatute of *Glouceſter* made 6 *E.* 1., whereas before damages were not awarded in *Mortdanceſtor*, unleſs upon a recovery againſt the chief lord, they ſhall be awarded in all caſes where a man recovers in *Mortdanceſtor*; ſo in coſinage, aiel and beſaiel;" *and by the ſame ſtatute*, "every one ſhall render damages where the land is recovered againſt him, upon his intruſion or act."

But for this *vide* tit. *Dower*, letter (I 146.)

By the ſtatute of *Merton*, *cap.* 1., Damages are given on the poſſeſſory action of dower, *unde nihil habet*.

Comp. Incumb. 292., &c.

In a *quare impedit*, or *darrein preſentment*, he for whom the judgment is given, ſhall recover as well his damages as his preſentment and advowſon.

(*b*) As all actions on the caſe or covenant, for which *vide* title

In all actions *ex delicto*, which are either treſpaſſes founded on force, or upon fraud, in the not performing of contracts, damages ſhall be recovered; and theſe are (*b*) ſuch actions, as are ſaid to ſound only in damages.

Covenant and *Trover*, for which *vide* tit. *Trover and Converſion*;—in account, *vide* Roll. Abr. 575. *Supra* Vol. I. 40. In detinue the thing is to be recovered in ſpecie, or damages for it. Roll. Abr. 574. In debt the ſame is to be reſtored *in numero*, but there are damages for the detainer, *vide* Vaugh. 101. damages ſhall be recovered in an *audita querela*. 26 E. 3. 73. In a writ of ward of the body and land Damages ſhall be recovered, Roll. Abr. 575. But in writs of execution no damages ſhall be recovered, Roll. Abr. 575. 50 E. 3. 23., nor in a *ſcire facias*. 2 H. 6. 15.

But for this *vide* title *Prohibition*, and *vide*

If, after a prohibition to the ſpiritual court, the party proceeds in ſuch court, the plaintiff upon his declaration upon the prohibition, or upon an attachment, ſhall recover damages.

Roll. Abr. 575. Jon. 477. Cro. Car. 559. 2 Jon. 128. Raym. 387. Vent. 348. 350. 3 Lev. 360.

(B) What Perſons are entitled to, or ſhall recover Damages.

15 H. 7. 4. b. 2 Inſt. 285.

IF leſſee for years be ouſted, and he in the reverſion diſſeiſed, and he in the reverſion recover in an aſſiſe, yet he ſhall not recover damages.

Roll. Abr. 569.

So, if after the ouſter he in the reverſion enter upon the diſſeiſor, (as he may by law, to ſave a deſcent), and after the diſſeiſor reenter upon him, and he recover in an aſſize, yet he ſhall not have any

any damages; for the re-entry of him in reverſion reduces the eſtate to the leſſee, and then the damages for the profits belong to him.

If tenant for life, and he in reverſion join in a leaſe for life, they may join in an action of waſte; and tenant for life ſhall recover the place waſted, and he in reverſion damages. Co. Lit. 42. a.

In debt by baron and feme, upon a bond made to the feme *dum ſola*, they ſhall recover damages (*a*) jointly. Cro. Eliz. 259. (*a*) In an aſſiſe by baron and feme, if it be found they were diſſeiſed, they ſhall recover damages of the iſſues in common, 11 H. 4. 16. b. Roll. Abr. 570 —In treſpaſs by baron and feme, for impriſoning the feme till a fine * paid, for all the treſpaſs, but the fine, they ſhall recover damages in common. Bro. Damages 51. Roll. Abr. 571. ——— * *Qu.* As to the fine, that being to the particular and excluſive damage of the huſband, if it is not the proper ſubject of an action at his ſuit alone?

So, in trover by baron and feme, executrix of *A.* for goods of *A.* they ſhall recover damages jointly; for the poſſeſſion of the wife, as executrix, was alſo the poſſeſſion of her huſband, and the damages recovered ſhall be to the eſtate of the teſtator, and ſo may concern them both. Styl. 48.

If two jointenants bring an aſſiſe, and the one is ſevered, if it be found that the other had goods taken upon the land, he ſhall recover ſole damages for them †. 11 H. 4. 17. Roll. Abr. 571. † The owner of the goods may maintain an action alone, for them.

(C) Againſt whom Damages ſhall be recovered.

BY the ſtatute of *Glouceſter*, made 6 *E.* 1, *cap.* 1. "Whereas "before damages were not awarded in aſſiſes of *novel diſſeiſin*, "(*b*) but only againſt the diſſeiſors; it is provided, that if diſ- "ſeiſors (*c*) alien the lands, (*d*) and have not whereof damages "may be levied, (*e*) they, to (*f*) whoſe hands ſuch tenements "ſhall come, ſhall be charged with (*g*) the damages (*h*), ſo that "(*i*) every (*k*) one ſhall (*l*) anſwer (*m*) for his time, provided that "the diſſeiſee ſhall recover damages in a writ of entry, &c. (*b*) Owen, 112. Hob. 98. (*c*) So, if diſſeiſed, for, by equity, it extends to all that come under the diſſeiſor by right or wrong. 2 Inſt. 284.——So, if the lord diſtrains for rent, and a ſtranger reſcues, though the ſtranger is only a diſſeiſor in an aſſiſe againſt him and the tenant; if the ſtranger is found inſufficient, the tenant ſhall anſwer in damages, though he claims not from the diſſeiſor. 2 Inſt. 284. (*d*) The tenant ſhall be charged only where the diſſeiſor is inſufficient; but if able to pay part, but not the whole, both ſhall be charged; therefore, the judgment is always given generally againſt both. 2 Inſt. 284. (*e*) Lands held *in capite* were aliened to *J. S.*, who died, his heir within age; and the king committed his cuſtody to *B.*, who took the profits, the heir was no tenant within the ſtatute. 2 Inſt. 284. *Secùs*, if aliened to an infant, who took the profits, or if, coming in as heir, he had been out of ward. 2 Inſt. 284. (*f*) Yet theſe general words ſhall not charge thoſe with damages who have an eſtate caſt upon them by law, unleſs they conſent thereto, as the heir of the alienee, by refuſing to take the profits, may diſcharge himſelf of the damages. 2 Inſt. 284. So, if diſſeiſor enfeoffs *A.* and *B.*, and makes livery to *A.* only, and *A.* dies, if *B.* never aſſented, he may waive the poſſeſſion, &c. Inſt. 360. 2 Inſt. 286. (*g*) And where by ſubſequent ſtatutes double or treble damages are given in an aſſiſe, they ſhall be anſwered by every mean tenant accordingly, and for their inſufficiency by the tenant. 2 Inſt. 285. (*h*) In an aſſiſe, but not in a writ of entry, for that is to be brought againſt the tenant only, and this clauſe refers only to the aſſiſe. 2 Inſt. 286, 287. (*i*) If named in the aſſiſe; otherwiſe, if the diſſeiſor is found inſufficient, the tenant ſhall be charged with the whole. 2 Inſt. 285. But if found, that the diſſeiſor is inſufficient, and that he enfeoffed *A.* who enfeoffed *B.*, who enfeoffed the tenant, and that *A.* had it one year, and *B.* another, and the tenant another, the tenant ſhall be charged for his own time only, and the plaintiff ſhall loſe his damage againſt *A.* and *B.*, becauſe not named in the writ. 2 Inſt. 285. (*k*) Tenant for years, or by ſtatute, &c. is no meſne occupier within the act, unleſs the aſſiſe is brought by tenant by ſtatute, &c. 2 Inſt. 284. (*l*) If they have ſufficient, otherwiſe the tenant muſt anſwer for the whole. 2 Inſt. 285. (*m*) Yet ſeveral judgments ſhall not be given, but one judgment entirely againſt all, accord-

ing

ing to the uſage; but the ſheriff upon the execution may uſe ſuch indifferency as juſtices require. 2 Inſt. 285. If the ſheriff returns that the diſſeiſor is inſufficient, proceſs ſhall iſſue to levy it of the tenant. 2 Inſt. 285.

(a) This extends not to his heirs. 2 Inſt. 186.

"By the ſame act the (a) diſſeiſee ſhall recover damages in a "writ of entry (b) againſt (c) him that is found (d) tenant after the diſſeiſor."

But by a ſubſequent clauſe in this act, where he recovers the land againſt the diſſeiſor, he ſhall have damage. (b) Extends not to him that has an eſtate by law caſt upon him, if he waives the poſſeſſion. Co. Lit. 360. 2 Inſt. 286, 287. (c) If brought againſt two jointenants, and one diſclaims, and the other takes upon him the whole tenancy, and pleads, &c., he ſhall anſwer the whole damages. 2 Inſt. 287. (d) The diſſeiſor enfeoffs *A.* who enfeoffs *B.*, and in a writ of entry in the *per* and *cui* vouches *A.*, who pleads and loſes, judgment ſhall be given againſt the vouchee, becauſe he is found tenant in law. 2 Inſt. 287.

2 Inſt. 289. Noy, 68. *vide* title *Cop arceners.*

In a writ of partition by one coparcener againſt the other, no damages ſhall be recovered, though the defendant hath not been at all times (e) ready to make partition.

(e) If a man will avoid the damages, becauſe he hath been at all times ready to render the thing in demand, he ought to come at the firſt day. 17 E. 3. 71. In detinue againſt an executor, ſuppoſing it to come to his hands after the death of the teſtator, the defendant may come at the grand diſtreſs, and ſay, that he hath at all times been ready to deliver the writing after the time that it came to his hands, and thereby ſave damages againſt him. 22 Ed. 3. 9. Roll. Abr. 574.

(D) Of aſſeſſing the Damages: And herein,

1. Of the *Quantum* of the Damages the Jury may give.

Vide Moor, 419. 3 Leon. 150. Owen, 34. Vent. 267. Where money laid out in repairs ſhall be recovered in damages. Godb. 53. Where in treſpaſs for breaking his cloſe, &c. the court refuſed to grant a new writ of inquiry, becauſe the damages were too ſmall, the ſuing forth the writ being the plaintiff's own act. 2 Leon. 214.

IN all actions which ſound in damages, the jury ſeem to have a diſcretionary power of giving what damages they think proper: for though in contracts the very ſum ſpecified and agreed on is uſually given, yet if there are any circumſtances of hardſhip, fraud, or deceit, though not ſufficient to invalidate the contract, the jury may conſider of them, and proportion and mitigate the damages accordingly; as, in caſe upon a policy of aſſurance, which was a cheat, for an old veſſel was painted, and goods of no value put in the veſſel, and about 1500*l.* inſured upon it, and then the ſhip was voluntarily ſunk (f). So, on an action brought on a promiſe of 1000*l.* if the plaintiff ſhould find the defendant's owl; the court declared, though the promiſe was proved, that the jury might mitigate the damages; alſo on demurrer, by which the promiſe is confeſſed, the jury may conſider of the circumſtances, and mitigate damages accordingly.

But for this *vide* tit. *Trial*, and for what cauſe a new trial will be granted, *vide* Mod. 2. In treſpaſs the jury gave the plaintiff half a farthing damages, and held good. 2 Roll. Rep. 21, 22., & *vide* 2 Jon. 138. [(f) But fraud vacates the policy, and therefore no ſuch action would lie.]

Lev. 111. James and Morgan, Keb. 569. S. C. Thornborough v. Whitacre, 6 Mod. 305. S. P. 2 Ld. Raym. 1164. S. C. 3 Salk. 97. S. C. 1 Wilſ. 295.

The plaintiff declared upon an *aſſumpſit* to pay for an horſe a barley-corn a nail, doubling every nail, and avers, that there were thirty-two nails in every ſhoe, which, doubling every nail, came to 500 quarters of barley; which being tried before *Hyde*, he directed the jury to give the value of the horſe in damage, and accordingly they gave 8*l.* and held good.

2. Whether

2. Whether they may give more than the Plaintiff has declared for.

In (*a*) perſonal actions, the plaintiff ſhall recover damages only for the *tort* done before the action * brought, and therein the plaintiff counts to his damage.

10 Co. 117. a. (*a*) But in a real action he recovers his damages pending the writ, and therefore never counts to his damage, 10 Co. 117. a. and though damages be given by ſtatute, yet the old form remains. 2 Inſt. 286. ——— * In Foſter and Bonner, B. R. E. 1776, the court, on argument, determined, that in an action, for carrying perſons acroſs the Thames, in prejudice to the Graveſend ferry, the plaintiff might give in evidence a *tort*, after ſuing forth the *latitat*, and before the day of exhibiting the bill, ſaying, in ſuch caſe, the filing the bill was the commencement of the ſuit.

Alſo, in perſonal actions the plaintiff ſhall recover no more than he hath counted for, although the jury give him more, for he beſt knows the meaſure of his wrong, and what he is entitled to †.

2 H. 6. 7. 8 H. 6. 5. 10 Co. 116. Owen, 45. S. P. *per Cur.*

Kelw. 21. Yelv. 45. Cro. Eliz. 544. Bulſt. 49. Fitz. Damages 16. S. C. Bro. 2. S. C. Cro. Jac. 297. S. C. ——— † If the jury give more, the plaintiff muſt relinquiſh the *extra* damages, for if he enters up the judgment for the whole, which the jury gave, it is error, and cannot be amended or helped, in any manner. So, determined in *B. R.* H. 1773, Sandiford and Bean, Eſq.

If the tenant vouches, the demandant ſhall not recover more damages againſt the vouchee than he hath counted of; for the vouchee comes in lieu of the tenant, and the judgment is given againſt the tenant.

8 H. 6. 11. Roll. Abr. 578.

But the plaintiff in *detinue* may recover more damages againſt the garniſhee than he hath counted of, for his count was not againſt the garniſhee, but againſt the defendant, and damages againſt him are for the delay after the count.

8 H. 6. 5. 11. Bro. Damages, 68. S. C. Roll. Abr. 578. S. C.

In treſpaſs for reſcuing a diſtreſs, to his damage ſo much; if the defendant juſtifies the reſcous upon ſpecial matter, upon which it is demurred for the plaintiff, he ſhall have damages as he hath counted of, (*b*) for the defendant hath acknowledged the treſpaſs, and hath not denied the damages.

21 E. 3. 40. b. Roll. Abr. 578. (*b*) In debt for 200 *l.* upon the 2 E. 6., for not ſetting forth tithes, if the defendant pleads the 31 H. 8. c. 13. § 21., and that the lands were diſcharged in the hands of the prior of *B.* at the time of the diſſolution, &c. and thereupon iſſue taken; and at the trial the defendant cannot make good his plea; the value ſhall be taken as confeſſed, becauſe the iſſue is joined upon a collateral point; and the defendant took not the value by proteſtation. Allen 88. Ruled upon a trial at bar, and a verdict given for 200 *l.* *Vide* Roll. Abr. 572.

Where the jury finds greater damages than the party declares of, the court may, to prevent error, give judgment for ſo much as the party declares for, *nullo habitu reſpectu* to the reſt, elſe the party may releaſe the (*c*) overplus, and take judgment for the reſt.

Yelv. 45. [(*c*) But a *remittitur* cannot be entered in a term ſubſequent to that in which the judgment is entered. Wray v. Liſter, 2 Str. 1110. Chevely v. Morris, 2 Bl. Rep. 1300.]

Alſo, though the jury cannot regularly give the plaintiff more damages than he hath counted of, yet may they award him coſts diſtinct and ſeparate from the damages; and though ſuch coſts (*d*) exceed the damages laid in the declaration, yet ſhall the plaintiff recover both; for the damages are given for the wrong, for which

For this *vide* 10 Co. 115. b. Cro. Eliz. 568. 2 Roll. Rep. 447. Cro. Jac. 65.

Yelv. 70. Roll. Abr. 578. but *vide* 2 Inſt. 288.

which the action is brought, and the coſts for the charge of the ſuit; the one before the ſuit, and the other in and for the ſuit.

(*d*) Where the jury may give 10 *l.* coſts, though they give but 10 *l.* damages on the ſtatute 21 Jac. 1. c. 16. Salk. 207. and *vide* tit. *Coſts*.

3. Muſt be aſſeſſed purſuant to the Plaintiff's Right, or the Injury he has received; and herein of aſſeſſing entire Damages.

10 Co. 117.

If in a writ of entry *ſur diſſeiſin*, or in nature of an aſſiſe, a writ of inquiry of damages is awarded, the plaintiff ſhall recover his damages but from the time of the diſſeiſin to the time of the award of the inquiry of damages, and not after, though the writ of inquiry be not ſerved till ſeven years after; and if in ſuch writ an iſſue is joined triable by verdict, he ſhall recover damages but from the time of the diſſeiſin to the time of the verdict.

10 Co. 117. (*a*) But in perſonal actions the plaintiff ſhall

But in a *præcipe quod reddat*, of a rent of the poſſeſſion of the demandant himſelf, he ſhall recover arrears as well (*a*) pending the writ as before *uſque diem judicii redditi*.

recover damages only for the tort done before the action brought. 10 Co. 117.

Co. Lit. 257.

The diſſeſee, in an action of treſpaſs, may recover damages for the firſt entry without any regreſs.

Co. Lit. 257. *vide* 1 Roll. Abr. 550.

But after regreſs he may have treſpaſs with a *continuando*, and therein recover for all the meſne occupation as well as for the firſt entry.

Co. Lit. 257. a.

So, in an action upon 5 *R.* 2. *cap.* 7. for entering into land, *ubi ingreſſus non datur per legem terræ*, the plaintiff ſhall recover damages for the firſt *tortious* entry only.

Co. Lit. 257.

But in an action upon 8 *H.* 6. *cap.* 9., where one enters by force, or enters peaceably and detains with force, or when one enters with force, or detains with force, the plaintiff without any regreſs ſhall recover treble damages, as well for the meſne occupation as for the firſt entry.

Hob. 189. Harbin and Green, Moor, 887. S. C. Carth. 387. 1 Ld. Raym. 248. 12 Mod. 131. Comb. 442. 2 Salk. 663.

If in caſe, for not grinding at the plaintiff's mill, the plaintiff derives his title under a leaſe made to him 11 *Jac.*, and then ſets forth, that the defendant at ſeveral times, from 2 *Jac.* to 12 *Jac.* did grind his corn elſewhere, he cannot have judgment, though after verdict, becauſe the damages are aſſeſſed for all that time, *viz.* from 2 *Jac.* to 12., whereas the plaintiff's leaſe commenced 11 *Jac.*; ſo that the damages are given to the plaintiff before he had any title.

S. P. and S. C. cited. See Ld. Raym. 329. Comyns 231. pl. 129.

2 Saund. 169. Hambledon and Veere, Lev. 299. S. C. Carth. 261. S. C. cited. (*b*) The plaintiff declared for a battery of

In caſe the plaintiff declared, that *J. S.* 19 *Sept.* 16 *Car.* 2., was retained as an apprentice to ſerve the plaintiff for nine years, and continued in his ſaid ſervice till the 31 *Oct.* 21 *Car.* 2., when the defendant procured the ſaid *J. S.* to leave the plaintiff's ſervice, (*b*) *per quod* the plaintiff *totum proficuum quod ratione ſervitii præd.* J. S. *per totum reſiduum termini reciperi potuiſſet totaliter perdidit*; and (*c*) after verdict for the plaintiff, and general damages given, though it appeared the term was not expired, it was intended

tended that damages were given for all the term, as well the time (*d*) to come as paſt; for the damages muſt be intended to be taxed according to the declaration; and if it ſhould be intended otherwiſe, it would be uncertain to what time they were taxed, whether to the exhibition of the bill, or verdict given.

his ſervant, 19 Jan. &c. *per quod* he loſt his ſervice for a long time, viz. for the

ſpace of ſix months then next following, &c. Hob. 284. After a verdict for the plaintiff, though the original bore *teſte* before the end of the ſix months; yet the plaintiff had his judgment, for the *viz.* was more than needed, being not of the ſubſtance of the action, but for aggravation of damages only. Allen 23. *per curiam*, but yet *vide* Cro. Jac. 619. Yelv. 94. (*c*) Where upon a demurrer it may be helped, for the plaintiff may take damages for the departure only. Mod. 271. (*d*) For this *vide* 5 Mod. 286. Carth. 389.

In treſpaſs, the plaintiff declared, that upon the ſecond day of *July, anno* 5 *W.* 3. *&c.*, and from thence to the time of the action, he was poſſeſſed of two meadows adjoining to a river; and that the defendant, *Aug.* 2. in the ſame year, exalted his mill-banks to that degree, that thereby the water overflowed his (the plaintiff's) meadows, *per quod* he loſt the uſe and profit of his meadows, from the ſaid ſecond of *July* to the time of the action; and after verdict and entire damages, judgment was arreſted; for it was impoſſible that he ſhould loſe the uſe, *&c.* before the fact was done.

Carth. 386. Prince and Meulton, 2 Salk. 663. pl. 5. S. C. Comb. 442. S. C. Ld. Raym. 248. S. C. [Yalden v. Hubburb, Com. Rep. 231. 2 Ld. Raym. 1382.]

But where in treſpaſs for erecting and continuing 300 perches of ſtone wall on the ſoil of the plaintiff 2 *April an.* 2 *W. & M. tranſgreſſion. prædict. quoad continuation. mur. præd. a* 20 *die Feb. anno primo W. & M. uſque diem exhibitionis billæ continuando;* it was objected, that the continuance being laid for one year before the commencement of the treſpaſs, and entire damages being given, all was void; yet it was adjudged, that the continuance being for a time before the commencement of the action was ſenſeleſs and void; and it cannot be intended that any damages were given for a matter which was void in itſelf.

Carth. 230. Bridges and Horner.

In caſe, for ſtopping lights by erecting a new ſtructure, the declaration concluded, that *occaſione premiſſorum magna tenebritate obſcurat. fuit & adhuc exiſtit, &c.* after verdict and entire damages, it was objected, that by *adhuc exiſtit*, the jury had given damages for a matter ſubſequent to the action, and that no damages can be given for a matter after the action commenced (*a*); becauſe if another action ſhould be brought for the ſame thing, the former action could not be pleaded in bar to it; but it was reſolved, that the *adhuc* ſhould (*b*) refer to the time of the plaint levied, and not to the time of the declaration.

Carth. 261. Carter and Cawthrop, 4 Mod. 152. S. C. 3 Lev. 345. S. C. 1 Show. Rep. 366. S. C. [(*a*) In treſpaſs, tort, &c. new actions may be brought for matter

ſubſequent to the depending ſuit, and therefore damages cannot be given for it: but it is otherwiſe where a duty or demand has ariſen, pending the writ, for which no ſatisfaction can be had by a *new* ſuit, for there ſuch duty or demand ſhall be included in the judgment upon the action already depending; as in the old writ of annuity; *aſſumpſit* for principal and intereſt, upon a contract obliging the defendant, the principal with intereſt from ſuch a time. Robinſon v. Bland, 2 Burr. 1086.] (*b*) But in an action *de uxore abducta*, and keeping her from him *uſque* ſuch a day, which was ſome time after the exhibiting of the bill, judgment was ſtayed, for the jury ſhall be intended to have given damages for the whole time mentioned in the declaration. Vent. 103. See 10 Mod. 273. 274.

If an action upon the caſe be brought for ſpeaking words all at one time; and upon not guilty pleaded, verdict be given for the plaintiff; though ſome of the words will not maintain the action,

Roll. Abr. 576. But for this, and for what

things the damages ſhall be ſaid to be given, *vide* Godb. 343. Moor, 141. pl. 283. 708. pl. 987. Cro. Eliz. 329. 788. Bulſt. 37. 3 Bulſt. 283. Cro. Car. 237. 328. March 48. Sid. 38. Winch 33.

action, yet if any of the words will, the damages may be given entirely, for it ſhall be intended that the damages were given for the words which are actionable, and that the others were inſerted only for aggravation *.

——* But, if the declaration conſiſts of ſeveral counts, all the words in ſome of which are not actionable, and there is not any ſpecial damage laid, or if laid, not found, and a general verdict is taken for the plaintiff, (except as to the ſpecial damage, if any laid, and that is found for defendant,) the judgment will be erroneous, and may be avoided, by motion in arreſt of judgment, or reverſed, on error brought.——[It is the rule of the court of C. P. to award a *venire facias de novo* in ſuch caſe, upon payment of coſts, that the plaintiff may ſever his damages. Anger v. Wilkins, Barnes 478. Smith v. Haward, *Id.* 480.]

Moor, 708. pl. 987. Cro. Eliz. 329. Bulſt. 37. 3 Bulſt. 283. Cro. Car. 237. 328.

But if the action be brought for ſeveral words ſpoken at ſeveral times, and the action will not lie for the words ſpoken at one time, but will lie for the words ſpoken at another time; and upon not guilty pleaded, a verdict be found for all the words, and entire damages given; this is not good. See *ſupra*, n. Hutt. 131. Roll. Abr. 576.

10 Co. 130. a. 132. b. (*a*) Trover *de uno riſco*, (*Anglice* a trunk full of linen, &c.) and damages intended to be given for the trunk only. Cro. Jac. 665.

If the plaintiff declares that he bought of the defendant *diverſa bona & catalla*, *viz. unum fulcrum lecti* (*Anglice* a field bedſtead) with a teſter and curtains of *ſay*, *unum canopium* (*vocat.* a canopy) *&c.* and that the defendant aſſumed to deliver *bona præd.*, but had not, *&c.* and there is a verdict for the plaintiff, and general damages given, it ſhall not be preſumed that any damages were given for the teſter and curtains, which (*a*) were not alleged *poſitivè*; but only *expoſitivè* and this expoſition is too extenſive, for *fulcrum* ſignifies the bedſtead only.

2 Roll. Rep. 178. Steel and Spight, (*b*) *A.* brought an action in an inferior court for ſlandering him in his trade, by which he loſt his cuſtom, within the juriſdiction of that court *& alibi*; and it was held maintainable, notwithſtanding the *alibi*. Vent. 104. cited, by Twiſden to have been adjudged.

If in an action upon a covenant divided into two (*b*) branches, the breach is aſſigned in one part only, *&c.* and the jury aſſeſs damages generally *pro fractione conventionis præd.* this ſhall have relation to that part only in which the breach was aſſigned.

Styl. 161. Creſſit and Burgis. (*c*) An action upon the ſale of ſeveral things for divers ſums of money, *quæ quidem pecuniarum ſummæ attingunt ad* 10 *l.*, whereas rightly computed, they came but to 9 *l.*, the jury gave damages leſs than 9 *l.* and it was held good; but if the verdict had been for 10 *l.* it had been naught. Vent. 104. cited by Twiſden to have been adjudged.

If in debt upon 2 *E.* 6., for not ſetting forth tithes growing upon ſeventy acres of land, *&c.* the jury as to ſixty-ſix acres give damages, *&c.* and as to the five acres reſidue, give damage, *&c.* whereas it ought to have been, as to the four acres reſidue; yet this being only (*c*) a miſcounting of the jury, and no damage to any thereby, the plaintiff ſhall have his judgment.

Sid. 96. (*d*) But with ſuch recital, it would not have been preſumed that damages

If in treſpaſs for an aſſault, battery, and wounding, the defendant, *quoad* the force, pleads not guilty; and *quoad* the aſſault and battery, that he was removing a market-croſs to a more convenient place, and the plaintiff interrupted him, *per quod molliter manus impoſuit*, *&c.*, and thereupon they are at iſſue, and the jury find the defendant guilty *de injuriâ ſuâ propriâ*; and ſo (*d*) recite the

the entire declaration of the aſſault, battery, and wounding, (though the wounding was not in iſſue,) and aſſeſs damages *occaſione tranſgreſſionis illius* to 20*l.*, it muſt be intended, that the damages were given for all in the declaration, *viz.* the wounding, though not in iſſue, and the jury cannot find (*a*) more than the plaintiff has declared for, and aſſeſs damages for it.

were given for what was not in iſſue. Hob. 187. Cro. Jac. 353.

(*a*) Nor can they give damages for what they have not found. Bulſt. 64.

If in trover, *inter alia de una ſalſura (Anglice a ſalting trough)*, there is a verdict for the plaintiff and entire damages; the declaration as to the trough being merely in *Engliſh*, the damages ſhall be intended given for the other particulars; but if the defendant had been acquitted of the other things, and expreſly found guilty of this, it would have been otherwiſe.

Sid. 98. Lev. 99. For this ſee 10 Co. 133. Raym. 15. 3 Lev. 336. Ld. Raym. 317.

If in an avowry for rent due in money, and alſo for ſo many hens, it appears on the face of the avowry that the hens were not due at the time of the diſtreſs taken; although there are entire damages and coſts, yet the plaintiff may releaſe the damages and rent for the hens, and take judgment only for the rent in money (*b*), but need not releaſe the coſts.

Carth. 437. Morrice and Golder, adjudged, and a *remittitur* entered accordingly. (*b*) Byars and Newton, Trin. 28. Car. Rot. 728. S. P. ſaid to be adjudged.

If an action upon the caſe is brought (*c*) upon two promiſes (*d*), and both are found for the plaintiff, the jury may give entire damages for both, for this is at the peril of the plaintiff; but if the action does not lie for one of them, the plaintiff (*e*) ſhall not have judgment for the other (*f*).

Roll. Abr. 570. Roll. Rep. 423. 3 Bulſ. 258. S. C. the judgment being given on demurrer and entire damages aſſeſſed upon a writ of enquiry. (*c*) So, in other actions upon the caſe. Moor, 707. pl. 987. Cro. Eliz. 560. Hob. 189. 10 Co. 130. Moore, 281.—So, in debt. Brownl. 70.—So, in treſpaſs. Styl. 174. 182. 399. 3 Leon. 213. Cro. Car. 21. Godb. 57.—So, in covenant. Cro. Eliz. 685. Cro. Jac. 439. Sand. 155.—And for this *vide* 5 Co. 108. a. 10 Co. 130. 3 Bulſ. 231. Hetl. 51. 53. Lit. Rep. 61. Styl. 198. Cro. Eliz. 59. Cro. Jac. 239. Sid. 38. Moore, 281. [1 Stra. 621. Fort. 376. Andr. 21. 2 Ld. Raym. 1381.] (*d*) So, where the plaintiff alleges two breaches of an award, one of which is inſufficient, and entire damages are given. Leon. 170. 5 Co. 108. 10 Co. 131., but *vide* Yelv. 35. and tit. *Arbitrament.* (*e*) Where entire damages ſhall hinder the plaintiff's judgment, *vide* 2 Roll. Abr. 99.——[(*f*) But if one of the promiſes be inſenſible, or impoſſible to be performed, and there be a general verdict for the plaintiff with entire damages, the judgment will not be arreſted; becauſe it is not to be intended, that any part of the damages was aſſeſſed as to ſuch a promiſe. 1 Roll. Abr. 577. pl. 5, 6. But a diſtinction is made by Lord C. J. Vaughan, in Nichols v. Reeve, 1 Freem. 83. between a legal impoſſibility of performing a promiſe, and a phyſical one; that it is only with reſpect to the latter that the above rule holds: for in the other caſe, *non conſtat* to the jurors whether the promiſe be good or not in law, and therefore the preſumption is, that they gave damages for it.]

So, where an action againſt an adminiſtrator was laid as follows, *ſſ. In conſideration that the plaintiff had ſold a mare to the inteſtate, he promiſed to pay the plaintiff tantam denariorum ſummam quantam equa prædict. rationabiliter habere meruit*, and then avers in fact, *quod equa prædict. rationabiliter habere meruit* 8*l.*; which laſt promiſe being void, it being abſurd to ſay that the mare deſerved to have ſo much money, makes the whole void.

Carth. 254. Blackman and Cobbet, adjudged, and the judgment of the court of C. B. in which there were entire damages, reverſed accordingly.

4. Where

4. Where to be aſſeſſed jointly or ſeverally, where there are ſeveral Defendants.

11 Co. 6. b. Cro. Eliz. 860. Cro. Jac. 118. 384. Roll. Rep. 31. Hob. 66. *vide* Bulſ. 157.

The jury cannot regularly aſſeſs (*a*) ſeveral damages for one treſpaſs, with which the defendants are jointly charged by the plaintiff's writ or declaration; for though in fact one was more malicious, and did greater wrong than the other, yet all coming to do an unlawful act, the act of one is the act of all the parties preſent.

(*a*) For by finding them guilty *de præmiſſis*, they find them equally guilty, and it is a rule in law, that what the plaintiff had laid joint in his declaration, the jury cannot ſever in their verdict. Carth. 20. *arguendo*.

11 Co. 6. b. Brownl. 233. S. C.

But in treſpaſs, if one defendant is found guilty at one time, and the other at another time, ſeveral damages may be (*b*) taxed.

(*b*) And the plaintiff hath election to take execution *de melioribus damnis*. 3 Mod. 102.

Cro. Car. 239. Walſh and Biſhop, 3 Mod. 102. S. C. cited.

So, where they plead ſeveral pleas, as in an action of battery, if one pleads not guilty, and the other juſtifies, and both iſſues are found for the plaintiff; in ſuch caſe he may enter a *nolle proſ.* againſt one, and take judgment againſt the other, becauſe their pleas are ſeveral.

11 Co. 6. b. Roll. Rep. 31. S. C. 10 Co. 119.

If in treſpaſs againſt two, one appears againſt whom the plaintiff counts *ſimul cum, &c.* who pleads, and is found guilty and damages aſſeſſed, and after the other appears and pleads, and is found guilty, he ſhall be charged with the damages taxed by the firſt jury.

11 Co. 5. b. Sir John Heyden's caſe. Cro. Car. 102. Like point in an appeal of mayhem.

If in treſpaſs againſt *A. B.* and *C.* for a battery and wounding, *A.* appears, and the plaintiff declares againſt him, *ſimul cum, &c.* and *A.* pleads not guilty, and a *venire* iſſues, *&c.* and after *B.* appears, and the plaintiff declares againſt him *ſimul cum*, and *B.* pleads not guilty, and a *venire* iſſues, and both theſe iſſues are tried at the ſame aſſiſes, *viz.* that againſt *A.* is firſt tried, and 200 *l.* damages given; and after that againſt *B.* is tried, and 50 *l.* damages given; and after *C.* appears and confeſſes the action, and a writ of inquiry is awarded upon the roll, but none iſſues, the (*c*) plaintiff at his election may have judgment for the damages given by the jury, and this ſhall bind all, for in judgment of law the ſeveral juries gave their verdict at the ſame time.

(*c*) In treſpaſs againſt *A.*, *B.*, and *C.*, *A.* and *B.* juſtify; upon which there is a demurrer, and *C.* pleads, thereupon iſſue is joined, and the demurrer is adjudged againſt *A.* and *B.*, and upon writ of enquiry damages are given; and after, the iſſue is found for the plaintiff, and damages given: the the plaintiff may have his election, which damages he will take. Roll. Rep. 395. *per Cur.* Cro. Jac. 350. S. C. adjudged upon a writ of error; and the firſt judgment affirmed accordingly, becauſe the writ is entire, and the defendants are all charged with one battery, though the declarations are ſeveral. Roll. Rep. 30, 31. S. C. [1 Wilſ. 30.]

Noke v. Ingham, 1 Wilſ. 89.

[So, where two defendants in *aſſumpſit* ſevered in pleading, and the one pleaded a bankruptcy, which, on iſſue joined, was found for him, it was holden, that the plaintiff might enter a *nolle proſequi* as to him, and ſtill proceed to final judgment and execution againſt the other.]

Cro. Jac. 251. And if the damages

In treſpaſs for an aſſault, battery and wounding, the defendant *quoad* the battery and wounding pleads not guilty, and *quoad* the aſſault

assault justifies, and both issues are found against the defendant, several damages shall not be found, for the assault is included in the battery and wounding.

should be found severally, it would be double.

If in trover and conversion of 2000 loads of coals, upon not guilty pleaded, the defendants are (*a*) found severally guilty for several loads of coals, and severally not guilty for the residue; the jury must assess several damages (*b*); adjudged upon a writ of error in the *Exchequer-Chamber*, and judgment against them severally for damages, according to the verdict, and intire costs.

Cro. Car. 54. Player and Warn.

(*a*) So, in trespass, if one defendant is found guilty in part only, and the other in all, the damages shall be several. Cro. Eliz. 860. Brownl. 233. Bulst. 50. (*b*) But *vide* Carth. 20., where it is said that the contrary had been lately resolved in *C. B.* between Whorewood and Jackson. [And agreeably to that resolution the law is now settled. For where the count is of a *joint* trespass, and the jury find the defendants guilty of a *joint* trespass, or they all confess the trespass, the damages cannot be severed. Hill v. Goodchild, 5 Burr. 2790. Onslow v. Orchard, 1 Str. 422. Lowfield v. Bancroft, 2 Str. 910. Mitchell v. Milbank, 6 Term Rep. 199.]

In trespass and false imprisonment, and imposing the crime of treason on the plaintiff, against *A. B.* and *C. B.* confessed the action, *A.* and *C.* pleaded jointly not guilty, and were found guilty; the jury assessed damages, *viz.* 1000 *l.* against *A.* and 50 *l.* against *B.* and *C.* each; and the plaintiff entered a *nolle prosequi* as to *B.* and *C.*, and took judgment against *A.* only for the 1000 *l.*: it was holden, that the defect of the verdict was (*c*) cured by the *nolle prosequi*; for as the plaintiff might have brought his action against them jointly or severally, so it is but reasonable that he should have the same election as to the damages; although it was objected that the plaintiff hath election *de melioribus damnis* only where the trials are at several times, and this was a fact of which they are all equally guilty, and that it was a contradiction to say that the plaintiff is injured by one to the value of 50 *l.* only, and by the other to the value of 1000 *l.*

Carth. 19. Rodney v. Strode *& al.* adjudged in B. R. Pasch. 2 J. 2, and affirmed in the Exchequer-chamber, as also in the House of Lords, 1 W. & M. and a like judgment said to be lately given in B. R. between Trobarefoot and Greenway, 3 Mod. 101. S. C. Cro. Car. 243. Like case; where it is said, though damages ought not to have been taxed severally, yet the plaintiff relinquishing his suit against the other, it is not material, no advantage being taken thereof. [Though if several damages be assessed in such case, and judgment thereupon entered up, it would be error, yet is it no ground to arrest the judgment. Carth. 19. 6 Term Rep. 199.] (*c*) For this *vide* Rast. Ent. 127. 583. 654. Roll. Abr. 784. Cro. Car. 54.

[If there be judgment by default as to part, and an issue upon other part, or in an action against several defendants, if some of them let judgment go by default, and others plead to issue, there ought to be a special *venire*, as well to try the issue, as to inquire of the damages, *tam ad triandum quam ad inquirendum*, and the jury, who try the issue, shall assess the damages for the whole, or against all the defendants. In these cases, when the defendants who plead to issue are acquitted at the trial, the jury, in some instances, shall assess damages against the defendants who let judgment go by default, and in others not. In actions upon *contract*, as *covenant* (*d*), *assumpsit* (*e*), &c. the plea of one defendant, for the most part, enures to the benefit of all; for the contract being entire, the plaintiff must succeed upon it against all or none; and therefore, if the plaintiff fail at the trial, upon the plea of one of the defendants, he cannot have judgment of damages against the others, who let judgment go by default. But in actions of

Tidd's Pr. 591. 11 Co. 5.

(*d*) 1 Lev. 63. 1 Sid. 76. 1 Keb. 284. S. C. (*e*) Ca. Pr. C. B. 107. Pr. Reg. 102. S. C.

3 Term Rep. 662.

tort, as *treſpaſs*, &c. where the wrong is joint and ſeveral, the diſtinction ſeems to be this, that where the plea of one of the defendants is ſuch, as ſhews the plaintiff could have no cauſe of action againſt any of them, there, if this plea be found againſt the plaintiff, it ſhall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages againſt thoſe who let judgment go by default (*a*): but where the plea merely operates in diſcharge of the party pleading it there, it ſhall not operate to the benefit of the other defendants, but notwithſtanding ſuch plea be found againſt the plaintiff, he may have judgment and damages againſt the other defendants (*b*).

(*a*) 2 Ld. Raym. 1372. 1 Stra. 610.

(*b*) 2 Str. 1108. 1122.

Tidd's Pr. 592.

If there be a demurrer to part, and an iſſue upon other part, or, in an action againſt ſeveral, if ſome of them demur, and others plead to iſſue, the jury who try the iſſue ſhall aſſeſs the damages for the whole, or againſt all the defendants.

2 Str. 1140. 1222.

But if in treſpaſs, one defendant lets judgment go by default, another demurs, and a third pleads to iſſue, and is acquitted, the plaintiff may aſſeſs ſeveral damages againſt the others.

Snow v. Como, 1 Str. 507.

If there be a demurrer to one count, and an iſſue on the other, and the plaintiff be nonſuited on the iſſue, contingent damages cannot be aſſeſſed on the demurrer.]

(E) Where the Court may increaſe or mitigate the Damages.

Roll. Abr.

IN (*c*) all actions at *niſi prius*, where damages are the principal, as the court can have no certain conuſance of the cauſe, either by record or other matter apparent, they can neither mitigate nor increaſe the damages.

(*c*) In treſpaſs for cutting his trees, upon not guilty pleaded, the court cannot increaſe the damages given by the jury, becauſe it lies not in their conuſance. 3 H. 4. 4. Bro. Coſts 7.—Nor can they diminiſh them, becauſe the treſpaſs is local, and it cannot appear to them what the damages were. Brownl. 204.—So, in caſe for words, though the court thought the damages exceſſive, yet they would not mitigate them. Palm. 314. And though at firſt they inclined to do it, yet upon great conſideration they reſolved to leave ſuch matters of fact to the trial of the jury, who beſt know the quality and eſtate of the perſon, and the damages he hath ſuſtained.

22 E. 3. 11. b. 3 H. 4. 4. Roll. Abr. 572. Leon. 139. ſo done.

But in (*d*) battery *pro amputatione manus dextræ*, the court may increaſe the damages, for it is apparent to the court by the record and (*e*) view of the perſon.

(*d*) So, in an appeal of mayhem, upon view of the mayhem. 8 H. 4. 22. 3 Aſſ. 30. ——In an appeal of mayhem the jury gave 20 marks damages, and upon view in court, and information of the ſurgeons there preſent, the court increaſed the damages to 100 *l.* becauſe he loſt the uſe of his hand. Roll. Abr. 572. Freeman and Trevers. (*e*) It is not ſufficient that the juſtices of *niſi prius* upon view thereof, certify that he had ſuſtained damages to ſuch greater ſum; for the juſtices of the court, out of which it iſſues, cannot increaſe the damages without their view. 8 H. 4. 23. Roll. Abr. 572. 3 Salk. 115. pl. 6. Ld. Raym. 176. ——But upon a view *in pais* by any of the juſtices of the court into which the *niſi prius* is returned, they may increaſe damages. 8 H. 4. 23. Bro. Damages 74.

19 H. 6. 10. adjudged. Roll. Abr. 573. Styl. 310. S. C. adjudged.

So, in treſpaſs, if judgment be given upon *nihil dicit*, and a writ of inquiry of damages executed, the court may increaſe or (*f*) diminiſh the damages found by the inqueſt; for that they might have awarded damages, according to their diſcretion, without ſuch writ:

(*f*) Judg-

writ: adjudged in an action of aſſault, battery and wounding (*a*); the manner of doing thereof being ſpecially laid in the declaration, though the inqueſt gave 200*l.* damages, yet upon examination of ſurgeons, and upon view of the wound in court, and for the heinouſneſs of the fact, being done in the high ſtreet in the day-time with a ſtilletto, with an intent to kill him; and the ſurgeon by agreement being to have 150*l.* for the cure; the plaintiff being in great danger of death, and having loſt a pottle of blood, as the ſurgeons ſaid, the court increaſed the damages to 400*l. in toto*; and judgment given accordingly.

ment in battery by *non ſum informatus*, and upon a writ of inquiry of damages found, &c. And upon a motion to mitigate the damages, the court

ſaid, that in ſuch caſes they never alter the damages. Lit. Rep. 150. Hetl. 93. Ld. Raym. 176.

(*a*) Otherwiſe, if the wounding be not particularly expreſſed in the declaration, that the court may judge thereof by the record; for it ought to appear that the wounding was by this battery, and the party is not to be viewed in court by a bare averment at the bar. Styl. 345.——So, in an appeal of mayhem, when the particulars of the mayhem are not expreſſed in the declaration, the court upon view of the mayhem cannot increaſe the damages, unleſs the judges of *niſi prius*, before whom tried, certify the particulars of the mayhem to the court; or where tried before a judge of the ſame court, who affirms that theſe are the mayhems that were proved upon evidence; otherwiſe *non poteſt conſtare curiæ*, that theſe are the ſame mayhems for which the plaintiff has declared. Latch 223. Sid. 108. 177. [In Auſtin v. Hilliars, Hardr. 408., it was adjudged, that the damages may be increaſed, if the word *maihemavit* be in the declaration, though the better way is to expreſs the manner of the maihem. And in another caſe, the court ſeemed to think a declaration that the defendant aſſaulted and maimed the plaintiff in his left hand, particular enough. Brown v. Seymour, 1 Wilſ 6. If the wound be apparent, though it be not a maim, the damages may be increaſed by the court. Cook v. Beal, 1 Ld. Raym. 176.]

In treſpaſs for an aſſault and battery againſt *A.* and *B.*, *A.* appeared, *&c.* and a verdict was given againſt him, and damages taxed to 30*l.* and the court upon view of the mayhem increaſed the damages to 40*l.* and after a verdict was given againſt *B.* and damages taxed; and then it was moved that the court, upon another view of the wound, would increaſe damages againſt *B.*, for that *A.* had murdered the officer that came to ſerve the execution upon him for the 40*l.*, ſo that poſſibly the plaintiff might recover nothing againſt *A.* But it was denied by the court, for that they could have the view but once in the ſame action; though if he had brought ſeveral actions, it would have been otherwiſe; but the court directed the plaintiff to ſtay till *A.* was hanged, and then they might have the view and increaſe the damages. Lit. Rep. 51.

In treſpaſs *Quare inſultum fecit et maletractavit* the wife of the plaintiff, *et equam*, upon which the wife rode, *percuſſit*; ſo that the wife was thrown, and another horſe trod upon her, *per quod* ſhe loſt the uſe of three fingers, *&c.*; there was a verdict for the plaintiff, and 8*l.* damages; and the court refuſed to increaſe the damages upon view of the mayhem and hearing ſurgeons, becauſe there was no mayhem or wounding directly done by the party, but rather by accident, *viz.* by the coming, *&c.* of another horſe, which, whether he came, *&c.* or the wife might have avoided him, is matter of evidence. Sid. 433. Burford and his Wife v. Dodwell, Mod. 24.

The courts have a general diſcretionary power, except in ſpecial caſes, as (*b*) local treſpaſſes, *&c.* either to increaſe or abridge the damages found by an (*c*) inqueſt of office. Roll. Abr. 573. (*b*) 27 H. 8. 2. pl. 8. 10 H. 6. 10. pl. 28. Brownl. 204.

(*c*) In action for taking his goods, if the defendant avows, upon which it is demurred, and adjudged for the plaintiff, or upon default, and damages found upon the writ of inquiry of damages, the court may increaſe them; for the court (this being upon demurrer) might have awarded damages without inquiry; and therefore the inqueſt is but for their information.

14 H. 4. 9. 3 H. 6. 29. b. Yelv 152. Brownl. 214.—But where on a writ of inquiry the court refuſed to mitigate damages, *vide* 3 Leon. 150. Godb. 135. Lit. Rep. 150. Hetley 93.—— * *Qu. de hoc?* The conſtant practice is, to award a writ of inquiry to the ſheriff who ſummonſes a jury, to aſſeſs the damages, which done, the inqueſt is returned to the court.

13 Hen. 4. 7. b. *vide* Roll. Abr. 578. All. 88.

In treſpaſs for taking his goods to the damage of 20 *l.* if the defendant pleads an arbitrament made in another county, and this is tried againſt the defendant, and damages aſſeſſed for the treſpaſs; yet in as much as this foreign jury could not have full conuſance of the treſpaſs, and the defendant hath not denied the damage to be according to the count, the court with the aſſent of the plaintiff may increaſe the damages, and to ſo much as the plaintiff hath counted †.

† *Qu.* if this is law? The plaintiff might have produced his evidence before this as well as before another jury; and whether ſetting aſide the verdict would not be more proper?

2 Hawk. P. C. c. 23. § 147.

On the ſtatute of *Weſt.* 2. *cap.* 12., which gives damages to an appellee on a falſe and malicious appeal; if the jury give too great damages, the court may abridge them; or if they give too ſmall damages, the court may increaſe them; for after the acquittal of the appellee, their inquiry as to damages is to be conſidered only as an inqueſt of office; alſo the (*a*) words of the ſtatute are, *Damages ſhall be given according to the diſcretion of the juſtices*, &c.

(*a*) By the ſtatute 3 E. 1. c. 20. it is enacted, that if a treſpaſſer in parks and ponds is attainted at the ſuit of the party, great and large amends ſhall be awarded, according to the treſpaſs; in the explanation of which ſtatute, it is ſaid, that if the damages are too ſmall, the court hath power to increaſe them, for that the word *award* properly belonged to the court. 2 Inſt. 200.——* If there is a judgment by default or confeſſion, and the certainty of the demand appears upon record, the court may aſſeſs damages, without awarding a writ of inquiry, if they will. 2 Sand. 107.—So, if there be judgment for the plaintiff on demurrer.—So, in debt—(where generally, if not always, the damages are nominal).—But where the demand is not certain upon the record, or where the damages are not merely nominal, and judgment is for plaintiff on demurrer, by default, or confeſſion, and the damages are not confeſſed, a writ of inquiry ſhould iſſue. See Yelv. 152. 3 Leo. 213. Lut. 211. 213. 11 H. 7. 5. b. Cro. El. 536. For damages are to be proved, by a *vivâ voce* examination of witneſſes, which is not the proper province of the court. *—— [But in actions upon promiſſory notes and bills of exchange, it is the practice, inſtead of executing writs of inquiry, to apply to the court for a rule to ſhew cauſe, why it ſhould not be referred to the maſter to ſee what is due for principal and intereſt; and why final judgment ſhould not be ſigned for that ſum without executing a writ of inquiry; which rule is made abſolute, on an affidavit of ſervice, unleſs good cauſe is ſhewn to the contrary. Shepherd v. Charter, 4 Term Rep. 275. Raſhleigh v. Salmon, 1 H. Bl. 252. Andrews v. Blake, *Id.* 529. Longman v. Fenn, *Id.* 541. This practice, however, is confined to actions upon promiſſory notes and bills of exchange, where the *quantum* of damages depends upon figures, which may be as well aſcertained by the maſter as before a jury: and, therefore, where the defendant had ſuffered judgment by default, in an action of *aſſumpſit* on a foreign judgment, the court refuſed to make the rule abſolute for a reference to the maſter; ſaying, this was an attempt to carry the rule further than had yet been done, and as there was no inſtance of the kind, they would not make a precedent for it. Meſſin v. Lord Maſſareene, 4 Term Rep 493. In a ſubſequent caſe, viz. Maunſel v. Lord Maſſareene, 5 Term Rep. 87., the court refuſed to make the rule abſolute in an action on a bill for exchange for foreign money; the value of which is uncertain, and can only be aſcertained by a jury. Cuming v. Munro, 5 Term Rep. 87. Bagſhaw v. Playn, Cro. El. 536. Reads v. Peck, Cro. Ja. 617.]

(F) Of the Manner of aſſeſſing and recovering Damages.

Yelv. 176. (*b*) So, on the ſtatute of Weſtm. 2. c. 26. The court ſhall double the damages. 2 Inſt. 416.——So, on the ſtatute 23 H 6. c. 10. Cro. Car. 438.

IF treſpaſs is brought againſt overſeers of the poor, *&c.* for any act done by authority of 43 *Eliz. cap.* 2., and there is a verdict for the defendant, the jury ſhall aſſeſs the damages which ſhall be (*b*) trebled by the court.

N

(a) No damages can be given to the party grieved upon an indictment, or any (b) other criminal proſecution; and where, by ſtatute, damages are given to the party grieved by the offence intended to be redreſſed, they cannot be recovered on an indictment, grounded on ſuch ſtatute, unleſs ſuch method of recovering them be expreſly given by the ſtatute (c); but they ought to be ſued for in an action on the ſtatute, in the name of the party grieved; yet the court may, by (d) virtue of a privy ſeal, give to the party injured part of the fine ſet on the offender, or (e) may induce a defendant to make ſatisfaction to the proſecutors, by giving an intimation, that on that account the fine to the king ſhall be mitigated.

(a) Roll. Abr. 220. 2 Roll. Abr. 83. Cro. Car. 531. (b) Notwithſtanding the king, by his commiſſion, erecting a new court, expreſsly directs, that the party ſhall recover his damages by ſuch a proſecution. Cro. Car. 558. 2 Hawk. P. C. c. 25. § 3. (c) Jon. 380. Cro. Car. 438. 448. (d) 1 Keb. 487 —May give the third part of the fine aſſeſſed. 2 Hawk. P. C. *ubi ſupra*. (e) Said to be every day's practice. 2 Hawk. P. C. *ubi ſupra*.

In all actions in which the plaintiff is to be recompenſed in damages, the jury muſt aſcertain the damages by their verdict, nor can ſuch omiſſion or defect be ſupplied by writ of inquiry; for, if this were permitted, the party would be deprived of his remedy by attaint againſt the jury for exceſſive damages; for no attaint lies againſt them on a writ of inquiry, it being an inqueſt of office.

10 Co. 119. Latch. 113. Roll. Abr. 272. 2 Roll. Abr. 112. Skin. 595. pl. 8. Salk. 205. pl. 3.

So, in a writ *de valore maritagii*, where iſſue was joined on the tenure, and the jury aſſeſſed 40*s.* damages, and 10*s.* coſts, but did not inquire of the value of the marriage; it was holden that this defect (*f*) could not be ſupplied by writ of inquiry.

10 Co. 118. b. Cheney's caſe. (*f*) So, in detinue, where the jury gave a verdict, but omitted to inquire of the value of the goods. 10 Co. 119 b. But in Skin. 595. pl. 8. and Salk. 205. pl. 3., this point is ſaid by *Holt*, C. J. to have been otherwiſe determined, but, as he thought, contrary to law, being againſt Cheney's caſe.

If there be (*g*) a demurrer upon evidence, though the jury are thereby diſcharged of the iſſue, yet they may tax damages conditionally, *viz.* if judgment ſhall be given for the plaintiff, or when the demurrer is determined, it (*h*) may be done by (*i*) writ of inquiry, and ſaid to be the moſt uſual courſe where there is a demurrer to evidence to diſcharge the jury without further inquiry.

Cro. Car. 143. Styl. 22. (*g*) Where there is a demurrer to part, and iſſue to part. 2 Roll. Abr. 722.

(*h*) Where an omiſſion of taxing damages by the jury cannot be ſupplied by writ of inquiry, but a *venire facias de novo* ſhall go. 2 Roll. Abr. 321.—Where the court will refuſe a writ of inquiry, but will award a new *venire*. 22 E. 3. 5. Roll. Abr. 571. (*i*) Where upon a writ of inquiry the plaintiff is not bound to prove his property. Cro. Jac. 220. Yel. 151. Brownl. 214.

If in debt upon a bill obligatory, the plaintiff hath judgment (*k*) by default, the court, by the aſſent of the plaintiff, which is always entered upon record, may tax the damages *occaſione detentionis debit.* (*l*), but if he will not aſſent thereto, he may have a writ of inquiry; but this election is in the plaintiff, not in the defendant: alſo, it is ſaid to be the courſe and practice of both courts upon a judgment in debt (*m*), by default or confeſſion, to tax damages as well as coſts.

2 Saund. 106, 107. Holdip and Otway, Sid. 442. S. P. Fitz. Bar. 283. (*k*) So, if a verdict is found for the plaintiff, and the jury do not aſſeſs damages, &c. for the debt is certain, and the loſs of the plaintiff apparent. Dyer, 105. in margine.—In replevin, the plaintiff is nonſuit; the court, without a writ of inquiry, may aſſeſs

aſſeſs damages, becauſe they accrue not in reſpect of any local matter, but it is the delay in the non-payment of the rent; *ſecùs*, where judgment is given for the plaintiff, for he ought to recover for taking his cattle, and the damages may be greater or leſs, according to the value of the cattle and circumſtances of taking. 3 Leon. 213. (*l*) Cro. Jac. 415. (*m*) So, upon demurrer. Latch. 113.

Salk. 205. pl. 3. Herbert and Waters, Skin. 595. pl. 8. S. C. adjudged.

If in replevin, the defendant avows as overſeer of the poor for a diſtreſs for a rate, upon the 43 *Eliz. cap.* 2. and on the trial the plaintiff is nonſuit, if the jury omit to find damages, this omiſſion will be ſupplied by writ of inquiry; for if the jury had inquired, they had inquired only as an inqueſt of office, on which no attaint lies.

10 Co. 119. Skin. 596. S. P. agreed.

Alſo, the omiſſion of the inquiry of the value of the church in a *quære impedit*, may be ſupplied by a writ of inquiry.

Sid. 380. Salk. 205. pl. 3. 206. Skin. 595. pl. 8. S. C. cited, and agreed to be law. See 10 Mod. 319.

But in an avowry for a rent-charge, according to the 17 *Car.* 2. *cap.* 7. the omiſſion of the jury cannot be ſupplied by writ of inquiry; for that ſtatute expreſly requires, that the ſame jury ſhall enquire of the rent arrear, value of the cattle, &c.

Debt.

(A) In what Caſes an Action of Debt will lie.

(B) At what Time it ſhall be ſaid to have accrued.

(C) Who may bring Debt: And herein of the Privity of Contract and Eſtate.

(D) Againſt whom it may be brought.

(E) Where Debt is the proper Action, and not Covenant Caſe, &c.

(F) Of the Manner of bringing the Action, and where it muſt be brought in the *Debet & Detinet*, or *Detinet* only.

(G) Of the Extinguiſhment of the Debt, and pleading in Bar thereof.

(A) In

(A) In what Caſes an Action of Debt will lie.

AN action of debt is ſaid to be founded upon contract, either expreſs, or implied; in which the (*a*) certainty of the ſum or duty appears, and therefore the plaintiff is to recover the ſame *in numero*, and not to be repaired in damages by the jury, as in thoſe actions which ſound only in damages; as *aſſumpſit*, trover, *&c.*

4 Co. 90. Slade's caſe. Vaugh. 101. (*a*) Hence debt due by ſpecialty can only be recovered by action of debt.——If upon a ſubmiſſion to arbitration, the arbitrators award the payment of a certain ſum of money, debt lies; but if they award the doing of ſomething advantageous to the party only, an action on the caſe. *Vide* tit. *Arbitrament and Award.* If one makes a bill to another in theſe words, *memorandum, I owe to* A. B. 20 *l. to be paid in watches*; an action of debt, &c., muſt be brought for the money, and not an action for the watches, for the number of watches is not certain. And. 117.

But if in an (*b*) action, in which the plaintiff can only recover damages, there be judgment for him, he can afterwards bring an action of debt for thoſe damages.

(*b*) As in waſte, 43 E. 3. 2., and *vide* Roll. Abr. 600, 601., ſeveral caſes to this purpoſe.—[Debt will lie on a foreign judgment, without ſtating in the declaration, or proving the giving of the judgment. Walker v. Whitter, Dougl. 1.]

Alſo, if after judgment for the plaintiff in *B. R.* the defendant brings a writ of error *in* (*c*) *cam. ſcacc.*, an action of debt may be brought in *B. R.* upon the judgment, pending the writ of error; and the defendant cannot plead *nul tiel record*; for by the writ of error the tranſcript of the record only is removed *.

Sid. 236. Lev. 153. Raym. 100. S. C. (*c*) So, after writ of error brought in parliament. Sid. 236. But for this *vide* Style, 124. Mod. 121. 3 Lev. 397. 2 Vent. 261. 3 Keb. 330. and title *Error.*——* But, the court on motion, will ſtay the ſuit, the defendant giving judgment, and make a rule to ſtay execution till the writ of error on the principal judgment is determined.

Debt lies in the *Marſhalſea*, or any other court, upon judgments in *C. B.* or *B. R.*, and upon *nul tiel record*, the iſſue ſhall be tried by *certiorari*, and *mittimus* out of Chancery.

Salk. 209. pl. 3. *per Cur.*

Every contract muſt be legally (*d*) entered into, and the (*e*) conſideration thereof muſt be lawful, otherwiſe an action of debt will not lie.

For this *vide* head of *Obligations.* (*d*) If a man by deed acknowledges, that he hath ſo much money of *J. S.*'s due to him, in his hands, though here is no contract of borrowing between them, yet *J. S.* may have an action of debt againſt him. 11 H. 6. 39. (*e*) As marriage, work, ſoliciting a cauſe, &c. *vide* Roll. Abr. 503., ſeveral ſuch inſtances;—but not for money won at play, though an action on the caſe will lie; but for this *vide* title *Gaming*, and 5 Mod. 13.

If a ſheriff levies a certain ſum of money on a *levari facias*, at the ſuit of *J. S.*, and returns the writ (*f*) ſerved, *J. S.* may have an action of debt againſt the ſheriff, without any actual contract; for the levying of the money to the uſe of *J. S.* is a contract in law, that he ſhould pay it over.

Hob. 206. Moor, 886. Brownl. 5. And where it will lie againſt the executor of the ſheriff, *vide* title *Sheriff*, and title *Executors and Adminiſtrators.* (*f*) Otherwiſe, where he returns, that he hath taken goods into his hands to ſuch a value, which remain *pro defectu emptorum.* Cro. Jac. 514. 2 Roll. Rep. 57. Godb. 276. And *vide* March, 13.——But if he returns, they were reſcued from him, he ſhall be charged; for he might have taken the *poſſe comitatus*, &c. 2 Saund. 343. Cro. Jac. 514. Godb. 276.

Roll. Abr. 598. (a) As 14 H. 8. c. 5. againſt practiſing phyſick without licence. —— 2 and 3 Ed. 6. c. 13., which gives the treble value for not ſetting forth tithes, *vide* head of *Tithes*. Roll. Abr. 598., and which is now the common practice.

If (a) a ſtatute prohibits the doing of a thing under a certain penalty, and preſcribes no particular method for the recovery thereof, the party entitled to the penalty may recover the ſame by action of debt.

Roll. Abr. 598. Latch. 17. 51. Noy, 75. (b) The ſheriff brought debt for his fees of executing an *elegit*; and held by Holt, that it lay; for it is all the execution the plaintiff in the original act on can have on this judgment; and he may enter on the land extended, if he can, without force. Salk. 209. pl. 2. *vide* Cro. Car. 286.

An action of debt lies by a ſheriff upon the ſtatute of 28 *Eliz. cap.* 4., for his fees given by the ſtatute, for an execution ſerved by him; though the ſtatute does not ſay that he ſhall have his fees, or any action for them, but only ſays, that he ſhall not take, for (b) any execution ſerved, any conſideration or recompence beſides that thereafter in the ſaid act mentioned, &c.

Co. Lit. 162. a. (c) Alſo, the grantee for years of an annuity may have an action of debt for the arrears. Cro. Eliz. 268. 895. (d) But if there had been tenant for life of a rent, and he died, the rent being in arrear, his executor, by the common law, might have an action of debt for the arrears, becauſe there was no other remedy. 4 C. 49. a.

The action of debt is a proper remedy which the law gives for the recovery of rents reſerved upon leaſes for (c) years; but this extended not to (d) freehold rents; the reaſon whereof, and how it is now remedied by 8 *Ann c.* 14. *vide* title Rents.

Carth. 161. Newcomb and Harvey, adjudged. (e) Alſo, debt would lie againſt a ſecond aſſignee. Carth. 162. *per Curiam.* (f) Huſband poſſeſſed of a term in right of his wife, makes a leaſe for half the term, and dies; his executors ſhall have debt for the rent, and yet the feme ſhall have the reverſion. Dyer, 227. (g) If a termor ſurrenders to the leſſor without deed, rendering rent; this is recoverable as a rent, and is not as a ſum in groſs. Vent. 272. 2 Lev. 80. adjudged.

If a leſſee for years aſſigns over his whole term by indenture, reſerving rent, the leſſee, by the name of rent, may recover in an action of debt upon the (e) contract; although it was objected, that the leſſee having no (f) reverſion, it was to be conſidered as a ſum in (g) groſs, and therefore not recoverable until the term was expired.

Cro. Jac. 243. Yelv. 179. Bulſt. 29. 31. (b) So, if a man lend periſhable goods as a pledge, and they decay, yet the perſon to whom they are pledged may have an action of debt for his money, becauſe the duty continues. Yelv. 179. Co. Lit. 209.

If a man lend goods as a ſecurity for money, and the borrower tender the money, and recover the goods in an action of trover, yet the pawnbroker may have an action of debt for his money (b); becauſe, though the ſecurity ceaſes, yet the duty remains, inaſmuch as the money lent is not paid back to the party from whence it came. The ſame law as to land.

Bro. Statute Merchant, 16. Moor, pl. 1097. Cro. Eliz. 494.

The conuzee of a ſtatute-merchant, as alſo the conuzee on the 23 *H.* 8. *c.* 6., the ſtatute and recognizance having the ſeal of the conuzors, as well as the ſeal of the king, may bring an action of debt, and waive the execution given by the ſtatute; *ſecus*, of a ſtatute-ſtaple; becauſe the king's ſeal only, without that of the party, is affixed to it.

Bonafous v. Walker, 2 Term-

[If an officer entruſted with the cuſtody of a priſoner, againſt whom judgment has been obtained, permit his eſcape, he is liable to

to an action of debt, in which the very ſum for which the party is charged in execution is to be recovered. But againſt his executors the ſuit is not *originally* maintainable (*a*).

Rep. 129. (*a*) 41 Aſſ. pl. 15. Dy. 322. a. b.

1 Roll. Abr. 921 —This action in Saund. 218. is referred to the common law: but in 2 Inſt. 382. and 2 Term Rep. 129., to ſtat. Weſtm. 2., 13 E. 1. c. 11., and 1 R. 2. c. 12.

If an indenture of covenant contain a ſtipulated penalty for non-performance, the remedy is by an action of debt for ſuch ſpecifick ſum. By the ſame method the arrears of an annuity or rent-charge may be recovered (*b*).

3 Wooddeſ. 96. (*b*) Co. Entr. 119. a. b. 120. a. Hardr. 332.

Debt may be brought by the aſſignees of bail (*c*) and replevin (*d*) bonds, under particular ſtatutes.]

(*c*) Stat. 4 Ann. c. 16. § 20. (*d*) Stat. 11 G. 2. c. 19. § 23.

(B) At what Time it ſhall be ſaid to have accrued.

IF a man enters into a bill obligatory for the payment of ſeveral ſums of money at ſeveral days, an action of debt will not lie till the laſt day is paſt.

Co. Lit. 47. b. 292. S. P. *—

* In 292. b. it is more fully explained, viz. there it is ſaid, "If a man be bound in a bond, or by contract to another, "to pay 100*l.* at five ſeveral days, he ſhall not have an action of debt before the laſt day be paſt.— "But if a man be bound in a recogniſance to pay 100*l.* at five ſeveral days, preſently after the firſt day "of payment, he ſhall have execution upon the recogniſance for that ſum, and ſhall not tarry, till the "laſt be paſt, for that it is in the nature of ſeveral judgments." 3 Co. 22. a. 128. b. Cro. Jac. 505. Cro. Car. 241. (*e*) If to pay 20*l.* in manner following, viz. 10*l.* at one day, and 10*l.* at another day, debt lies not till after the laſt day, becauſe one entire duty; but if a man binds himſelf to pay *J. S.* 10*l.* at one day, and 10*l.* at another day; after the firſt day, debt lies for 10*l.* becauſe it is in itſelf a ſeveral duty. Owen, 42. [Coates v. Hewit, 1 Wilſ. 81. *acc.*] — So, if *A.* makes a bill to *B.* for the payment of 20*l.*, viz. 10*l.*, &c., and thereby covenants and grants with *B.* that if he makes default in either of the ſaid payments, that he will then pay what of the whole ſhall be unpaid, after default at the firſt day, debt lies for the whole. Leon. 208. adjudged.

So upon a contract, debt lies not till all the days of payment are paſt, for where there is but (*f*) one contract, there can be but one debt, and conſequently but one action of debt for the recovery of it.

Co. Lit. 292. 3 Co. 22. 4 Co. 94. 5 Co. 51. S. P. [Rudder v. Price, 1 H. Bl. 547.]

(*f*) But the law is otherwiſe of a covenant or promiſe to pay money, &c. at ſeveral days, for as often as the money is not paid, according to the covenant or promiſe, ſo often is there a breach of the covenant or promiſe, and conſequently ſo often an action lies. Co. Lit. 292. b. [Cooke v. Whorwood, 2 Saund. 164. See too 1 H. Bl. 552.]

If a man leaſes lands for years, reſerving yearly 20*l.* at four (*g*) quarters, debt lies for one quarter before the others are paſt; for it is reſerved for the leſſor's maintenance in lieu of the profits, and ſhall be conſidered as ſeveral contracts.

Co. Lit. 47. b. 292. b. S. P. (*g*) So, if reſerving weekly, during the term, nine quarters of wheat. Roll. Abr. 601.; but for this *vide* Plowd. 172. Allen, 57. Raym. 222. 2 Lev. 80. Vent. 242. 272. Carth. 161., and title *Rent*.

If one enters into an obligation or contract to pay money, &c. on two ſeveral contingencies, the obligee may have an (*h*) action of debt on the happening of either of them; for the putting in, that he ſhall pay at the one or the other, muſt be taken to have been inſerted for the benefit of the obligee; and the rather, becauſe

Vide title *Election*. (*h*) As in debt on an obligation, that if a ſhip put to ſea,

and either the goods or the obligor

beeauſe every contract is to be conſtrued moſt ſtrongly againſt the obligor.

came ſafe, he ſhould pay ſuch a ſum over and above the uſe allowed by the ſtatute; although the obligor dies, yet an action of debt lies againſt his executor on the happening of the other contingency; for the law ſupplies the words, *which ſhould firſt happen*. Lev. 54. Sayer and Gleane.

(C) Who may bring Debt: And herein of the Privity of Contract and Eſtate.

Vide head of *Rent*. 11 H. 6. 15. 19 H. 6. 41. b. Co. Lit. 162. a.

AT common law, if the leſſor, who had reſerved rent-ſervice, had died, and there had been rent arrear, neither his heir nor (*a*) executor could maintain an action of debt for them; not the heir, becauſe he had nothing to do with the perſonal contracts of his anceſtor; not the executor, becauſe he could not repreſent his teſtator as to any contracts relating to the freehold and inheritance.

(*a*) But if a woman had been endowed of a rent,

or a rent had been granted for life, and the tenant had attorned; and after rent had been arrear, and then the particular eſtate in the rent had determined by death, the executors of the tenant in dower, or of the grantee for life, ſhould have had debt by the common law; becauſe by poſſibility the teſtator might have had debt; as, if he had ſurrendered his eſtate to the reverſioner, he ſhould have had debt for the arrears incurred before; and theſe particular eſtates, with the attornment of the tenant, or when the law ſupplies an attornment, amount to a real contract in law; which realty, when the freehold is determined, reſolves itſelf to the perſonalty. 4 Co 49. a. b. Keilw. 47. Executor may bring debt for the arrears of annuity due to his teſtator upon the deed.

11 H. 6. 15. Roll. Abr. 596.

But the executor might have maintained an action of debt for (*b*) relief fallen in the life-time of the teſtator.

4 Co. 49. S. P. Noy, 43. S. P. adjudged; and ſaid, that in ſuch action, ſeiſin of the ſervices need not be alleged; otherwiſe, where the party himſelf avows. Dalt. 17. Becauſe it is now become as a flower fallen from the ſtock, and they have no other remedy. Co. Lit. 162. b. S. P. For it is no rent, but a caſual improvement. (*b*) Debt will lie for an adminiſtratrix for a fine of a copyholder; and *per* Holt, Ch. Juſt., it is the proper action; but three judges held, that an *aſſumpſit* likewiſe will lie. Carth. 90, 91. 3 Mod. 239. Show. 35. 3 Lev. 262. [Evelyn v. Chicheſter, 3 Burr. 1717. *acc.*]

(*c*) Intended of tenants *pur auter vie*, ſo long as *ceſtui que vie* lived. Co. Lit. 162. a.

(*d*) Reſerved upon a leaſe for life, or gift in tail within the act. Co. Lit. 162.

(*e*) Extends not to a quit-rent iſſuing out of a copyhold. Yelv. 135. But *vide* Carth. 91. where, by

And now by 32 *H.* 8. *cap.* 37., reciting, "For as much as by "the common law, executors or adminiſtrators of tenants in fee-"ſimple, tail, or for (*c*) life, of rents (*d*) ſervice, charge and ſeck, "and fee-farms, had no remedy to recover ſuch arrears as were "due to their teſtators in their life; it is enacted, That the exe-"cutors and adminiſtrators of ſuch perſon to whom (*e*) ſuch rent "or fee-farm ſhall be due, and not paid at his death, may have "debt for ſuch (*f*) arrearages againſt the (*g*) tenant or tenants "that ought to have paid the ſaid rents or fee-farms, ſo being be-"hind in the life of their teſtator, or againſt the executors or "adminiſtrators of the ſaid tenants; and further, that it ſhall be "lawful for ſuch executor or adminiſtrator of ſuch perſon, to "whom (*h*) ſuch rent or fee-farm ſhall be due, and not paid at "his death, to diſtrain for the (*i*) arrears, and all ſuch rents and "fee-farms upon the lands, &c. charged with the payment of "ſuch rent or fee-farms, and chargeable to the diſtreſs of the "teſtator, ſo long as the ſaid lands, &c. continue in the ſeiſin "or poſſeſſion of the tenant in demeſne, who ought to have paid "the

" the ſaid rent or fee-farm ſo behind to the teſtator in his life, " or in the ſeiſin or poſſeſſion of any other claiming (*k*) only (*l*) " by (*m*) and (*n*) from the ſame tenant (*o*) by purchaſe, gift, or " deſcent, (*p*) in like manner as their teſtator might or ought in " his life, and ſhall make avowry upon the matter aforeſaid."

Eyre, Juſt. this is doubted.

(*f*) Whether money, corn, cattle, &c., or other profit to be delivered or yielded, whether annual, or ſecond, third, &c. year, but work days, or other corporal ſervice, is not within the act. Co. Lit. 162. (*g*) Whether the leſſor, leſſee, or occupier. Lit. Rep. 93. The tenant is not charged, but he is under a neceſſity to pay it, to ſave the diſtreſs. Allen, 62. (*h*) This extends not to the grantee of a rent-charge for years, if he lives ſo long. Cro. Car. 171. adjudged; for the ſtatute hath provided only where the teſtator dies ſeiſed of a rent in fee, or for life, and the executors have no remedy, & *vide* 2 Sid. 62. (*i*) But it extends not to the arrears of a *nomine pœnæ*, relief, aid *pur fair fits chivalier* or *file marrier*. Co. Lit. 162. b. (*k*) Of *ceſtue que uſe* of a feoffment, though he claims not only by the feoffor, but by the ſtatute alſo. 4 Co. 50. b.——So, if the tenant makes a gift in tail, and the donee dies, a diſtreſs may be taken upon the poſſeſſion of the iſſue in tail, though he claims *per formam doni*, as well as by deſcent. 4 Co. 53. b. 2 Leon. 153. 3 Leon. 59, 60. (*l*) The tenant leaſes for life, the remainder in fee, and the tenant for life pays not his rent to the lord, and the lord dies, and the tenant for life dies, the executors of the lord cannot diſtrain upon him in remainder, for he claims not by or from the tenant for life. Co. Lit. 162. b. 5 Co. 118. a.——So, in caſe of a reverſion. Co. Lit. 162. (*m*) And not paramount, as the lord by eſcheat. Co. Lit. 162. Leon. 303. Or one that is remitted to an ancient title. 4 Co. 50. b. (*n*) The feoffee, and leſſee of the feoffee, &c. *in infinitum*, are within the act. 4 Co. 50. a. b. Leon. 303. 2 Leon. 153. (*o*) But tenant in dower, or by the curteſy, ſhall not be charged, for they claim not by the party only, but by law alſo; Leon. 303. *per Curiam*. 3 Leon. 263. *per Curiam*. (*p*) So, that if after rent is arrear, the lord grants away his ſeigniory, his executors ſhall have no remedy, for the act gives none, where the teſtator had none at his death.

And by the ſame act, " If one, in right of his wife, hath any " eſtate in fee-ſimple, tail, or for life, in rents, or fee-farms, " which ſhall be unpaid in the wife's life, after the death of his " wife, his executors and adminiſtrators ſhall have debt for the " (*q*) arrears againſt the tenant of the demeſne that ought to " have paid the ſame, his executors or adminiſtrators, and he " may diſtrain for the arrears in like manner as he might have " done if his wife had been then living, and avow upon the " matter aforeſaid."

(*q*) Extends to ſuch as incurred before marriage; for as to thoſe incurred during marriage, he might have had debt by the common law. 4 Co. 51. a. b. Co. Lit. 162. b. Co. Ent. 119. Bendl. 263. Kelw. 214.

And by the ſame act, " If one hath rents or fee-farms for the life " of another, which ſhall be unpaid, and *ceſtui que vie* dies, after " his death, ſuch perſon, his executors or adminiſtrators, may " have debt againſt the tenant in demeſne that ought to have paid " it when firſt due, his executors or adminiſtrators; and alſo " (*r*) diſtrain for the ſame arrears upon ſuch lands, &c. (*s*) out of " which payable, in ſuch manner as he ought or might if *ceſtui* " *que vie* had been living."

(*r*) But if upon a judgment againſt tenant for life of a rent-charge, a moiety thereof is extended upon an *elegit*, and after rent being arrear, the tenant for life dies, the tenant by *elegit* cannot diſtrain for the arrears by this act; for coming in by an act of parliament, he is in the *poſt*. Pool and Neal, 2 Sid. 28. 62. adjudged. (*s*) If a rent be granted to *A.* for the life of *B.*, and after the land out of which, &c., is let to *C.* for life, the remainder to *D.* in fee; and rent being in arrear, *B.* dies, and after *C.* dies, *A.* may diſtrain upon *D.* in remainder for all the arrears. Co. Lit. 162. b. Edrich's caſe. 5 Co. 118. adjudged, & *vide* Moor, 625. pl. 858. Cro. Eliz. 805. S. C. Debt is given in lieu of the diſtreſs.

If a man leaſes for years, rendering rent, and after deviſes the rent to another, and dies, the deviſee may have an action of debt for the rent, though it is become a rent-ſeck, becauſe by the original creation thereof debt lay.

Roll. Abr. 598.

So, if the leſſor grants over the rent, and the leſſee attorns, for the attornment creates a privity; and there is no caſe where a thing

Leon. 315. 2 Leon. 1. *vide* Dyer,

140. Cro. Eliz. 895. (a) Huſband poſſeſſed of a term in right of his wife, makes a leaſe for half the term, and dies, his executors ſhall have debt for the rent, and yet the feme ſhall have the reverſion. Co. Lit. 46.—Rent granted for life, tenant dies, debt will lie, becauſe there is no other remedy. Dyer, 227.

a thing may be transferred or aſſigned over, but the remedy ſhall go along with it; and the law (a) favours remedies for rents.

Cro. Eliz. 268. adjudged. Bulſt. 151. If a man grants an annuity for years, an action of debt may be brought for the arrears during the years, for being a grant for years, it is by the deed as a contract.

ſaid to be adjudged. Yelv. 208. and Bulſt. 151. Lucas and Fulwood, S. P. ſeems to be admitted; but the plaintiff could not recover, becauſe his plaint was of debt, and his count of annuity; but *vide* Dyer, 140. Cro. Eliz. 3. 9 H. 7. 17. cited in 7 Co. Lillington's caſe, 45 E. 3. 8.

4 Co. 49. a. If the father grants a rent-charge to the ſon in fee, and the rent being arrear, the father dies, and the land deſcends to the ſon, by which the rent is extinct, the ſon may charge the executors of the father in an action of debt for the arrearages incurred in the life of the father; for though no action lies for them, as for the arrearages of a rent, [yet for the arrears of an annuity it is maintainable; and though by the deſcent of the land to the grantee, being heir to the grantor, as well the annuity as the rent was determined, and the original election was annexed to an inheritance, yet inaſmuch as the inheritance of both was determined by act of law, (which will do no wrong to any) his election ſhall remain as to the arrears.]

Hawk. Abr. Co. Lit. 73. [By ſtat. 8 *Ann.* *c.* 14., an action of debt is given for the recovery of rents upon leaſes for a life or lives *during their continuance*, which the common law denied: on which ſtatute Mr. Serj. *Hawkins* queries, whether it doth not extend to leaſes of incorporeal hereditaments?

By ſtat. 5 *Geo.* 3. *c.* 17. § 3., which enables eccleſiaſtical perſons to leaſe tithes and other incorporeal inheritances, debt is given for the recovery of rent on ſuch leaſes.]

(D) Againſt whom it may be brought.

10 H. 6. 11. 26 E. 3. 64. Roll. Abr. 592. IF a feme, leſſee for life, takes huſband, and dies, debt lies againſt the huſband for (b) rent iſſuing out of the land, incurred during coverture; for he took the profits out of which the rent iſſued.

(b) Alſo it lies againſt him or his executors, for the arrears of a rent-charge incurred during ſuch time as he took the profits. 4 Co. 49. b.

3 Co. 22. Walker's caſe. Moor, 351. pl 472. S. C. adjudged. Cro. Eliz. 556. If leſſee for years aſſigns all his intereſt to another, yet the leſſor may have debt againſt the (c) leſſee for the arrears incurred after the aſſignment, for the privity of contract remains, and the leſſee by his own act ſhall not prevent the remedy of the leſſor againſt him upon his contract.

S. C. cited, 715. S. C. cited, and denied by three judges to be law. Sid. 266. S. C. cited, and agreed to be law, though ſeveral of the caſes there put, as there reported, were denied to be law. Latch. 260. S. C. cited, and ſaid it was not adjudged, as appears by the book of entries. *Vide* Cook, 122. Poph. 120. ſeems to be the S. C. cited, & *vide* Dalſ. 16. (c) Or aſſignee, at his election. 4 Leon. 17. 3 Co. 24. But

But if he once accepts the rent from the assignee, he shall not after charge the lessee for rent due after the assignment. 3 Co. 24. b. Marrow and Turpin. Moor 600. pl. 829. 2 And. 133. & *vide* Sid. 402. —— For in the acceptance of the rent from the assignee, notice of the assignment is implied. March and Brace, Cro. Jac. 334. adjudged, 2 Bulst. 152. adjudged, & *vide* Roll. Rep. 366. —— But though he refuses to accept the assignee as his tenant, yet he may after charge him in an action for the rent, if he pleases. Devereux and Barlow, 2 Saund. 181. —— Where covenant, against the lessee, after assignment of his term, brought upon an express covenant for non payment of rent, and held good, and that the accepting the assignee as tenant did not hurt. Edwards and Morgan, 3 Lev. 233. Carth. 178.

But if after such assignment of the lessee the lessor grants over his reversion to another, the grantee shall not have debt against the lessee, for the privity of contract holds only between the lessor and lessee. 3 Co. 22. b. *per Cur.* Poph. 55. S. P. adjudged. Brownl.

S. C. Cro. Eliz. 556. cited. Moor, 351. cited; but *vide* Cro. Eliz. 636., and 3 Lev. 233.

If *A.* leases three acres to *B.* rendering rent, and *B.* assigns all his estate in one acre, and after *A.* grants the reversion of three acres to *C.*, he may have debt against (*a*) *B.* for the whole rent, for the entire estate remaining in part, the entire privity and action for the whole remains against the first lessee. Cro. Eliz. 6 3. 3 Co. 24. a. S. C. cited. and *vide* Lit. Rep. 53.

(*a*) Cro. Jac. 411. said the lessor in such case may have a joint action against the lessee and assignee. — For arrears of a rent-charge for life, after determination thereof, debt lies not against him alone that received the profits of part of the land charged, but against all that received the profits of any part thereof. Sand. 284.

If lessee for years assign his whole term in the moiety of the land, the lessor may have an action against the assignee for the moiety of the rent; for the assignee having the entire estate in the moiety of the land, he hath a sufficient privity of estate to be charged by the lessor, if he pleases, with the moiety of the rent. 2 Lev. 231. Gamon and Vernon, adjudged.

If a prebendary leases for years rendering rent, and this is confirmed by dean and chapter, and the lessee dies, and his (*b*) executor (*c*) assigns over the term, and after the prebendary resigns, and a new prebendary is made, he shall not have debt against the executor of the first lessee for the rent due after the assignment; for the successor was no party to the contract, but privy in law only, (*d*) and by the assignment of the term, the cause of the charge is removed. Adjudged between (*e*) *Overton* and *Syddal*, *Cro. Eliz.* 555. (*b*) So, where the administrator of the lessee assigns. Marrow and Turpin, Cro. Eliz. 715. adjudged. Moor, 600. pl. 829.

adjudged *per totam curiam.* 2 And. 133. adjudged. Latch. 260. cited, and said no judgment was ever given, as appears by the roll; but 2 Vent. 210. cited, and said that the acceptance of rent from the assignee was pleaded, &c. 3 Mod 326. cited, and said the late resolutions had been contrary. 4 Mod. 78. cited, and denied to be law; for the executor shall be still liable to the contracts of his testator, so long as he hath any assets to satisfy them. (*c*) By the report of the case in Popham the lessee assigned. (*d*) That the executor is liable notwithstanding, Ironmonger and Nusam, Noy, 97. Latch 261. 2 Vent. 209. cited to have been so resolved. Helyar and Castiord, Sid. 240. 266. adjudged. Lev. 127. adjudged. But by this report the action was brought against an administrator. (*e*) Poph. 120. S. C. and the court divided. Goulst. 120. adjudged by three judges *cont.* Popham, who held the contrary, and that the successor was privy to the contract of the predecessor. 3 Co. 24. a. S. C. cited to have been adjudged by Popham, C. J. and all the court, whether the assignment were by the lessee himself or his executor; yet *vide* the report of the case in the books before. Sid. 266. S. C. cited from 3 Co. 24. and denied to be law, as there cited. Lev. 127. S. C. cited to have been adjudged, because the privity of contract did not go to the successor more than to the heir, and the heir of the lessor shall not have debt against the lessee after assignment, because the privity of estate only descended to him. Latch. 262. S. C. cited, and said that the lessor being a sole corporation, the privity of contract was determined.

If

Lev. 215. Keighly and Bulkley, adjudged by Keeling and Windham, *cont.* Twiſden. Sid. 338. S. C. Raym. 162. 2 Keb. 260. S. C.

If the aſſignee of a term aſſigns to another, yet he may be charged in debt for rent growing due after, before notice given to the reverſioner; but *Q.*

Carth. 177. Tovey and Pitcher, held by Pollexſen and Rokeby in C. B. *cont.* Powel and Ventris,

For where covenant was brought for rent againſt the aſſignee of the executrix of the leſſee, who pleaded that before any rent arrear he aſſigned over to *J. S.*, on demurrer it was holden, that the privity was deſtroyed, and the aſſignment complete without notice, and the defendant diſcharged of all the rent accrued after the aſſignment.

that the defendant ought in his plea to have ſet forth notice given to the plaintiff of the aſſignment; and Ventris dying the judgment was accordingly; but upon a writ of error in B. R. the judgment was reverſed by three judges. 3 Lev. 295. S. C. Show. 340. S. C. 4 Mod. 71. S. C. 2 Vent. 228. 234. S. C. Salk. 81. pl. 2. 12 Mod. 23. S. C. [1 Ld. Raym. 368. S. C. cited. *Vide ſupra* 72, 73.]

(E) Where Debt is the proper Action, and not Covenant, Caſe, &c.

4 Co. 92. b. Slade's caſe.

ACTIONS of debt are founded on contract, in which the plaintiff ſets forth his demand in certainty, and inſiſts on being reſtored to it *in numero.*

Vaugh. 101.

The inconveniency of the defendant's being allowed to wage his law in this action occaſioned the ſubſtituting of other actions in the room of it; ſuch as all actions on the caſe, which are properly founded on injuries and fraud, for in theſe the defendant could not wage his law, becauſe he could not make oath of paying that which by reaſon of its uncertainty he could not know; and which could never be before it was aſcertained by the jury.

4 Co. 92. b. Slade's caſe. Moor, 433. S. C. Yelv. 20. S. C. *Vide* the Regiſter 95.

Hence if *A.* declares that he ſold corn, &c. to *B.* and that *B.* at or before ſuch a day promiſed to pay ſo much money, *A.* may at his (*a*) election bring debt or *aſſumpſit* for the injury done by the violation of the contract.

(*a*) If I deliver 20 *l.* to *A.*, to deliver to *B.*, and he does not deliver it, I may have an action of account, debt, or perhaps caſe, againſt him. Kellw. 69. a. 77. b. Cro. Jac. 687. Dyer, 21. Hut. 12. —— *A.* delivers oxen to *B.*, to ſell for as much as he can get, and he ſells them for ſo much, *A.* may have debt againſt *B.* for the money. Roll. Rep. adjudged —— *A.* delivers money to *B.*, to re-deliver, debt lies for it. Palmer, 364. —— The defendant by bill ſealed, acknowledged that he had received 7 *l.* of the plaintiff *ad emendendum* a pair of bellows. Cro. Eliz. 644. adjudged, that account or debt lay. *Vide* 3 Leon. 38. Roll. Abr. 597. Dan. 26. 2 Ld. Raym. 814. 2 Salk. 658. pl. 3. 7 Mod. 87.

Palm. 364.

A. pays money to *B.* as a fine, upon *B.*'s promiſe to make a leaſe of land, and before the leaſe is made *B.* is evicted, debt lies not for the money, for it was not paid to be received back; but caſe lies for non-performance of the bargain, in which he ſhall recover in damages not only the money given for the fine, but the damage by breach of the contract.

Styl. 31. 133. S. P. (*b*) 2 Jon.

If *A.* covenants with *B.* to pay him (*b*) ſo much money as he ſhall expend in the repairing and victualling of a ſhip for him, and *B.* expends

B. expends 300*l.* accordingly, an action of debt or covenant lies for the money expended. 184. Like point adjudged, though the certainty of the debt did not appear by the deed.

If it be recited by deed, that there is a ſuit depending between the vicar of *S.* and *A.* concerning a *modus decimandi*, which concerns all the pariſhioners of *S.*, and *B.* a pariſhioner, by the ſaid deed agree and promiſe *A.* to pay his proportionable part of the charges of the ſuit; an action of debt or covenant lies upon this deed; for by an averment of what was expended in the ſuit, that which was at firſt uncertain may be reduced to a certainty (*a*). 3 Lev. 429. Sanders and Mark, adjudged after a long debate. [(*a*) That debt will lie for an indeterminate ſum, capable of being readily reduced to a certainty, hath been eſtabliſhed by other caſes. Bloome v. Wilſon, Sir T. Jones, 184. Birtch v. Weaver, 2 Keb. 225. fo. 80. Rands v. Peck, Cro. Ja. 618. Nor is it now underſtood to be neceſſary that the plaintiff ſhould recover the full ſum demanded. Aylett v. Lowe, 2 Bl. Rep. 1221. Walker v. Witter, Dougl. 6. Rudder v. Price, 1 H. Bl. 550. And a declaration in debt upon a ſimple contract hath been holden good, though it ſpecified by the ſeveral counts a *leſs* ſum than appeared to be demanded in the recital of the writ, and yet aſſigned as a breach the non-payment of the ſum demanded in the writ. M'Quillin v. Cox, 1 H. Bl. 249.]

If *A.* retains *B.* to embroider a ſattin gown of a maid ſervant of the daughter of *A.* taking for the ſame 40*s.*, *B.* may have debt againſt *A.* for the money; for the embroidering the gown of another at the requeſt of *A.* is a ſufficient conſideration to charge *A.*, and it is at the election of *B.* to bring debt, or an *aſſumpſit*. Cro. Eliz. 880.

(F) Of the Manner of bringing the Action; and where it muſt be brought in the *Debet* and *Detinet*.

IF the action be brought for (*b*) money, it muſt be in the *debet* and *detinet*; but if (*c*) goods or chattels, it muſt be in the *detinet* only. (*b*) 50 E. 3. 16. b. Roll. Abr. 604. S. P.

(*c*) 3 Leon. 260. 4 Leon. 46. S. P. Winch, 75. It was brought for money in the *debet* and *detinet*, and for two ſhirts in the *detinet* only *——— * *Sed qu.* If the declaration was good, as it ſeems to be two diſtinct ſpecies of action, and requires two different pleas?

So, if brought for foreign money (*d*) not made current, for then it is as bullion. Palm. 407. Latch. 77. 84. Jon. 69.

S. C. adjudged, where by Dod. the action might be brought in the *debet* and *detinet*, or in the *detinet* only; but this muſt be intended where ſo much Engliſh money, being the value of the foreign, is demanded. Raſtal and Draper, Cro. Jac. 88. Yelv. 80. Brownl. 90. Noy, 13. *& vide* Leon. 41. Yelv. 135. Brownl. 102. (*d*) But if made current by proclamation, the action for it may be brought in the *debet* and *detinet*. Noy, 13. Latch, 77. 84. Palm. 407.—Debt in the *debet* and *detinet* for 107*l.* 10*s.* where the declaration was upon a ſpecial wager for 100 guineas, which the plaintiff averred were worth 107*l.* 10*s.*, and it was objected that it ſhould have been in the *detinet* only, for 100 guineas in ſpecie, but held well enough as to this point, though reverſed for another fault. St. Leger and Pope, Carth. 322. 5 Mod. 4. 4 Mod. 406. Lutw. 484. Salk. 344. S. C. pl. 1. 10 Mod. 336. 12 Mod. 81. S. C.

If a man ſells certain cloths for 66*l.* *Flemiſh* money current at *Middleburgh*, to be paid upon requeſt, he may bring an action of debt for 39*l.* 12*s.*, ſetting forth the ſpecial matter, and averring that the 66*l.* *Flemiſh tempore venditionis, &c.* amounted to 39*l.* 12*s.* *monetæ Angliæ*, and that the defendant has not paid, *&c.* and if he values the foreign money otherwiſe than in truth it is, the defendant Cro. Jac. 88. Raſtal and Draper, adjudged. Yelv. 80. Brownl. 90. Moor, 775. S. C.

Leon. 41. Cro. Eliz. 536. S. P. adjudged, & *vide* Yelv. 135. Brownl. 102.

fendant may plead in abatement, and ſo help himſelf. Adjudged, after a verdict, for the plaintiff, and ſaid that it being found that he owed what is demanded, there ought to be no (*a*) farther inquiry of the value.

(*a*) But in debt againſt an executor for 47 *l.* 8 *s.* 8 *d. monetæ Flandriæ attingent, ad valentiam* 40 *l.* Engliſh, the defendant pleaded *plene adminiſtravit*, and it was found againſt him; and judgment given *quod recuperet debitum*; but upon a writ of error between Bagſhaw and Plain, Cro. Eliz. 536., it was reverſed, becauſe it ſhould have been *quod recuperet* the 47 *l.* 8 *s.* 8 *d.* Flemiſh, and a writ to have been awarded to inquire the value. Moor, 704 pl. 980. reverſed, becauſe the jury had not inquired of the value of the Flemiſh money, and the affirmation of the plaintiff that it amounted to 40 *l.* was not a ſufficient warrant for the court to give judgment upon.

Moor, 566. Roll. Abr. 602, 603. 20 H. 6. 5.

If an executor brings debt for any thing in right of his teſtator, it muſt be in the *detinet* only.

5 Co. 32. b. S. P. laid down as a rule.

Roll. Abr. 602. Lane, 79. S. C. adjudged.

As if *A.* be in execution upon a judgment for *B.*, and after *B.* die, and after, *A.* bring an *audita querela* againſt *C.* the executor of *B.* and have a *ſcire facias*, and thereupon put in bail by recognizance in Chancery, according to the ſtatute of 11 *H.* 6. *c.* 10. and after upon this *audita querela* judgment be given againſt *A.*, and afterwards a *ſcire facias* iſſue againſt the bail, and after judgment the bail be taken in execution upon the recognizance, and the ſheriff ſuffer him to eſcape; upon which eſcape the executor brings an action of debt; (*b*) this action ought to be brought in the *detinet* only, and not in the *debet* and *detinet*, for this recognizance is in the nature of the firſt debt, this being in a legal courſe.

(*b*) So, if one, as executor, obtains judgment in debt, and takes the defendant in execution, and the ſheriff ſuffers him to eſcape, &c. for the firſt action being in the *detinet*, and that for the eſcape being founded upon the ſame record, it ought to purſue it. Cro. Eliz. 326. Cro Jac. 545. 685. Hob. 264. 2 Roll. Rep. 132. Styl. 232. Hut. 79. S. P. adjudged, in which laſt book it was endeavoured to diſtinguiſh it from the other caſes, becauſe the plaintiff declared generally, and not as executor.

Roll. Abr. 603. Lane, 80. S. P.

So, if an executor recovers in an action of debt upon a contract, and afterwards brings debt upon the judgment, it muſt be in the *detinet*.

20 H. 6. 5. b. Roll Abr. 602. S. C.

If an executor brings debt upon an obligation made to the teſtator, where the day of payment incurred after the death of the teſtator, yet the writ ſhall be in the *detinet* only, for he brings the action as executor.

20 H. 6. 6. b. Roll. Abr. 602.

So, if a man binds himſelf to the teſtator to pay him 100 *l.* when ſuch a thing ſhall happen; if it happens after the death of the teſtator, yet the writ of debt by the executor ſhall be in the *detinet* only.

11 H. 6. 36. Roll. Abr. 602. S. C.

If a rent be granted to another for years, the executor of the grantee ſhall have debt for the arrearages of this rent incurred after the death of the teſtator in the *detinet* only, for he had it as executor.

Roll. Abr. 603. Spark and Spark, Cro. Eliz. and Noy, 32. S. C. adjudged.

So, if leſſee for 20 years leaſes for 10 years rendering rent, and dies, his executor or adminiſtrator ſhall have debt for the rent incurred after the death of the teſtator (*c*) in the *detinet* only.

Cro. Car. 225. Lev. 250. 2 Keb. 407. Sid. 379. S. P. adjudged. (*c*) But in the caſe of Tratle and King, 2 Jon. 169. it is adjudged, it lay in the *debet* and *detinet*, and a diverſity taken be-

tween

tween things in action and chattels in poſſeſſion; for as to things in action the writ muſt always be in the *detinet*; as for the arrears of an account, &c. and it ſhall not be aſſets till recovered; but in this caſe, the reverſion of the term being in the executor immediately by the death of the teſtator, it is aſſets, for the whole value, and the ſhewing he is executor, is only to entitle him to the term to which the rent is incident. ——And where being brought in the *debet* and *detinet* it is aided after verdict, by 16 & 17 Car. 2. c. 8. *vide* Lev. 250.

If in an account an executor recovers a debt due to his teſtator, in debt for the arrearages thereupon, the writ ſhall be in the *detinet* only; for though the action is converted into a debt by the account, yet it is the ſame thing which was received in the life of the teſtator. Cro. Eliz. 326. Cro. Jac. 545. 5 Co. 31. a. But for this *vide* Hob. 88. 184. 272. Noy, 19. 2 Lev. 111. 2 Jon. 47.

But if an executor takes an obligation for a debt due to his teſtator by contract, in debt upon this obligation the writ ſhall be in the *debet* and *detinet*. 20 H. 6. 4. b. 5. b. Roll. Abr. 602. S. C.

So, if an executor recovers in treſpaſs for goods taken out of his poſſeſſion, in debt for the damages recovered, the writ ſhall be in the *debet* and *detinet*, for he need not name himſelf executor. 20 H. 6. 5. b. Roll. Abr. 602. S. C. Lane, 80. S. C. cited.

So, if the executor ſells the goods of the teſtator for a certain ſum, he ſhall have debt for this in the *debet* and *detinet*. Roll. Abr. 602. Lane, 80. Cro. Jac. 685.

If an executor, having lands by an extent upon a ſtatute made to the teſtator, and naming himſelf executor, by deed leaſes them for three years, rendering rent, &c., if an action of debt is after brought by him for this rent, it muſt be in the *debet* and *detinet*, becauſe it is founded upon his own contract. Winch. 80. S. C. Brownl. 205. Mod. 185. S. P.

So, an executor, being leſſee for years of a rectory in the right of the teſtator, may have debt upon 2 & 3 *E.* 6. *c.* 13. for not ſetting out tithes in the *debet* and *detinet*, becauſe founded upon a wrong in his own time, and by the ſtatute it is given to the party grieved. Cro. Jac. 545 cited to have been adjudged.

Alſo, debt againſt an executor ſhall be in the *detinet* only, for he is chargeable no farther than he has aſſets. 11 H. 4. 16. Roll. Abr. 603.

But after (*a*) judgment againſt an executor, one may in a new action of debt in the *debet* and *detinet* ſuggeſt a *devaſtavit* by the executor, and (*b*) thereby charge him *de bonis propriis*. Sid. 397. *vide* tit. *Executors*.

(*a*) But not without a judgment. Cart. 2. —And therefore it lies not upon a bond ſuggeſting ſuch a *devaſtavit*, for it is hard upon ſuch a ſurmiſe to charge an executor in his own right. Vent. 321. adjudged, and the court ſaid they would not extend theſe actions farther than they had been. 2 Lev. 209. adjudged. Lev. 147., and for this *vide* Roll. Abr. 603. 5 Co. 32. Sand. 216. (*b*) Where the defendant has been held to ſpecial bail in ſuch action. Vent. 355. Sid. 63.

So, if the executor obliges himſelf to pay a debt due by contract by the teſtator, in debt upon this obligation the writ may be in the *debet* and *detinet*, becauſe the obligation made it his own debt. 11 H. 6. 8. 17. b. Roll. Abr. 603. S. C.

In an action of debt againſt an executor for rent, incurred in the life of the teſtator, the writ ſhall be in the (*c*) *detinet* only. 11 H. 6. 36. Roll. Abr. 603.

(*c*) If debt be brought againſt an adminiſtrator in the *debet* and *detinet* for rent due before his time, where it ſhould only be in the *detinet*, this is aided after verdict, by 16 & 17 Car. 2. c. 8. *vide* Sid. 379. Potter's caſe, and tit. *Error*.

Roll. Abr. 603. Cro. Eliz. 711. Moor, 566. Brownl. 56. Cro. Jac. 411. 546. Bulſt. 23.

But if an action of debt be brought againſt an executor for the arrearages of a rent, reſerved upon a leaſe for years, and (*a*) incurred after the death of the teſtator, the writ (*b*) ſhall be in the *debet* and *detinet*, (*c*) becauſe the executor is charged of his own poſſeſſion.

2 Brownl. 206. Cro. Car. 225. All. 34. Mod. 185. 2 Brownl. 202. Palm. 116. S. P.

(*a*) Where part incurred in the time of the teſtator, and part after his death, his executor may be charged in the *detinet* for the whole. All. 76. Styl. 118. (*b*) He may be charged in the *detinet* only, but then he ſhall anſwer only out of the teſtator's eſtate. Royſton and Cordary. All. 42. adjudged, and ſaid that it was never doubted. Styl. 79. adjudged, & *vide* Styl. 52. Lev. 127.* (*c*) For though he hath the land as executor, yet nothing ſhall be employed to the execution of the will but ſuch profits only as are above that which is to make the rent; and therefore ſo much of the profits as is to make or anſwer the rent he ſhall take to his own uſe, and he ſhall be charged for it in the *debet* and *detinet*. Poph. 120. *per* Popham. 5 Co. 31. Cro. Eliz. 712. [but ſee Cro. Car. 225.] —— And if the land be not worth more than the rent, it is a good plea to ſuch action in the *debet* and *detinet*; for in ſuch caſe he is to be charged in the *detinet* only. Vent. 171. *per cur.*; and for this *vide* Palm. 118., Sid. 266., Mod. 185. —— But where he is to be charged upon a leaſe made to the teſtator, and hath not the profits of the leaſe to anſwer it, he ought to be charged in the *detinet* only; as where debt is brought againſt an executor of a leſſee for rent incurred after aſſignment of the term. Poph. 120. Sid. 266. Lev. 127. 2 Vent. 209. 3 Mod. 327. So, if brought againſt him after waver of the term. Lev. 127. & *vide* Allen, 43. [Q. Whether an executor can wave a term? 1 Mod. 185.]

* But where part incurs in the life of teſtator, and part after, the plaintiff may bring two actions, for the firſt part in the *detinet* only, the other in the *debet* and *detinet*, and need not charge him as executor, in the laſt caſe, by which means he may obtain a judgment *de bonis propriis*.

5 Co. 36. a. Lloyd and Walcot. 3 Leon. 206. S. C. adjudged. Allen, 73. S. P.

If an action of debt is brought againſt baron and feme, upon an obligation entered into by the feme before marriage, it ſhall be in the *debet* and *detinet*; for by the marriage all the perſonal goods and power of diſpoſing of the real are by law given the huſband, which he has to his own uſe, and not as executors, who have them only to the uſe of another.

5 Co. 36. a. (*d*) And for another reaſon, becauſe he is bound by ſpecial words in the obligation. Cro. Eliz. 712. & *vide* Cro. Eliz. 350. 2 Leon. 11. 2 Brownl. 204, 205.—But if in the *detinet* only, it is good after verdict, by 16 & 17 Car. 2. c. 8. Comber and Watton, Lev. 224. adjudged. Sid. 342. 375. 379.

So, if an action is brought upon a bond againſt the heir of the obligor, it ſhall be in the *debet* and *detinet*, (*d*) becauſe he hath the aſſets in his own right.

(G) Of the Extinguiſhment of the Debt, and pleading in Bar thereof.

Vide head of *Pleas and Pleadings*. 13 H. 4. 1. Roll. Abr. 604. Burr. Rep. 9.

IF a man accepts an (*e*) obligation for a debt due by ſimple contract, this extinguiſhes the contract, but the acceptance of an obligation for a debt due by another obligation is (*f*) no bar of the firſt obligation.

(*e*) This muſt be intended from the debtor; for if a ſtranger gives bond for ſuch debt, it is otherwiſe. 2 Leon. 110. adjudged †.——So, if upon the making the contract, a ſtranger gives bond for it, or being preſent promiſes to give bond for it, and after does ſo, the debt by contract is extinguiſhed, the obligation being made upon or purſuant to the contract. 2 Leon. 110. *per cur.*——So, if a man accepts a bond for a legacy, he cannot after ſue for his legacy in the ſpiritual court, for by the deed the legacy is extinct, and it is become a mere debt at common law. Yelv. 38. (*f*) For one deed cannot determine the duty upon another. Cro. Eliz. 304. 727. for this *vide* 2 Dan. 116.——So, if a ſtatute is accepted for it. Roll. Abr. 470.——Otherwiſe, if a judgment is given or obtained upon the obligation. 6 Co. 44, 45.

† So, a negotiable note, or bill of exchange, has been held in B. R. an extinguiſhment of a ſimple contract debt, the defendant being liable to pay the money to a third perſon.—Richardſon and Rickman, M. 1775. [*Vide ſupr.* vol. 1. 281-2.]

In

In debt upon an obligation the defendant cannot plead *nil debet*, but muſt deny the deed by pleading *non eſt factum*, for the ſeal of the party continuing, it muſt be diſſolved *eo ligamine quo ligatur*. *Vide* Hard. 332. of Pleas in Bar, head of *Pleas and Pleadings*.

But if the debt be due by ſimple contract, then he may plead *nil debet*, for it does not appear that there is any debt continuing. Hob. 218. 2 Inſt. 651.

In debt for rent, if it be by deed, the proper plea is *non eſt factum*; but if it be without deed, the defendant may plead *non dimiſit*, nothing in arrear, or that he never (*a*) entered; alſo, by the better opinion of the books, if the rent be due by indenture, the defendant may plead *nil debet*; for an indenture does not acknowledge a debt like an obligation, ſince the debt accrued by ſubſequent enjoyment. [The indenture is only inducement to the action; matter of fact is the foundation of it.] Hard. 332. (*a*) But if the leaſe be by indenture, debt lies, though he never entered. 2 H. 8. 14. Roll. Abr. 605.

2 Ld. Raym. 1477. 2 Stra. 763.—And therefore, in a declaration in debt for rent againſt ſuch leſſee, it need not be ſhewn that he entered, for the contract is the ground of the action. 4 Leon. 18. Hetl. 54. Vent. 41.——And the occupation not material; otherwiſe, of a leaſe at will. Dyer, 14. a. Hetl. 54. Vent. 41. 108. Salk. 209. pl. 1. S. P. for it muſt appear to the court when he entered, and how long he occupied; *ſecùs*, of a leſſee for years. Ld. Raym. 170.——Where upon a leaſe from year to year *quamdiu partibus placuerit*, no entry or continuance of the poſſeſſion was ſhewn as to the ſecond year, and yet after verdict it was intended he was in poſſeſſion for all the time for which the rent was found due. 3 Salk. 136. pl. 3. Mod. 3. Sid. 423. & *vide* Plow. 423. Palm. 117. 2 Roll. Rep. 131. Keilw. 65.

[So, in debt for an eſcape (*b*), or on a *devaſtavit* (*c*) againſt an executor, *nil debet* is a good plea; for the judgment is but inducement, and the eſcape and *devaſtavit* are the foundation of the action.] (*b*) Waites v. Briggs, 2 Salk. 565. (*c*) Wheatley v. Lane, 1 Saund. 219.

In debt for the arrears of an (*d*) annuity granted for life, *nil debet* is no good plea, for the action is merely founded upon the deed, for without it no action can be maintained; and though by the death of the grantee the nature of the action is changed, the annuity being determined; yet this proves not but that the action is founded upon the deed. Keilw. 147. (*d*) But in debt upon the grant of a rent, *nil detinet* is a good plea, becauſe the plaintiff hath other remedy to levy it, viz. by diſtreſs; otherwiſe, upon the grant of a bare annuity, for there being no remedy by diſtreſs, the grant muſt be avoided by matter of as high a nature, viz. by acquittance. Hard. 333.

[So, in debt for a penalty upon articles of agreement, or on a bail-bond, *nil debet* is no plea, for in theſe caſes the deed is the foundation, and the fact but inducement.] Warren v. Conſett, 2 Ld. Raym. 1500. 2 Str 778. S. C. 1 Barnard. 15. S. C. 8 Mod 106. 323. 382. S. C. Forteſc. 363. 367.

But in debt for the arrears of a rent-charge, deviſed to the plaintiff's wife for life, againſt the (*e*) adminiſtrator of the occupier of the land, *nil detinet* is a good plea, for a will is no deed, nor wants any delivery: adjudged, and ſaid the action was not ſo much grounded upon the will itſelf as upon the ſtatute, by which men are enabled by will to diſpoſe of their lands and rents iſſuing out thereof. Hard. 322. Wilſon's caſe. (*e*) That where the teſtator could not plead *nil debet*, his executor ſhall not plead *non detinet*. 2 Mod. 266.

In debt upon 2 & 3 *E.* 6. *c.* 13. for not ſetting forth tithes (*f*), not guilty, or (*g*) *nil debet* are good iſſues. 2 Inſt. 651. Cro. Eliz. 621. S. P.

adjudged. (*f*) Where the action is founded upon a penal ſtatute, not guilty is a good plea. Cro. Eliz 257. Goulſ. 39. Noy, 56. 2 Inſt. 651. Moor, 914. pl. 1293. [See 1 Term Rep. 462.] (*g*) Hob. 218. S. P. adjudged.

Moor, 49. Keilw. 39. Cro. Eliz. 880. Palm. 223.

In debt upon a contract, the defendant cannot plead the contract was for a leſs ſum, or otherways, than the plaintiff has declared, and traverſe the contract in the declaration laid, but may (*a*) wage his law.

(*a*) Or plead *nil debet* *.

The contract being but the conveyance to the action, is not traverſable. Co. Lit. 295. But for this *vide* head of *Pleas and Pleadings*. —— * The plea of *nil debet*, in ſuch caſe, puts the whole matter in iſſue.

1 Ld. Raym. 566. 12 Mod. 376. S. C. 1 Ld. Raym. 394. S. P. Gilb. Debt, 434. 443. Semb. *contr.*

[Under the plea of *nil debet*, the defendant may give in evidence a releaſe, or other matter, in diſcharge of the action.

Draper v. Glaſſop, 1 Ld. Raym 153. Anon. 1 Salk. 278. S. P.

And it has been holden, that as this plea is in the preſent tenſe, the ſtatute of limitations may be given in evidence under it.

Bredon v. Harman, 1 Str. 701.

But in debt *qui tam*, the defendant was not allowed to give in evidence on *nil debet*, a former recovery againſt him by another perſon for the ſame cauſe.]

Deodand.

3 Inſt. 57, 58. 5 Co. 110. H. P. C. 34. Pult. 125. Crom. 31. a.

A Deodand is that inſtrument which occaſions the death of a man, and is forfeited to the king in order to be diſpoſed of in pious uſes by the king's almoner. This forfeiture of whatever procures the death of a man without the default of another was (*b*) introduced to increaſe the terror and abhorrence of murder, ſo that nothing that occaſioned it ſhould ſeem to go unpuniſhed. Alſo that weapon or inſtrument, whereby one man kills another, is called a deodand.

(*b*) And was poſſibly taken from the law of *Moſes*, which requires that the beaſt that murders ſhould be ſlain. 2 Exod. 28.

Hawk. P. C. c. 27.

To underſtand what things are forfeited as deodands, we muſt obſerve that it is laid down as a rule, that *omnia quæ movent ad mortem ſunt deodanda*, and, therefore, that wherever the thing which is the occaſion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited alſo.

Salk. 220. The Lord of the Manor of Hamſtead's caſe,

As, where a cart meeting a waggon loaded upon the road, and the cart endeavouring to paſs by the waggon, was driven upon a high bank and overturned, and threw the perſon that was in the cart juſt before the wheels of the waggon, and the waggon run over

over him and killed him; it was holden, that the cart, waggon, loading, and all the horſes were deodands, becauſe they all moved *ad mortem*. by Pollexfen and Gregory, on the Home Circuit.

But if a man, riding on the ſhafts of a waggon, fall to the ground and break his neck, the horſes and waggon only are forfeited, but not the loading, becauſe it no way contributed to his death. 3 Inſt. 58. S. P. C. 20. Hawk. P. C. c. 27.

So, where a thing not in motion cauſes a man's death, that part thereof only which is the immediate cauſe is forfeited; as where one climbing upon the wheel of a cart while it ſtands ſtill, falls from it and dies of the fall, the wheel only is forfeited, but if he had been killed by a bruiſe from one of the wheels being in motion, the loading alſo would have been forfeited, becauſe the weight thereof made the hurt the greater.

Alſo, if a man riding on a horſe over a river is drowned (*a*) through the violence of the ſtream, the horſe is not forfeited, becauſe not that, but the waters cauſed his death. Cro. Jac. 483. 2 Roll. Rep. 23. Poph. 136. Salk. 220.

(*a*) *Secùs*, if the horſe had thrown him.

By the opinion of our (*b*) antient authors, things fixed to a freehold, as the wheel of a mill, a bell hanging in a ſteeple, *&c.* may be deodands; but by the (*c*) latter reſolutions they cannot, unleſs they were ſevered before the accident happened. (*b*) S. P. C. 20. b. Pult 124. b. (*c*) As Sid. 204. Lev. 136.

Raym. 97. Keb. 723. 744. S. C. where a man was ringing a bell, and the rope caught him up and daſhed him againſt the roof of the belfry, whereby he died. 6 Mod. 187. S. C. cited by Holt, and that it was no deodand.——So, of the wheel of a forge. 6 Mod. 187. See Salk. 220. Hawk. P. C. c. 26. § 5, 6, 8, &c. Stra. 61.

Alſo it was (*d*) formerly holden, that this forfeiture did not extend to caſual deaths ariſing from the indiſcretion of children or infants, within the age of diſcretion, for that ſuch puniſhment of innocent owners by taking their goods would anſwer no good end of juſtice; beſides, the misfortune in this caſe might ſeem rather owing to the indiſcretion of the infant than any default in the thing: but this diſtinction has not been allowed of (*e*) late; for the law does not ground the forfeiture on any default in the things forfeited, ſince it extends it to things without life, to which it is plain that no manner of fault can be imputed. (*d*) S. P. C. 21. a. 3 Inſt. 58. H. P. C. 33. Pult. 125. Dalt. c. 97. (*e*) 2 Keb. 719. 806. Hawk. P. C. c. 27.

This forfeiture takes place at land only, and doth not extend to the ſeas that are continually liable to ſtorms and tempeſts, and therefore a ſhip in ſalt water, whether in the open ſea, or within the body of a county, from which a man falls and is drowned, is not forfeited. 3 Inſt. 58. H. P. C. 33. S. P. C. 20. b. Hawk. P. C. c. 27.

But a ſhip, by a fall from which a man is drowned in the freſh water, ſhall be forfeited, but not the merchandize therein, becauſe they no way contribute to his death. H. P. C. 33. 3 Inſt. 58. Hawk. P. C. c. 27.

In all theſe caſes, if the party wounded die not of his wound within a year and a day after he received it, there ſhall be nothing forfeited; for the law does not look on ſuch a wound as the cauſe of a man's death, after which he lives ſo long; but if the party die within that time, the forfeiture ſhall have relation to the wound S. P. C. 21. b. H. P. C. 55. Hawk. P. C. c. 27. Dalt. c. 97. Plow. 260. Keilw. 68.

given, and cannot be ſaved by any alienation or other act whatſoever in the mean time.

5 Co. 110. b. Co. Lit. 115. Dalt. c. 97. S.P.C. 21. a. Pult. 125. Hawk. P.C. c. 27.

However, nothing can be forfeited as a deodand, nor ſeized as ſuch, till it be found by the coroner's inqueſt to have cauſed a man's death; but after ſuch inquiſition the ſheriff is anſwerable for the value of it, and may levy the ſame on the town where it fell; and therefore the inqueſt ought to find the value.

Foſt. Cr. Law, 266.

As this forfeiture ſeemeth to have been originally founded rather in the ſuperſtition of an age of extreme ignorance, than in the principles of ſound reaſon and true policy; it hath not of late years met with great countenance in *Weſtminſter-Hall* *.

* Upon inquiſitions, the jury find the value as ſmall as poſſible.—And in ſome caſes only the value of the identical thing moving to, or cauſing the death; as for example, of the wheel of a loaded waggon, &c. [This practice, the court of King's Bench have impliedly ſanctioned, by refuſing to reform it on an application by the crown or its grantees. Foſt. 266. 2 Barnardiſt. 82. Nor can ſuch inquiſitions be taken by the grand jury on default of the coroner. 1 Burr. 19.; and when taken by the coroner, they may be removed and traverſed. *Ibid.* 2 H. H. P. C. 416.]

Deſcent.

(A) Of Lineal Deſcent: And herein of the Excluſion of the aſcending Line.

(B) Of Collateral Deſcent.

(C) Of the Half-Blood, and the *Poſſeſſio Fratris*.

(D) Of Deſcents according to Cuſtom.

(E) Where a Perſon ſhall be ſaid to take by Purchaſe, and not by Deſcent.

(F) Of a Deſcent, its Operation to take away an Entry.

(G) In what Caſes the Entry of the Diſſeiſſee may be lawful notwithſtanding a Deſcent.

(H) Whoſe Entry is preſerved notwithſtanding a Deſcent.

(I) How the Entry may be preſerved by continual Claim: And herein,

1. Of the Nature of continual Claim, and the Effects of it.
2. What is neceſſary to a continual Claim to make it effectual.
3. The Time in which it is to be made.

(A) Of Lineal Deſcent: And herein of the Excluſion of the aſcending Line.

ANciently, the lords gave lands to ſuch perſons as had behaved themſelves well in the wars, for their lives only, and ſometimes they alſo married their daughters to them, and then they limited the lands to go not only to the tenant himſelf, but alſo to the iſſue of that marriage; and this firſt brought in the notion of ſucceſſion among the northern nations where the feudal tenures prevailed.

The lands therefore in the elder times went to the immediate deſcendants of ſuch marriage, and originally to none elſe: and in the firſt place they went to the (*a*) males as the moſt worthy of blood, and moſt capable of doing the ſervice annexed to ſuch donations: and the feud was united in the (*b*) male, becauſe he was obliged to do the duty in the wars, and for every knight's fee was to go out forty days with his lord, ſo that the feud did not divide among the males, becauſe the duty could not be commodiouſly divided: beſides, the males were to keep up the name and grandeur of the family; and, therefore, the inheritance was not ſhared or broken. From hence it came to paſs, that among the males, the eldeſt was preferred as the moſt worthy, ſince he was ſooneſt able to go to the wars, and to do the (*c*) duties of the tenure.

Gilb. Treat. of Ten. 9.

(*a*) *Vide* title *Coparceners.*

(*b*) *Vide* titles *Gavelkind* and *Borough-Engliſh.*

(*c*) Alſo, the eldeſt ſon was anciently married with the conſent and approbation of the lord, for the lord always approved the firſt marriage of his feudatory, and of his heir apparent; and if the feudatory died, his heir within age, the lord had the total marriage of him; and if he was of full age, the lord gave licence to ſuch marriage. From hence the deſcent always ſettled in the eldeſt line, and the daughter of the eldeſt ſon was preferred before the ſecond or third brother, and their male deſcendants, in order to encourage the beſt marriages with ſuch eldeſt ſon. Spelm. Rem. 29.

When a feud eſcheated to the lords for felony, or want of heirs, the lords uſed to reſtore it to the old family, or grant it out again to another family *ut feudum antiquum*, and then the deſcent was formed in ſuch new feud, as if it had been *feudum antiquum.* Hence, the lineal ſucceſſion or ſucceſſion of the father was totally excluded, becauſe no caſe could happen where the aſcending line could be admitted *in feudis antiquis*; for the father took before the ſon under the firſt feudatory in every ancient feudal donation; and all above ſuch donation were excluded, ſo that in ſuch donations the father could not claim as heir to his ſon. And this order of deſcent which excluded the father was the rather continued, becauſe the father was guardian to his ſon; and in thoſe barbarous times they would not truſt the father with any profit from the death of his own iſſue, and ſo the father was totally excluded.

Co. Lit. 11. b.

But though the father cannot inherit his ſon, yet if a leaſe for life be made to the ſon, the remainder to his next of blood, the father ſhall take the remainder by (*d*) purchaſe under the words of deſignation.

Co. Lit. 10. b.

(*d*) So, if a man hath iſſue two ſons, and the eldeſt dies, leaving a ſon, and a remainder is limited to the next of blood to the father, the younger ſon ſhall take it; ye. the other is the father's heir. Co. Lit. 10. b.

Lit. § 3. Co. Lit. 11. b.

Alſo, if the ſon purchaſes lands, and dies without iſſue, and without brothers and ſiſters of the whole blood, and the lands deſcend to his uncle, the father may be heir to the uncle, if the uncle was in (*a*) actual poſſeſſion; but he claims it as heir to his brother who was laſt (*b*) ſeiſed, according to the rule *quod ſeiſina facit ſtirpem.*

(*a*) Therefore, in caſe of a reverſion upon a leaſe for life, made of the lands by the ſon, the father cannot be heir, becauſe the ſon was laſt actually ſeiſed; otherwiſe, of a reverſion upon a leaſe for years; for the poſſeſſion of the tenant is the poſſeſſion of the uncle. Co. Lit. 11. b.—If a ſon be enfeoffed with warranty, and the uncle enter into the lands after the death of the ſon, and die; my Lord Coke ſays, that the father cannot take benefit of ſuch warranty, becauſe it was never actually poſſeſſed by voucher, or *warrantia chartæ*. Co. Lit. 11. b.—If an advowſon be granted to the ſon and his heirs, and the ſon die without iſſue, and the advowſon deſcend to his uncle, and he die before he can or does preſent to the church, the father ſhall not inherit, for before a preſentation there is no actual ſeiſin of the advowſon. The ſame law of a rent. Co. Lit. 11. b.

(*b*) The evidence of ſeiſin, or defect thereof, ſhews when it will or will not deſcend to the father from the uncle.

Eaſtwood v. Vinke, 2 P. Wms. 614. Co. Lit. 11. b.

[But if the father happen to be alſo couſin to the ſon, and as ſuch his heir, he may, in that remoter capacity, inherit immediately after the ſon.]

But here we muſt take notice, that if, after the deſcent to the uncle, the father has iſſue a ſon or daughter, that iſſue ſhall enter upon the uncle, for the land deſcended originally upon the uncle, becauſe he was then the next heir; therefore, if an heir nearer than he is ſprings up, by the ſame rule that he ſucceeded to the land at firſt, that heir muſt now take place and exclude him: and by the ſame rule, if a man hath iſſue a ſon and a daughter, and the ſon purchaſes lands in fee, and dies without iſſue, the daughter ſhall inherit; but if the father hath afterwards iſſue a ſon, this ſon ſhall enter into the land as heir to the brother; and if he hath iſſue a daughter and no ſon, ſhe ſhall be coparcener with her ſiſter.

(B) Of Collateral Deſcent.

Plow. 444 to 449. Clere and Brook, Co. Lit. 12.

IF a man purchaſed the *feudum novum ut feudum antiquum*, and died without iſſue, it went firſt to the father's ſide, becauſe the lords in ſuch feudal donations were preſumed to reſpect the father's ſide, who had been the ancient tenants of the manor; for where it was given *ut feudum antiquum*, it muſt be preſumed to be meant, as if it had been an ancient feud of that manor, and therefore it went to the father's ſide *in infinitum*, before it could go to any of the female blood. If the father's male line failed, it went to the female blood of the father; for the lords were preſumed rather to reſpect the female blood of their former tenants, than the blood of the mother who was newly introduced into the family of their feudatory, becauſe the feud was given as an ancient one, and, by conſequence, the blood of the precedent tenant was preferred to any other: but the blood of his mother's ſide was preferred to the blood of his grandmother; becauſe, being both female bloods, and both coming under the conſideration of ancient tenants, the (*c*) nearer tenant's blood was preferred to the more remote: but if the father's ſide wholly failed, then the blood of the

(*c*) Co. Lit. 10. b. *Hæres in lineâ rectâ præfertur hæredi in lineâ tranſverſali, & propinquior excludit propinquum, propinquus remotum, remotus remotiorem.*

the mother was admitted, *to wit*, firſt the male line, and then the female of ſuch blood, ſince the lord muſt be preſumed to introduce the blood of the mother, when he had given an indefinite right of repreſentation.

Agreeably to this ſcheme of deſcent upon the purchaſe of the *feudum novum ut feudum antiquum*, if a ſon purchaſe land in fee-ſimple, and die without iſſue, they of the blood of his father's ſide ſhall inherit as heirs to him before any of the blood of his mother's ſide, for the old rules, formerly ſettled for the directing of the deſcents of ſuch feuds as were purchaſed, ſtill prevail; and all new purchaſes made now of lands in fee ſhall be conſidered as the purchaſes formerly made of the *feudum novum ut antiquum*. Lit. §4. *Vide infra*, letter (E), 36.

If the ſon purchaſes land, and dies without iſſue, and it deſcends to any heir of the part of the father, and then the line of the father (after entry and poſſeſſion) fail, it ſhall never reſort to the line of the mother, though in the firſt inſtance, or firſt deſcent from the ſon, it might have deſcended to the heir of the part of the mother; for now by this deſcent and ſeiſin, it is lodged in the father's line, to whom the heir of the part of the mother can never derive a title as heir, becauſe he can never ſhew that he was heir to him that was laſt actually ſeiſed; which being a rule to be ſtrictly obſerved, he muſt entitle himſelf by it, otherwiſe be excluded.

(C) Of the Half-Blood, and the *Poſſeſſio Fratris*.

NONE ſhall be heir of land in fee-ſimple, or to a warranty, or ſue an appeal of death as heir, unleſs he be of the (*a*) whole blood, *viz.* both of the father and the mother. Co. Lit. 14. a.

(*a*) In a long courſe of time the feudal donations were worn out, and then it became impoſſible to compute up to the firſt marriage, where ſuch donations were originally ſettled, and therefore they changed the computation, and computed from the laſt poſſeſſor, provided the heir that claimed was of the blood of the firſt purchaſer, and then the rule was taken *quod ſeiſina facit ſtirpem*; for ſince the feudal donation was loſt, they could not regularly compute the deſcendants from the firſt feudal marriage; and therefore they computed from the laſt feudatory; and ſince both bloods of the firſt marriage were neceſſary to any perſon that would claim under the firſt donation, they required that a man ſhould be of the whole blood of the laſt feudatory, that would claim as heir to him; for if any perſon was of the whole blood of ſuch feudatory, then he muſt of neceſſity be of both bloods of that remote feudal marriage, where the feud was originally placed; and thus the half-blood came to be excluded; *vide Diſtribution*, under title *Executors and Adminiſtrators*.

Therefore, if an elder brother purchaſes lands in fee, and dies without iſſue, his ſiſter of the whole, not his younger brother of the half-blood, ſhall be his heir. Co. Lit. 14. a.

So, if a man ſeiſed in (*b*) fee hath iſſue a ſon and a daughter by one venter, and a ſon by a ſecond venter, and dies, and the eldeſt ſon (*c*) enters and dies, his ſiſter ſhall inherit according to the rule *quod poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem*. Co. Lit. 15.

(*b*) But this rule does not extend to lands in tail, for as to them a man muſt claim as heir *per formam doni*. Co. Lit. 15.——So, of a remainder after an eſtate for life that never fell in poſſeſſion, for a man muſt claim by virtue of the contract, as heir to him to whom the remainder was limited. 3 Co. 41. b. So, of a reverſion, whether any rent were reſerved, or not. 3 Co. 41. b. 42. b. (*c*) But without an actual ſeiſin the younger ſhall have the lands as heir to his father. Co. Lit. 15. a.

If

Co. Lit. 15. a. 243. a. And. 47. Keilw. 110. (*a*) So, if a guardian by knight's ſervice, or ſocage, enters, for the poſſeſſion of the guardian is the poſſeſſion of the infant. Co. Lit. 15. a. [And ſee the caſes of Whitcombe v. Whitcombe, Pr. Ch. 280. Goodtitle v. Newman, 3 Wilſ. 516. So, the entry of a deviſee for years, it is ſaid, will make a *poſſeſſio fratris*. Jenk. 242.]

If a father makes a leaſe for years, and the leſſee enters, and dies, the eldeſt ſon dies during the term, before entry or receipt of rent, the younger ſon of the half-blood ſhall not inherit, but the ſiſter; becauſe the poſſeſſion of the leſſee for years, who was formerly conſidered only as a bailiff to the leſſor, is the (*a*) poſſeſſion of the eldeſt ſon.

Co. Lit. 15. Cro. Car. 411. Roll. Abr. 628. Jon. 361. N. Bendl. 143. 8 Aſſ. 6.

But if a man makes a leaſe for life, and dies, leaving a ſon and a daughter by one *venter*, and a ſon by a ſecond wife, and the eldeſt ſon dies before the leaſe for life is determined, the youngeſt ſon ſhall inherit, becauſe the eldeſt was never ſeiſed.

So, if a father makes a leaſe for life, and after recovers againſt his leſſee by default, and dies, and the eldeſt ſon enters, againſt whom the leſſee recovers by a *quod ei deforceat*, and then the eldeſt ſon dies, the brother of the half-blood, and not the ſiſter, ſhall have the reverſion; for when the tenant for life has recovered his eſtate, he hath entirely defeated all poſſeſſion in his leſſor, which he acquired by the judgment on default, and all poſſeſſion in the eldeſt ſon likewiſe by virtue of that judgment, and is entirely in of his old eſtate; ſo that there is no actual ſeiſin left in the elder brother whereon to found a *poſſeſſio fratris*.

Co. Lit. 14. b. And ſo of other hereditaments, as a ſeignory, &c. 3 Co. 41. b. 42. a.—Of offices, courts, liberties, franchiſes, and commons of inheritance. Co. Lit. 15. b. 3 Co. 42. a. (*b*) Co. Lit. 15. b. S. P. 3 Co. 42. a. S. P. (*c*) Dyer, 10. pl. 40. 274. pl. 43. Roll. Abr. 502. pl. 3. [*i. e.* of a uſe *not* executed by the ſtatute; for uſes executed are legal eſtates. Co. Lit. 14. b. note 5. 13th edit.]

There is *poſſeſſio fratris* of an advowſon or (*b*) rent, after actual receipt of the rent, or preſentation of the clerk; ſo of (*c*) a uſe, becauſe equity follows the rule of the common law; ſo likewiſe of a copyhold, where the eldeſt ſon receives the profits, and dies, though before admittance.

(*e*) 1 Co. 121. b. 2 P. Wms. 713. Hardr. 488.

[So, of a truſt (*d*) and (ſeemingly by the better opinion) of an equity of redemption (*e*).]

(*e*) 1 Atk. 604. Co. Litt. 205. a. note (1), 19th edit.

Co. Lit. 15. a.

But though the eldeſt ſon enters, and gets an actual poſſeſſion of the land, yet if the father's relict be endowed of the third part, and the eldeſt ſon die, the brother of the half-blood, and not the ſiſter, ſhall have the reverſion of the third part, becauſe the actual ſeiſin which the brother obtained, was defeated as to the third part, by the widow's entry into it, who is eſteemed in law to be in, in continuance of her huſband's eſtate, without any interruption.

Co. Lit. 15. a.

But if the eldeſt ſon had made a leaſe for life, and the leſſee had endowed the wife of the father, who afterwards died, the daughter ſhould have the reverſion, and not the half-brother; for the widow's acceptance of dower from the tenant for life, and the exiſtence of his eſtate in the land after her deceaſe, ſhew that the tenant for life had an intereſt in the land; but ſuch an intereſt always preſuppoſes an actual ſeiſin in the leſſor; otherwiſe he could not

not make that livery which is neceſſary on the paſſing of a freehold; therefore, notwithſtanding the dower, this actual ſeiſin in the brother ſhall eſtabliſh a *poſſeſſio fratris*.

Lands are given to a man and his wife in ſpecial tail, the remainder to the heirs of the huſband, and they have iſſue a ſon, and the wife dies, the huſband marries again, and hath iſſue a ſon, and dies, the eldeſt ſon enters, and dies without iſſue; the ſecond brother of the half-blood ſhall inherit the remainder, becauſe the eldeſt brother was not ſeiſed of a fee-ſimple, as the margin is, but only of the ſpecial tail, and ſo no ground for a *poſſeſſio fratris* of the fee expectant on the tail. Co. Lit. 14. b. Roll. Abr. 628.

If a man dies ſeiſed of ſeveral parcels of land in one county, and after his death his eldeſt ſon enters into one parcel generally, and, before any actual entry into the reſt, dies, this general entry into part ſhall veſt in him an actual ſeiſin in the whole, ſufficient to eſtabliſh a *poſſeſſio fratris* upon; for ſince the freehold in law is caſt upon him by the death of his father, and ſince the poſſeſſion is in nobody, and ſo no particular eſtate to be defeated, a general entry into parcel, in the name of all, may well ſerve to reduce the whole into an actual poſſeſſion: but if his entry into parcel be ſpecial, it ſhall only reduce that parcel into poſſeſſion; for it is reaſonable to bound the operation of his act by the intention which he appears to have had in doing it. Co. Lit. 15.

The advantages of this rule of *poſſeſſio fratris* do not only extend to the ſiſter, but to her iſſue, who ſhall be preferred to the half-brother, becauſe they repreſent the anceſtor, and therefore ſhall ſucceed to thoſe advantages, which their anceſtor would have enjoyed if ſhe had lived. Co. Lit. 15. a.

There can be no *poſſeſſio fratris* of dignities, as duke, marquis, and the other honours annexed to the peerage, but the brother of the half-blood ſhall (*a*) inherit them; and this difference ſeems to be founded on a ſtrict regard to the publick good, which is the better conſulted when ſuch perſons are promoted to thoſe dignities as are capable of diſcharging the great duties annexed to them. Co. Lit. 15. a. 3 Co. 42. b. Cro. Car. 601.

(*a*) The Lord Gray being a baron by writ, was created Earl of Kent, to him and the heirs male of his body, and had iſſue two ſons by ſeveral venters, the eldeſt of whom had iſſue a daughter, the barony ſhall go to the daughter *jure repræſentationis*, but the earldom to the ſecond ſon, according to its original limitation. Cro. Car. 601. [Coll. Proc. on Claims of Bar. 195. But if it was of a feudal title of honour, as of the earldom of Arundel, or barony of Berkeley, there *poſſeſſio fratris* ſhould hold well; becauſe the title is annexed to the land.—So, of an office of dignity, and *eâ ratione* the office of high-chamberlain of England deſcended to the Earl of Lindſey of the whole blood, and departed from the line male of the Earl of Oxford; and adjudged accordingly in parliament. Hal. MSS. Coll. Proc. on Claims of Bar. 173. Sir W. Jon. 96.]

Alſo, the policy of the kingdom hath eſtabliſhed laws and rules for the government of the poſſeſſions and deſcent of the crown, different from thoſe which guide and direct the deſcents of private property: therefore, if the king hath iſſue a ſon and a daughter by one venter, and a ſon by another venter, and purchaſes lands, and dies, and the eldeſt ſon enters and dies without iſſue, the daughter ſhall not inherit thoſe lands, nor any other fee-ſimple lands of the crown, but the younger brother ſhall have them together with the crown. Co. Lit. 15. a.

(D) Of Deſcents according to Cuſtom.

Lit. § 210. Co. Lit. 140. a. Lamb. 608. *vide* head of *Gavelkind*, and Lamb. 628., that it is probable that moſt lands in England were thus partible.

THERE are ſeveral cuſtoms as to deſcents, which having been allowed time out of mind, muſt be preſumed to be coeval with the common law, and therefore cannot be altered without an act of Parliament, as that of *gavelkind* in *Kent*, by which the deſcent is firſt to all the male children, then to the females, then to collateral relations; but in this, according to the civil law, regard is to be had to the *ſtirpes*, and therefore if the eldeſt ſon had iſſue a daughter, ſhe ſhould inherit her father's ſhare with the younger ſons.

Co. Lit. 10. Lamb. 607. Hob. 31. (*a*) Alſo for a condition broken, the heir at common law ſhall enter, becauſe the condition is a thing of a new creation, and altogether collateral to the land. Lamb. 608. Co. Lit. 11, 12. (*b*) This cuſtom, like all other cuſtoms that are derogatory from the common law, is to be conſtrued ſtrictly, becauſe as far as the particular cuſtom hath not derogated from the common law, the general cuſtom of the whole kingdom ought to prevail. Roll. Abr. 568.

But if a remainder of lands of the nature of gavelkind be limited to the right heirs of *J. S.* the heir at common law ſhall take it, and not the heirs in gavelkind; for this remainder being (*a*) newly created, cannot be reckoned (*b*) within the cuſtom.

2 Lev. 87. adjudged. Mod. 96. S. C. adjudged. [1 Freem. 105. 345. S. C. 3 Keb. 165. 214. S. C. 1 Vern. 489. S. C. cited.] *Vide* Noy, 15. and Bro. tit. *Cuſtom*, 58. *contr.*; but *vide* 14 H. 8. 9. 26 H. 8. 4. Noy, 15. (*c*) That a truſt ſhall deſcend accordingly. 2 Roll. Abr. 780.

If a rent be granted out of gavelkind lands, it is of the nature thereof, and ſhall (*c*) deſcend to all equally; for the rent is part of the profits of the land, and iſſues thereout.

Co. Lit. 140. a.

The general cuſtom of gavelkind lands extends to ſons only; but a ſpecial cuſtom, that if one brother dies without iſſue, all his brothers may inherit, is good.

For this, and the reaſons thereof, *vide* title *Borough-Engliſh*. (*d*) Where the cuſtom was laid, that if a copyholder dies ſeiſed, his youngeſt ſon ſhould inherit, and the copyhold was granted to a man and his wife, and the heirs of the man, and he died, whether within the cuſtom? 2 Leon. 208. *dubitatur*.

By the (*d*) cuſtom of borough-engliſh, the youngeſt ſons only ſhall inherit.

Co. Lit. 110. b.

If borough-engliſh lands be let to a man and his heirs, during the life of *J. S.* and the leſſee die, the youngeſt ſon ſhall enjoy them.

2 Lev. 138. S. P. adjudged upon a ſpecial verdict. Roll. Abr. 623. 4 Leon. 242. Cro. Jac. 198. Cro. Car. 411. (*e*) If the cuſtom of a copyhold be, that the eldeſt daughter ſhall have the land, the eldeſt ſiſter ſhall not have it by the cuſtom. Godb. 166. Roll. Abr. 623. 4 Leon. 242. [So, if the cuſtom be, that lands ſhall deſcend to the eldeſt ſiſter, where there is neither a ſon nor a daughter, an eldeſt niece is not within it. Denn v. Spray, 1 Term Rep. 466.]—But by ſome cuſtoms the youngeſt brother ſhall inherit, and *conſuetudo loci eſt obſervanda*. Co. Lit. 110. b.——Special cuſtom, that lands in fee ſhall deſcend to the younger ſon, but lands in tail to the elder, is good. March, 54.——So, that lands ſhall deſcend to the younger ſon, if not of the half-blood; and if he be, then to the eldeſt. Co. Lit. 140. b.

If

If a cuſtom be, that if a man dies without heir male, his eldeſt daughter ſhall have the land; and if he have no daughter, that the eldeſt ſiſter ſhall have the land; and if he have not a ſiſter, the eldeſt couſin; but if he have an heir male, that he ſhall have it before any of them; and the tenant of the land have ſeveral daughters, but no heir male, and the eldeſt daughter die in the life of the tenant of the land, having iſſue a daughter; this grandchild is within the cuſtom, and ſhall have the land by deſcent upon the death of the grandfather. Roll. Abr. 623. Godfrey and Bullock.

But if the cuſtom be, that the youngeſt ſon ſhall inherit, and a man have iſſue two ſons, and the eldeſt have iſſue two ſons, and die, and the lands deſcend to the youngeſt ſon, who dies without iſſue, the eldeſt ſon of the eldeſt brother ſhall have the land, becauſe the cuſtom holds not in the (*a*) tranſverſal line, but only in the lineal deſcent. Roll. Abr. 624. reſolved *per Cur.*

(*a*) If a copyholder of the nature of borough-engliſh, ſurrenders to the uſe of himſelf and his wife, and his heirs, and dies leaving iſſue three ſons, and the youngeſt dies in the lifetime of the wife; the eldeſt brother ſhall inherit, as heir to the younger brother; for the cuſtom cannot extend to the collateral deſcent. Roll. Abr. 624. Cro. Car. 411. Jon. 360. S. C. by two judges againſt two.

If there be a cuſtom within the manor of *T.* that if the father dies, leaving no ſon, but two or more daughters, that the eldeſt daughter ſhall have his land for her life only, and after her death it ſhall deſcend to the next heir male that can derive by males; and for want of ſuch, that it ſhall eſcheat to the lord; and there is another cuſtom, that if the tenant dies, and leaves a wife, that ſhe ſhall have it for her life; and a copyholder of the manor dies, leaving a wife and two daughters, and no ſon, and his wife enters, and the eldeſt daughter dies, and after the wife dies, the ſecond daughter ſhall have the lands for life, within the cuſtom; for though ſhe was not the eldeſt at the death of her father, yet ſhe was ſo at the death of her mother, whoſe eſtate was a continuance of the father's eſtate, as in caſe of free bench. Lev. 172. between Newton and Shaftoe, adjudged, and that the cuſtom was good, according to Co. Lit. 140. b. Keb. 925. 2 Keb. 111. S. C. Sid. 267. S. C. adjudged, and that the cuſtom was good; though ſaid in the report thereof, that it ſeemed to be admitted by all, that ſuch cuſtom, as to fee-ſimple lands, would be void; it being wholly againſt the nature of a fee to eſcheat as long as there are heirs; and 268, another caſe was ſaid to have been adjudged accordingly, upon debate in B. R. in 20 Car. 2. between Sampſon and Quinſey; but *vide* that caſe. Lev. 293. adjudged without argument, becauſe the court ſaid, the point had before been adjudged in the caſe of Newton and Shaftoe.

If *A.* hath iſſue five ſons, and the youngeſt dies in the life-time of the father, leaving iſſue a daughter; after which the father purchaſes copyhold lands of the nature of borough-engliſh; thoſe lands ſhall, at the death of the father, go to the daughter of the youngeſt ſon *jure repreſentationis*, and not to the fourth ſon, although he was the youngeſt ſon at the time of the purchaſe, and death of the father. Salk. 243. between Clements and Scudamore, adjudged. 6 Mod. 120. S. C. adjudged. 1 P. Wms. 63. S. C. 2 Ld. Raym. 1024. S. C.

(E) Where a Perſon ſhall be ſaid to take by Purchaſe, and not by Deſcent.

Lit. § 4. Co. Lit. 13. IT is an eſtabliſhed rule in deſcents, that none can inherit as heirs, but thoſe who are of the blood of the purchaſer; and, therefore, if lands deſcend to the ſon of the part of the father, and he enters, and after dies without iſſue, the lands ſhall deſcend to the heirs on the part of the father, and not to the heirs on the part of the mother; and if there be no heirs on the part of the father, then they ſhall go to the lord by eſcheat.

Lit. § 4. (a) But if a man gives lands to another and his heirs of the part of the mother, yet the heirs of the father's part ſhall inherit; for no man can inſtitute a new kind of inheritance, not allowed by the law. Co. Lit. 13. But *vide* Co. Lit. 354., that lands may be given to a man and his heirs, on the part of the father; in which caſe, none of the heirs of the part of the mother ſhall ever inherit; but in ſuch caſe, the inheritance, as long as it continues, deſcends according to the rules of law, though it be determinable for want of heirs on the part of the father.

In the ſame manner, if a man marries an (a) inheritrix of lands in fee, who has iſſue a ſon, and dies, and the ſon enters into the tenement as ſon and heir to his mother, and after, dies without iſſue; the heirs on the part of the mother are to inherit; and for want of ſuch heir the lands ſhall eſcheat.

Plow. 446, 447. So, if a grandfather had purchaſed lands in fee, and the lands had deſcended from him to the father, and from him to the ſon; if the ſon had entered, and died without iſſue, his father's brothers or ſiſters, or their deſcendants; or for want of them, his grandfather's brothers or ſiſters, or their deſcendants; or for want of them, his great-grandfather's brothers or ſiſters, or their deſcendants; or for want of them, his great-grandmother's brothers or ſiſters, or their deſcendants, might have inherited; but none of the line of the mother or grandmother, *viz.* the grandfather's wife, ſhould have inherited, becauſe not of the blood, either by father or mother, of the firſt purchaſer, *viz.* the grandfather.

Co. Lit. 12. b. (b) Where the anceſtor takes but a particular eſtate, and the limitations after operate by way of purchaſe, and not by deſcent; *vide* head of *Remainders*, and Co. Lit. 22. Styl. 148. Co. 93. Moor, 116. And. 69. Hob. 30. Vent. 372. 2 Lev. 75. Raym. 228. Mod. 121. 226. 2 Mod. 207. 4 Mod. 380. Carth. 272. (c) So, if he levies a fine *ſur cognizance de droit*, &c. to *A.* and *B.*, and by the ſame fine they grant and render the lands to him and his wife in tail, remainder to his right heirs; this makes it a new purchaſe, and the heirs of the part of the father ſhall inherit. Carth. 140. adjudged.

A man ſeiſed of lands as heir of the part of his mother, makes a feoffment in fee, and takes back an eſtate to him and his (b) heirs, this is a (c) new purchaſe of the lands, and conſequently, if the purchaſer dies without iſſue, the heirs of the part of the father, and not the heirs of the part of the mother, ſhall ſucceed him in it; for he is the original purchaſer of that eſtate, which he takes back to him and his heirs; and therefore it ſhall deſcend as a new purchaſe.

Co. Lit. 13. But if a man ſeiſed as heir of the part of his mother, makes a feoffment in fee to the uſe of him and his heirs, the uſe ſhall go to the heirs of the part of the mother; for the uſe being a creature of equity, muſt be governed by the rules of equity, which conſiders in this caſe, that the uſe ſprings and ariſes out of an inheritance

inheritance which belongs to the heirs of the mother, and will therefore aſſign it to them, as a truſt which ariſes out of their property.

A man is ſeiſed of land on the part of his mother, and makes a feoffment in (*a*) fee, reſerving rent to him and his heirs; this rent, ſince the ſtatute *Quia emptores terrarum, &c.* if it has a diſtreſs annexed to it, muſt be conſidered as a rent-charge; and if it wants a diſtreſs, as a rent-ſeck; and ſo either way it is the grant of the feoffee, and conſequently a (*b*) new purchaſe; and therefore it ſhall go to the heir of the part of the father, and not to the heir of the part of the mother. Co. Lit. 12. b.

(*a*) But if he had made a gift in tail, or a leaſe for life of ſuch lands, reſerving a rent, the heir on the mother's ſide ſhould have had this rent, becauſe the reverſion belongs to ſuch heir, and conſequently the rent too, as incident to that reverſion. Co. Lit. 12. b. (*b*) If a man, ſeiſed of a manor on the part of his mother, had, before the ſtatute *quia emptores*, &c. made a feoffment in fee of parcel, to hold of him by rent and ſervice; though this rent and ſervice were newly created, yet continuing parcel of the manor, they ſhall, with the reſt of the manor, deſcend to the heir on the mother's ſide. Co. Lit. 12. b.

If a man hath a rent-ſeck of the part of his mother, and the tenant of the land grants a diſtreſs to him and his heirs, and ſo improves the rent into a rent-charge; this diſtreſs ſhall go along with the rent to the heir on the part of the mother, as incident and appurtenant to it. Co. Lit. 12. b.

If the heir of the part of the mother, of lands whereunto a warranty is annexed, is empleaded for thoſe lands, and vouches, and judgment is given againſt him, and likewiſe for him to recover in value, and he dies before execution, the heir on the mother's ſide ſhall ſue execution to recover in value againſt the vouchee; for the lands to be recovered in value are deſigned as a recompence for thoſe lands which were recovered by the demandant from the vouchee, and ſo muſt go to that perſon who has ſuſtained the loſs. Co. Lit. 13. a.

A man hath iſſue a ſon, and dies, and his wife dies alſo, and lands are let for life, the remainder to the heirs of the wife; the ſon dies without iſſue; the heirs of the part of the father ſhall inherit, and not the heirs of the part of the mother; for the lands veſted in the ſon as a purchaſer, and therefore the deſcent is to be governed by the rules of law. Co. Lit. 13. a.

If a man be ſeiſed of lands on the part of his mother, and makes a feoffment in fee of them upon condition, and dies; this condition ſhall deſcend to the heir of the part of the father; becauſe he is heir at common law; but if he enters for the condition broken, then he reſtores the eſtate to its former nature, and then the heir of the part of the mother ſhall enter upon him, and enjoy the land. Co. Lit. 12. b.

If a man, having only two daughters, his heirs, deviſes his lands to them and their heirs, they take as (*c*) jointenants, and not as coparceners; for the deviſe giveth it to them in another degree than the common law would have given it them; and for the (*d*) benefit of the ſurvivorſhip between them. Cro. Eliz. 431. Owen, 65. S. C. 3 Lev. 127. S. P. admitted *per Cur.*

(*c*) If to them and their heirs, equally to be divided between them, ſhare and ſhare alike, they are tenants in common. 2 Sid. 53. 78. *Vide* Godb. 362. 3 Leon. 25. Gouſſ. 18., and title *Jointenants and Tenants in Common.* (*d*) If a man deviſes lands to his ſon and heir apparent, and a ſtranger, they are jointenants for the benefit of the ſtranger. Godb. 54. Owen, 65.

If

Salk. 242. between Reading and Royſton, adjudged.

If *A.* hath iſſue two daughters, one of which dies in his life-time, leaving iſſue *J. S.* a ſon, and *A.* deviſes his lands to *J. S.* and his heirs, *J. S.* ſhall take the (*a*) whole by purchaſe, and not one moiety by purchaſe, and the other by deſcent.

(*a*) Palm. 373. 2 Roll. Rep. 352. 2 Sid. 79. S. P.

Moor, 644. adjudged. Cro. Eliz. 833. 919, 920. S. C. adjudged,

If a man deviſes lands to his eldeſt ſon, and his heirs, paying 20 *l.* a-piece to his younger children, at their ages of twelve years; and upon non-payment of the legacies deviſes the lands to his younger children, and their heirs, the eldeſt ſon is in by deſcent.

that the firſt deviſe to the eldeſt ſon, and his heirs in fee, being no more than the law gave him, was void; but the deviſe to the younger, upon his non-payment, was good, by way of future or executory deviſe. *Vide* title *Deviſes*; and Vaugh. 271. S. C. cited. 3 Mod. 207. S. C. cited. 1 Roll. Abr. 411. S. C. cited. Leon. 101. 3 Leon. 216. 2 Sid. 79. 2 Mod. 7. 286. Dyer, 371. Hard. 204.

Salk. 241. Clerk and Smith adjudged, and Gilpin's caſe, Cro. Car. 161., where it is adjudged, that a deviſe to the

So, if a man deviſes lands to his daughter's ſon in fee, who is his heir at law, upon condition that he ſhould pay 200 *l.* to ſuch perſons as the deviſor's wife ſhould appoint by deed; the wife makes no appointment, and the grandſon enters, and dies without iſſue, the lands ſhall go to the heirs *a parte materna*; for the grandſon took by deſcent, and not by purchaſe; for the deviſe gave him the ſame eſtate the law would have given him under a poſſibility of being charged.

heir at law, upon condition to pay debts, and if he fails, that the executors ſhall ſell, makes it a purchaſe in the heir at law, being tied with a condition, denied to be law by Treby, Ch. Juſt. and Powell, Juſt. Lutw. 793. S. C.

3 Lev. 127. Hedger and Row, adjudged.

If a man, being ſeiſed of lands on the part of his mother, deviſes them to his executors for ſixteen years, and after to one who is his heir *a parte maternâ*, he ſhall take by deſcent; for the deſcent to the heir *a parte paternâ* or *maternâ* is but a conſequent dependant upon the nature of the eſtate; though it was objected, it was better for him to take by purchaſe, for then the heirs of the part of the father might inherit before the heirs of the part of the mother, and ſo both heirs would be inheritable.

(F) Of a Deſcent, its Operation to take away an Entry.

Lit. § 385. (*b*) There are alſo other reaſons for this: as 1ſt, Becauſe the diſſeiſee not having claimed during the life of the diſſeiſor, the right of poſſeſſion muſt be preſumed to be derelict.

DEſcents which take away an entry are of two ſorts; 1ſt, Where the deſcent is in fee, as where a man ſeiſed of certain lands or tenements is diſſeiſed, and the diſſeiſor having iſſue dies ſeiſed, and the lands gained by the diſſeiſin deſcend to his heirs; this deſcent ſhall toll the entry of the diſſeiſee, and oblige him to ſue a writ of entry *ſur diſſeiſin* againſt the heir of the diſſeiſor, in order to recover the right of poſſeſſion which he hath loſt by the deſcent; and the (*b*) reaſon is, becauſe the freehold being caſt upon the heir, the notions of the law make this title to him, that there may be a perſon in being to do the feudal duties, and to fill the poſſeſſion, and anſwer the actions of all perſons; and ſince it is the law that gives him this right, and obliges him to theſe duties, antecedent

antecedent to any act of his own, it muſt defend ſuch poſſeſſion from the act of any other perſon till it be evicted by judgment, which being the act of law, may deſtroy the heir's title. 2d, Becauſe the relief was in the nature of a new purchaſe upon every deſcent, for the payment of which a diſtreſs was immediately taken upon the deſcent's being caſt. 3d, The right of poſſeſſion is gotten by deſcent, that it may be an encouragement to the tenant to be bold in war; for that none can diſpoſſeſs his children of the eſtate he died ſeiſed of. Spelm. Feud. 31.

2dly, Deſcents in fee-tail toll entries; as if a man be diſſeiſed, and the diſſeiſor grant the land in tail, and the tenant in tail having iſſue, die ſeiſed, and the iſſue enter, the poſſeſſion being thrown upon the heir in tail, the law conſtrues the right of poſſeſſion to be in him, for the reaſons above given, and therefore bars the entry of the diſſeiſor. Lit. § 386.

If a diſſeiſor make a gift in tail, and the donee diſcontinue in fee, and diſſeiſe the diſcontinuee, and die ſeiſed; this deſcent ſhall not take away the entry of the diſſeiſee; for the deſcent of the fee-ſimple to the heir is defeated by his remitter to the eſtate-tail; and though by virtue of ſuch remitter the heir is ſeiſed in tail, yet there is no deſcent of it, becauſe the tail was diſcontinued; and the ſubſequent diſſeiſin doth not regain it to the anceſtor; and though the heir be remitted into his elder title, yet ſuch remitter places him in only above the ſecond diſſeiſin, and doth not tend to make a deſcent of the eſtate-tail of which his anceſtor never died ſeiſed; and where a new right ſprings to the heir by operation and conſtruction of law, he ought to take, ſubject to the ſame claim, as ran upon ſuch eſtate before the remitter, elſe the act of law would work an injury to the firſt diſſeiſee, who poſſibly was prevented from bringing his aſſize or ejectment, by the frequent ſhifting of the poſſeſſion; and the law of deſcents being in prejudice of an ancient right, is to be taken ſtrictly, and therefore to take place only where the ſame eſtate deſcends from anceſtor to heir; and the rather, for that after diſcontinuance the diſſeiſee might not watch the death of the tenant in tail, whoſe intereſt was transferred, and therefore no preſumptive dereliction of the diſſeiſee could be formed in this caſe. Co. Lit. 238.

A diſſeiſor makes a gift in tail, the donee has iſſue, and dies ſeiſed, the entry of the diſſeiſee is taken away; but if the iſſue die without iſſue, ſo that the eſtate-tail is ſpent, then the entry of the diſſeiſee is revived, and he may enter upon him in reverſion or remainder; for in this caſe there is no relief to be demanded from him in reverſion or remainder; ſo that he labours under no hardſhip in that point, for which he might expect favour from the law: Likewiſe, the poſſeſſion is not caſt on him till entry; which being a voluntary act, the law annexes no privileges to it, as in caſe where a poſſeſſion is caſt on an heir by deſcent. Co. Lit. 238.

Grandfather, father and ſon, the ſon diſſeſes one, and enfeoffs the grandfather, who dies ſeiſed, and the land deſcends to the father, the diſſeiſſee cannot enter, for the right of poſſeſſion is devolved on the father, (who had no hand in the diſſeiſin,) by a fair and legal deſcent; but if the father dies ſeiſed, and the land deſcends to the ſon, the diſſeiſee may enter on the ſon, for the feoff- Co. Lit. 238. b.

ment made by the diſſeiſor to the grandfather is a ſtratagem to derive the lands gained by diſſeiſin to the ſon by deſcent, in order to enjoy the benefit annexed to ſuch conveyance, which the law will never cheriſh; but on the contrary blaſt ſuch deſigns, to diſcountenance all wrong and oppreſſion.

Lit. § 387, 388, 389. 394. In deſcents which toll entries, it is required, that the anceſtor die ſeiſed of a freehold and fee, or a freehold and fee-tail; for if the diſſeiſor, at the time of his death, hath not the freehold in him, it cannot be caſt on his heir, for then there is no danger that the freehold ſhould want a poſſeſſor; and therefore the law creates no title to ſuch poſſeſſion in the heir at law; for it were incongruous that the law ſhould ſuppoſe the right of poſſeſſion in the heir, when the poſſeſſion is in another at the death of the anceſtor; and if the right of poſſeſſion be not tranſmitted at the death of the anceſtor, the law will not afterwards create him a new title in prejudice of the perſon that has the right of propriety: if a diſſeiſor therefore makes a leaſe for life, he parts with the poſſeſſion, and cannot tranſmit it to the heir, having parted with it before; and a deſcent of a reverſion will not make a right of poſſeſſion; for nothing deſcends to the heir in reverſion but a right of reverſion, and that is a right againſt all perſons but the diſſeiſee; for ſince only a right deſcends, the heir can be in no better caſe than the diſſeiſor was at the time of his death; and, therefore, when the tenant for life dies, he has only the naked poſſeſſion, as the diſſeiſor had it; but if the diſſeiſor had died in poſſeſſion, the law, for the reaſons aforeſaid, caſting the poſſeſſion on the heir, makes it a right; for that is properly a right which a man comes to by act of law; and ſince the heir in ſuch caſe comes to the poſſeſſion by act of law, it muſt be called a right of poſſeſſion; and it could not be a right of poſſeſſion, if he could not defend it againſt all aggreſſors; and therefore in ſuch caſe the right of entry is taken away from every one; and hence aroſe the diſtinction of *jus proprietatis* and *jus poſſeſſionis*.

Co. Lit. 239. a. Hob. 323. If he in reverſion diſſeiſe his tenant for life, and die ſeiſed, this deſcent ſhall take away the entry of the tenant for life; for the right of poſſeſſion is by law caſt upon the heir.

Co. Lit. 239. a. So, if there be tenant for life, remainder in tail, remainder in fee, and tenant in tail diſſeiſe the tenant for life, and die ſeiſed, this deſcent ſhall take away the entry of the tenant for life; but if the king's tenant for life be diſſeiſed, and the diſſeiſor die ſeiſed, this deſcent ſhall not take away the entry of the tenant for life; for ſince the king cannot be diſſeiſed, the diſſeiſor gains but a bare eſtate of freehold during the life of the leſſee; and therefore the law does not caſt the poſſeſſion on the heir; for if the heir comes into the poſſeſſion, he muſt come in as an occupant, which being a voluntary acquiſition, the law does not favour it, as it does a right of poſſeſſion devolved by deſcent.

Co. Lit. 239. a. If a diſſeiſor make a leaſe to a man and his heirs during the life of *J. S.* and the leſſee die, living *J. S.* this ſhall not take away the entry of the diſſeiſee, becauſe the heir is only in as a ſpecial occupant of an eſtate of freehold, and not of a fee or fee-tail.

If

If a diſſeiſor make a leaſe for years, or has the land extended upon a ſtatute-merchant, ſtaple, judgment, or recognizance, and dies ſeiſed; this deſcent ſhall take away the entry of the diſſeiſee, becauſe the freehold or fee are caſt on him by act of law. Co. Lit. 239. a.

The deſcent of incorporeal inheritances, as advowſons, rents, &c. do not take away the entry of him who hath right, becauſe no diſſeiſin can be committed of them, but at the election of the owner thereof. Co. Lit. 237. b.

If a diſſeiſor make a leaſe for his own life, and die, this deſcent ſhall not take away the entry of the diſſeiſee; for though the freehold and fee deſcend to the heir of the diſſeiſor, yet the diſſeiſor died not ſeiſed of both, becauſe his death was to precede the determination of the leaſe, which carried the freehold to his heir. Co. Lit. 239.

Deſcents to a brother, ſiſter, uncle, or other collateral heir of the diſſeiſor, take away the entry of the diſſeiſee, as well as if the diſſeiſor had had iſſue, and the deſcent had been to them.

(G) In what Caſes the Entry of the Diſſeiſee may be lawful, notwithſtanding a Deſcent.

LORD and tenant; the tenant is diſſeiſed, and the diſſeiſor aliens to another in fee, and the alienee dies without iſſue, whereupon the lord enters, as upon his eſcheat; this does not take away the entry of the diſſeiſee, becauſe the lord does not come to the land by deſcent, but by eſcheat, for want of a tenant, which can warrant his title no longer than ſuch tenant is wanting, nor hinder the diſſeiſee from entry, who is that tenant; but if the lord by eſcheat die ſeiſed, and the land deſcend to his heir; here is a perfect deſcent, which ſhall take away the entry of the diſſeiſee; alſo his heir upon ſuch deſcent muſt pay relief, which the lord upon the eſcheat only was not obliged to do. Lit. § 390. 2 Inſt. 286. Co. Lit. 240.

If a diſſeiſor die ſeiſed, and his heir without heir, the diſſeiſee cannot enter upon the lord by eſcheat, becauſe his entry was taken away by the deſcent caſt before, and then whoever comes to the lands ſhall take the benefit of it. Co. Lit. 240. a.

A man ſeiſed of lands in fee, or in tail, upon condition, dies ſeiſed, if the condition be broken in his lifetime, or after the lands deſcended to his heir, yet the entry of the feoffor, or donor, or their heirs, is not taken away. Lit. § 391.

So, if ſuch tenant on condition be diſſeiſed, and the diſſeiſor die ſeiſed, and the lands deſcend to his heir, the entry of the tenant on condition is thereby taken away; but if the condition be after broken, the feoffor or donor, or their heirs, may enter; becauſe the condition went along with, and was annexed and incorporated in the land into whoſe hands ſoever it came, and the feoffor or donor have no other remedy but by entry, which is their title, as the tenant on condition, who is diſſeiſed, has; for he having a right, his remedy for it againſt the heir of the diſſeiſor is by action; and till the condition broken, as well the *jus proprietatis* Lit. § 392. Co. Lit. 240. a.

prietatis as the *jus poſſeſſionis* is in the feoffee; but when he is diſſeiſed, and a deſcent caſt, the heir of the diſſeiſor has only the *jus poſſeſſionis*.

Co. Lit. 240. b. [(*a*) *Qu.* as the writ *cauſâ matrimonii prælocuti* extends to all degrees? ſee the writ in the regiſter. Booth, 197. F. N. B. 205.]

He that hath title to enter upon a mortmain ſhall not be barred by a deſcent, becauſe then he would be without remedy, for he can maintain no action for it. So, where a woman hath title to enter *cauſâ matrimonii prælocuti*, no deſcent ſhall take away her entry, becauſe ſhe has no remedy by action to recover it (*a*).

Co. Lit. 240. (*b*) So, if one hath title to enter for conſent to a raviſhment, a deſcent caſt ſhall not take away his entry, becauſe he has no other remedy, nor can maintain any action for it. Co. Lit. 240. b. [(*c*) The deviſee, it ſeems, is not without remedy, for according to Co. Lit. 111. a., he may either enter, or have his writ *ex gravi querelâ*. But ſee Ow. 141. 1 Leon. 209.]

If a man ſeiſed of lands in fee, by his laſt will in writing deviſes them to another in fee, and dies, whereby the freehold in law is caſt upon the deviſee, and the heir, before any entry made by the deviſee, enters and dies ſeiſed; this deſcent ſhall not take away the entry of the deviſee, becauſe then he would be without (*b*) remedy, (*c*) having never had poſſeſſion.

Lit. § 393. (*d*) So, of tenant by the curteſy. 1 Salk. 241.

If a diſſeiſor die ſeiſed, and his heir enter and endow his mother, the diſſeiſee may enter upon her for that third part, becauſe ſhe is in continuance of her huſband's eſtate, and not by the heir; and therefore, as to that third part, the deſcent is (*d*) interrupted or defeated; but till endowment the diſſeiſee could not enter upon any part, nor after ſuch endowment can he enter upon the other two parts, becauſe as to them the deſcent was perfect, and continues, but as to the third part, the wife's title was paramount to the deſcent.

Lit. § 395. If a diſſeiſor enfeoff his father in fee, and the father die ſeiſed of ſuch eſtate which deſcends to the diſſeiſor as heir, yet the diſſeiſee may enter, becauſe coming again to the diſſeiſor, he ſhall take no advantage of the deſcent *quia particeps criminis*; but the diſſeiſee may either enter or have his aſſiſe againſt him.

Lit. § 396. Co. Lit. 242. If a man ſeiſed of lands in fee hath iſſue two ſons, and dies ſeiſed, and the younger ſon enters by abatement, and has iſſue, and dies ſeiſed, and the lands deſcend to his iſſue, who enters; yet the eldeſt ſon or his heir may enter upon them, becauſe the entry of the youngeſt ſon ſhall be intended upon a claim as heir, and the eldeſt ſon claiming as heir likewiſe, and ſo by the ſame title, may enter upon him, or any of his iſſue, be there never ſo many deſcents: alſo, the entry of the youngeſt may be intended to prevent others, and ſo to continue it in the family, and not with deſign to injure or ſtrip his brother of it; and then his brother's entry cannot be taken away: but if the younger brother, in this caſe, had made a feoffment in fee, and the feoffee had died ſeiſed, this deſcent had taken away the entry of the eldeſt brother, becauſe the feoffment made title by livery to the feoffee, and carried it out of the family.

Co. Lit. 242. b. If the younger brother of the half-blood enters by abatement, and a deſcent is caſt, or if the eldeſt brother hath iſſue, and dies, and

and after his death the younger brother or his iſſue enter, and many deſcents are caſt in his line; yet the eldeſt ſon, or his heirs, may enter; for though the brother of the half-blood cannot be heir to his eldeſt brother, yet he may by poſſibility be heir to his father if the eldeſt brother dies before actual poſſeſſion; and therefore ſhall be preſumed to enter only to preſerve the feud in the ſame family, and keep out ſtrangers, and not in oppoſition to the lineal heir of the family.

But if the elder brother had firſt entered, and the younger brother had entered upon him; this had been in deſtruction of the elder brother's poſſeſſion, and as much a diſſeiſin as if it had been committed by a ſtranger, and then his dying ſeiſed ſhall take away the entry of the eldeſt brother, or his iſſue. Lit. § 397.

If after the death of the father a ſtranger abates, and the younger ſon enters on him, and dies ſeiſed; this deſcent ſhall bind the eldeſt, becauſe *poſſeſſio terræ* muſt be *vacua* when the youngeſt ſon enters, which here it was not; but his entry on the abator having no right, was a diſſeiſin, and, by conſequence, a deſcent thereon will take away the entry of the eldeſt brother; for his entry was a diſſeiſin, not an abatement. Co. Lit. 242. a.

Lands are given to huſband and wife, and the heirs of their two bodies; they have iſſue a daughter, and the wife dies, the huſband has iſſue a ſon by another wife, who upon the deceaſe of the father abates, and dies ſeiſed; this deſcent ſhall take away the entry of the daughter, for by the limitation in ſpecial tail, the ſon by another *venter* was utterly incapable of inheriting them; and being an eſtate which the ſon could not in any caſe make title to as repreſentative of the father, his entry is an abatement; for the law cannot make that charitable conſtruction here, that he entered to preſerve the eſtate from ſtrangers that might have abated upon the eſtate, ſince the ſon himſelf is a ſtranger, and could not inherit; but in the caſe of the brother of the half-blood it was otherwiſe, becauſe he might have inherited his father. Co. Lit. 242. a. b.

If a man be ſeiſed of land of the nature of borough-engliſh, and have iſſue two ſons, and die, and the eldeſt ſon, before any entry made by the youngeſt, enter into the land by abatement, and die ſeiſed; this ſhall not take away the entry of the youngeſt brother, becauſe the eldeſt ſon ſhall be preſumed to enter to preſerve the eſtate in his family, which he or his heirs may ſome time or other, upon failure of his brother's line, happen to enjoy. Co. Lit. 242, 243.

The ſame law holds likewiſe in intruſions as well as in abatement; therefore, if a father makes a leaſe for life, and hath iſſue two ſons, and dies, and the tenant for life dies, and the youngeſt ſon intrudes, and dies ſeiſed; this deſcent ſhall not take away the entry of the eldeſt, for the reaſons before given: otherwiſe, if the father had made a leaſe for years only, becauſe the poſſeſſion of the leſſee for years made an actual freehold in the eldeſt ſon, ſo that the entry of the youngeſt cannot have ſuch conſtruction, but is a diſſeiſin, becauſe there is no *vacua poſſeſſio*. Co. Lit. 243.

Co. Lit. 243. a. If one coparcener enter into the whole, claiming it to herſelf, and take all the profits, yet ſuch entry ſhall be intended only in preſervation of the eſtate, and, therefore, a deſcent in ſuch caſe ſhall not bind the other ſiſter as to her moiety: but if ſhe diſſeiſe the other, after both have entered, and die ſeiſed, there, ſuch deſcent will take away the entry of the eldeſt, or her iſſue.

Co. Lit. 243. b. So, if ſuch coparcener enter, claiming the whole, and make a feoffment in fee, and take back an eſtate to her and her heirs, and have iſſue, and die ſeiſed; this deſcent ſhall take away the entry of the other ſiſter, becauſe the feoffment leaves no room for a preſumption that her entry was to preſerve the eſtate of the other ſiſter; and in the other caſe, the claiming the whole only makes the abatement as to her ſiſter's moiety; for if one coparcerner enters generally, and takes the profits, this ſhall be accounted in law the entry of them both, and no deveſting of the ſiſter's moiety.

Lit. § 407, 408. If an infant diſſeiſe one, and alien in fee, and the alienee die ſeiſed, and the lands deſcend to his heir, the infant being under age, the entry of the diſſeiſee is taken away; but if the infant diſſeiſor enter upon the heir of the alienee, as he may well do, not being bound by his alienation made under age, then may the diſſeiſee enter upon him, becauſe the deſcent to the heir of the alienee, which took away the entry of the diſſeiſee, is now avoided, and the infant diſſeiſor may enter at any time within or after full age.

Lit. § 409. So, if a diſſeiſor make a feoffment in fee, upon condition, and the feoffee die ſeiſed, this gains a right of poſſeſſion to his heir, and takes away the entry of the diſſeiſee; but if the diſſeiſor enter for the condition broken, then is the deſcent defeated, and the entry of the diſſeiſee revived, becauſe the diſſeiſor is then in of his defeaſible eſtate, having only a naked poſſeſſion without any right.

Co. Lit. 248. b. A civil death, as entry into religion, does not take away an entry, for this was the voluntary act of the anceſtor; and though there be a deſcent caſt upon it, yet it is not ſuch a deſcent as came by the act of God, and therefore ſhall not take away the entry of the diſſeiſee.

Lit. § 411. If I demiſe lands to a man for years, and am diſſeiſed, and my termor ouſted, and the diſſeiſor die ſeiſed, and a deſcent is caſt, I cannot enter, but my leſſee may, becauſe his entry is only to regain his term, and leaves the freehold and fee in the heir by deſcent, as it was before.

Co. Lit. 249. a. So, ſuch deſcent ſhall not take away the entry of tenant by *elegit*, ſtatute-merchant, *&c.* for theſe are only particular intereſts, of which, as of a term for years, there can be no dying ſeiſed, or deſcent thereof to the heir; but the freehold, which did deſcend, they leave as it was before, in the heir by deſcent.

Co. Lit. 249. Lit. § 412. In the times of domeſtick war, when the courts of juſtice are ſhut, a deſcent ſhall not take away an entry, though the diſſeiſin were in times of peace; for then the diſſeiſee would be without all remedy, there being no courts open wherein to bring his action;

tion: alſo, the deſcent, which is an act of law, can give no right, when the law itſelf is ſilent; but in the times of foreign war only, a deſcent ſhall take away an entry; for to encourage enterpriſing in ſuch war was this privilege chiefly given to the heir of the diſſeiſor.

No dying ſeiſed of biſhops, abbots, deans, parſons, *&c.* where the lands come to his ſucceſſor, ſhall take away an entry; for the ſucceſſor comes in by his own act and concurrence, and therefore ſhall have no more privilege than his predeceſſor had: alſo, the ſucceſſor pays no relief, unleſs by grant or preſcription; for the eccleſiaſtical lands were not relieved into the hands of the lord. Co. Lit. 250. Lit. § 243.

(H) Whoſe Entry is preſerved notwithſtanding a Deſcent.

AS to infants and (*a*) feme coverts, their entry is not taken away by a deſcent, by reaſon of their weakneſs and incapacity to claim, which is not imputed to them. Gilb. Ten. 28. Lit. § 402, 403.

(*a*) But if a feme ſole is diſſeiſed, and after her huſband dies ſhe takes another huſband, and then the deſcent happens; this deſcent ſhall take away the entry of the feme, for ſhe had once an opportunity of entering. 1 Salk. 241.

If a man ſeiſed of lands in fee dies, his wife *privement enſeint with* a ſon, and a ſtranger abates, and dies ſeiſed; and after, the ſon is born, he ſhall be bound by the deſcent, becauſe at the time of the deſcent he had no right to enter, not being then *in eſſe*, and by conſequence, had no wrong then done him; and the lord had none to avow upon for his ſervices at the time of the deſcent. Co. Lit. 245. a.

B. tenant in tail enfeoffs *A.* in fee, who hath iſſue within age, and dies, *B.* abates and dies ſeiſed, the iſſue of *A.* being ſtill within age; this deſcent ſhall bind the infant; becauſe the iſſue in tail is remitted to his former and elder right, which is to be preferred before the defeaſible title of the diſcontinuee's heir. Co. Lit. 246. a.

If a feme ſole ſeiſed of lands in fee be diſſeiſed, and then take huſband, and the diſſeiſor die ſeiſed, and a deſcent be caſt, this ſhall take away the entry of the wife after her huſband's death, becauſe being diſſeiſed when ſhe was ſole, ſhe might have entered, and her taking a huſband, who would not enter, was her own act and folly: but if ſhe were under age at her marriage, the privilege of her infancy then, and coverture after, ſhall preſerve her right of entry, though a deſcent be caſt. Co. Lit. 246. a. b.

If a deſcent be caſt, this ſhall bind a perſon *non compos*, *&c.* but not his heir, becauſe if any action ſhould be brought againſt ſuch perſon after recovery of his underſtanding, he could only plead his inſanity in excuſe at the time of ſuch deſcent; and the law does not permit a man to ſtultify himſelf. Lit. § 4 Co. Lit. 247. Gilb. Ten. 29. [F.N.B. 202. 2 Bl. Com. 291. Cro. Eliz. 398.]

A deſcent caſt, during impriſonment, ſhall not bind, becauſe during ſuch confinement he cannot be ſuppoſed to know of the Co. Lit. 259. a. Lit. § 436.

[But if he were at large when he was diſſeiſed, and the deſcent be caſt during his impriſonment, this deſcent ſhall bind. Co. Lit. *ubi ſupr.*]

deſcent, and by conſequence, not capable of taking any meaſure to prevent it.

Lit. § 439, 440. Co. Lit. 260, 261.

So, a deſcent caſt, during the abſence of one in foreign parts, ſhall not bind, but that on his return he may enter, becauſe he cannot be ſuppoſed to know his affairs at home, or to take ſuch ways as might ſecure it: but if he were within the realm at the time of the diſſeiſin, or at the time of the dying ſeiſed, then a deſcent caſt, though in his abſence after, ſhall bind, becauſe he might be preſumed to have conuſance of it, and therefore ought to have taken care to prevent it before his departure, or before the death of the diſſeiſor.

Lit. § 443. Co. Lit. 263.

If an abbot of a monaſtery die, and during the vacation a diſſeiſin be committed, and a deſcent caſt before the election of a new abbot, this ſhall not bind his entry after, becauſe there was no perſon during the vacation that could make continual claim, (the convent being in law all dead perſons,) and therefore there can be no laches imputed to any.

(I) How the Entry may be preſerved by continual Claim: And herein,

1. Of the Nature of continual Claim, and the Effects of it.

Lit. § 414. Gilb. Ten. 33.

COntinual claim is where a man, who hath a right and title to enter into any lands or tenements, whereof another is ſeiſed in fee or in tail, makes continual claim to them before the perſon dies ſeiſed thereof, the effect of which is, that, notwithſtanding any deſcent caſt after, yet he who made ſuch continual claim may enter, becauſe he hath done all that, perhaps, he could or durſt do to regain his poſſeſſion, and ſo no default being in him, his right of entry remains as it was before, notwithſtanding any deſcent.

Lit. § 415.

If tenant for life alien in fee, he in reverſion or remainder may enter on the alienee, or make continual claim to the land before the dying ſeiſed of the alienee, and then he may enter at any time after his death, though a deſcent be caſt.

Lit. § 416.

Lands are let for life, remainder for life, remainder in fee; tenant for life aliens in fee, and the remainder man for life makes continual claim before the death of the alienee, and then the alienee dies ſeiſed, and then the remainder man for life dies likewiſe before any entry; yet in this caſe he in the remainder in fee may enter by virtue of the continual claim made by the remainder man for life; for ſince the efficacy of this continual claim, if there had been a ſubſequent entry made by the remainder man for life, would have extended to the remainder in fee by reveſting that too, it is but reaſonable to allow the remain-

der-

der-man in fee a power of entry under ſuch continual claim, eſpecially ſince by reaſon of the intermediate remainder, he himſelf could not make continual claim.

2. What is neceſſary to a continual Claim to make it effectual.

If a man hath cauſe to enter into lands lying in ſeveral towns in the *ſame county*, and enter into parcel in one town only in the name of all the reſt, this ſhall be ſufficient to ſecure his entry into all the reſt. Lit. § 417.

But if the lands lie in *two counties*, the entry muſt be in each, becauſe the atteſtation of both facts, if controverted, muſt be by the *pares* of each county.

If three men diſſeiſe me *ſeverally* of three ſeveral acres of land in *one county*, and I enter into one acre in the name of all the three acres, this is good for no more than that one acre, becauſe each diſſeiſor made a diſtinct entry, which being diſtinct acts of notoriety require diſtinct ſolemnities to defeat them: likewiſe, each having an independant poſſeſſion, an entry upon one of them can never affect the reſt, ſo as to deſtroy their ſeparate poſſeſſions. Co. Lit. 252.

So, if one man diſſeiſe me of three acres of ground, and deviſe them ſeverally to three perſons for their *lives*, my entry upon one leſſee in the name of the whole will only reveſt what belongs to that leſſee; for where there are *different liveries* there muſt be different acts of notoriety to overthrow them, and, therefore, a different entry muſt be made on each tenant of the freehold. Co. Lit. 252. b. 4 Leon. pl. 35. Holland and Hopkins. Dal. 88. pl. 2.

But if the diſſeiſor had demiſed the three acres ſeverally to three perſons for *years*, then an entry upon one of the leſſees in the name of all the three acres would have recontinued and reveſted all the three acres in the diſſeiſee; for though they are different demiſes, yet being all terms for years, they are *not different liveries* to be defeated by diſtinct entries, and, therefore, one entry will ſuffice to regain the poſſeſſion from the diſſeiſor by overthrowing his entry by an act of equal notoriety. 4 Leon. pl. 35. Co. Lit. 252. b. Palm. 402. Lady Argol and Cheney.

I am diſſeiſed by the ſame perſon of one acre at one time, and of another acre in the *ſame county* at another time; in this caſe my entry into one of them in the name of both is good, for though there are two entries, yet it is but one continued act of wrong, and but one poſſeſſion is gained, for which but one aſſiſe lies, therefore one entry of the diſſeiſee is an act of ſufficient notoriety to reveſt the poſſeſſion of both acres. Co. Lit. 252. b.

If one diſſeiſe me of two ſeveral acres in *one county*, and I enter into one of them generally, without ſaying in the name of both, this ſhall reveſt only that acre where entry is made; for the *intent*, which is the rule to judge of a man's actions, appearing to extend no farther than that one acre, ſhall not be enlarged to reveſt the poſſeſſion of the other. Co. Lit. 252. b.

Livery within view and entry afterwards is equal to an entry on the land itſelf, and if a man cannot enter for fear of an outrage, yet it is good. So alſo, a claim within view is good when a man fears to enter, for in the caſe both of entry and claim a man ought Co. Lit. 252. Lit. § 419, 420, 421. 2 Inſt. 483

to take poſſeſſion where he can, becauſe it is the change of poſſeſſion makes the notoriety in both caſes; but if the diſſeiſor menace to hurt the perſon that has right, then the law allows him to make his claim as near the land as he dares to come.

Co. Lit. 253. b. 2 Inſt. 483. But every apprehenſion of danger will not warrant a claim within view; for if a man fears the burning of his houſes, or the taking away or ſpoiling of his goods, this is not a ſufficient ground to warrant a claim within view, becauſe if he ſhould ſuffer what is threatened, he may recover what he loſes, or damages to the value, without any corporal hurt.

Co. Lit. 253. b. 2 Inſt. 483. The *apprehenſion* then that will juſtify a man's claiming within view, muſt be of the perſon's lying in wait with weapons, or by words menacing to *beat, maim, or kill the perſon* that offers to enter; as alſo the *fear of impriſonment*; for the law will never oblige a man to hazard his perſon in ſuch a manner as may render him unfit to ſerve his country, when he may recover his right without ſuch danger, *viz.* by making claim within view.

In pleading, the diſſeiſee muſt ſhew ſome juſt cauſe of fear, that the court may judge of the reaſonableneſs of an apprehenſion of danger to his perſon; but in a ſpecial verdict, if the jurors find that the diſſeiſee did not enter for fear of corporal hurt, it is ſufficient, and it ſhall be intended they had evidence for what they find.

3. Of the Time in which it is to be made.

Co. Lit. 237. b. 254. b. In ancient times, if the diſſeiſor had been in long poſſeſſion, the diſſeiſee could not have entered upon him: ſo, if the feoffee of the diſſeiſor had continued a year and a day in quiet poſſeſſion, the diſſeiſee could not have entered upon him; for the diſſeiſee's neglect of entry for that time formed a preſumption, that either he had no right in the lands, or that he relinquiſhed it, eſpecially in the caſe of the feoffee of the diſſeiſor, becauſe he came in by a legal conveyance and the ſolemnity of livery, which gave notice to the diſſeiſee, in whom the poſſeſſion was, ſo that he might have entered on the feoffee immediately, and recovered the poſſeſſion.

Lit. § 427. Co. Lit. 255. a. But the law has been altered in this point; for if a man is now diſſeiſed, and the diſſeiſor continues in poſſeſſion for forty years without any claim made by the diſſeiſee, yet if the diſſeiſee at laſt make his claim before the death of the diſſeiſor, it ſhall ſecure his entry for a year and a day after ſuch claim made, to be computed from the day of the claim incluſive, notwithſtanding any deſcent caſt in that time; but if he ſuffers the year and day after the claim made to elapſe, then a deſcent after will bind him; and ſo *toties quoties* after a year and a day after any claim made, a deſcent will conclude his entry.

[By ſtat. 21 Ja. 1. c. 16. No man ſhall make entry upon any lands, but within twenty years after his right ſhall firſt accrue. And by ſtat. 4 Ann. c. 16. § 16., no claim or entry upon any lands, &c. ſhall be ſufficient to avoid a fine levied of ſuch lands, or to ſatisfy the ſtatute of limitations, unleſs an action be commenced within one year after, and proſecuted with effect.]

The

The rules of law concerning continual claim, and the effects of it, hold as well in relation to abators and intruders, their donees and feoffees, as in relation to diſſeiſors, their donees and feoffees, and for the ſame reaſons. Lit. § 428. Co. Lit. 255, 256.

If the diſſeiſor dies ſeiſed within a year and a day after the diſſeiſin, and before any entry by the diſſeiſee, this gives a right of poſſeſſion to the heir, becauſe when the diſſeiſee yields up the poſſeſſion peaceably, the preſumptive right is in the diſſeiſor, and the year and day which ſhould aid the diſſeiſee in ſuch caſe ſhall be taken only from the time of the claim made by him, not from the time the title of entry accrued to him; and therefore, it is adviſeable for the diſſeiſee to make his claim as ſoon after the diſſeiſin as he can. Lit. § 426.

Since *Littleton* wrote, an alteration as to the entry of the diſſeiſee on the death of the diſſeiſor has been made by 32 *H.* 8. *cap.* 33. by which it is enacted, "That except ſuch diſſeiſor hath "been in the peaceable poſſeſſion of ſuch manors, lands, *&c.* "whereof he ſhall die ſeiſed, by the ſpace of five years next af- "ter ſuch diſſeiſin, *&c.* without entry or continual claim, *&c.* "that ſuch dying ſeiſed, *&c.* ſhall not take away the entry of "ſuch perſon or perſons, *&c.*" 32 H. 8. c. 33. Co. Lit. 238.

But ſtill after the five years, continual claim muſt be made as at the common law, ſince the ſtatute which is introductive of a new law does not provide for it after the five years. Co. Lit. 238. a.

It is ſaid that abators and intruders are not within the ſtatute, becauſe it is penal, and extends only to a diſſeiſor in expreſs words, which was the moſt common miſchief, & *ad ea quæ frequentius accidunt jura adaptantur.* Co. Lit. 238. a. Plow. 47. a. *Quære.*

The feoffee of a diſſeiſor for the ſame reaſon is held to be out of this ſtatute; but in reſpect of the diſſeiſor himſelf the ſtatute is conſtrued with that latitude which may beſt preſerve the antient right; therefore, though the ſtatute ſpeaks of him that at the time of ſuch deſcent had title of entry, or his heirs, yet the ſucceſſors of bodies politick, ſo they be confined to a diſſeiſin, are within the remedy of this act, for the ſtatute extends clearly to the predeceſſor's being diſſeiſed, and, conſequently, without naming the ſucceſſor extends to him, for he is the perſon that at the time of ſuch deſcent had title of entry. Co. Lit. 238. a. 256. a.

If a man make a leaſe for life, and the leſſee be diſſeiſed, and the diſſeiſor die ſeiſed within five years, the leſſee for life may enter; but if he die before he enters, it is ſaid the entry of the reverſioner is not lawful, becauſe his entry was not lawful upon the diſſeiſor at the time of the deſcent, as the ſtatute ſpeaks: but if leſſee for life had died firſt, and then the diſſeiſor had died ſeiſed, he in reverſion had been within the remedy of the ſtatute, becauſe he had title of entry at the time of the deſcent, and ſo within the expreſs letter of the ſtatute, though he was not the immediate diſſeiſee. The ſame law of a remainder. Co. Lit. 238. a. Plow. 47. a.

Detinue.

DETINUE is an action that lies for the recovery of goods and chattels, though the party came to the poſſeſſion of them by (*a*) lawful means, as by bailment, borrowing, or pledging; and in this action the plaintiff is to recover the thing in ſpecie, or (*b*) damages for the detainer.

(*a*) It lies againſt a man that hath goods either by delivery or finding.

Co. Lit. 286. Roll. Rep. 128. (*b*) 2 H. 6. 15. Roll. Abr. 575.

But as in this action the defendant was allowed to (*c*) wage his law, (for it was thought but reaſonable that the bailor truſting to the bailee's honeſty and integrity at firſt, ſhould alſo truſt to his oath in a court of juſtice, ſince the reſtitution might have been ſecret,) and this was (*d*) found exceeding inconvenient, it being often experienced that thoſe, who were ſo diſhoneſt as to retain the goods of another, would generally purge themſelves on their oaths, the action of (*e*) trover and converſion was ſubſtituted in the place thereof, which being the action uſually made uſe of at this day in thoſe caſes, I ſhall but briefly conſider,

(*c*) For this *vide* tit. *Wager of Law.*

(*d*) 10 Co. 57. a. Moor, 481. Cro. Jac. 244. Yelv. 178.

(*e*) *Vide* tit. *Trover and Converſion.*

(A) By and againſt whom Detinue lies.

(B) For what Things it may be brought.

(A) By and againſt whom Detinue lies.

IF a bailee deliver the goods to another, he ſhall have an action of detinue againſt him, (*f*) becauſe he hath his poſſeſſion, and undertakes for the cuſtody, and the original bailor may have his action againſt either of them, becauſe in him is the property, which both are bound to anſwer to him.

Roll. Abr. 607.

(*f*) A man that hath a ſpecial and limited property, as a carrier that hath goods delivered, or a ſheriff by *fieri facias*, ſhall have this action againſt a ſtranger that takes away the goods, becauſe they are anſwerable in damages to the abſolute owner. 2 Bulſt. 311. Sid. 438. Mod. 30. 2 Sand. 47. 2 Keb. 588. Yelv. 44. Cro. Jac. 73. Dyer, 98, 99. Lev. 282. Vent. 52. Danv. Abr. 20. pl. 4, 5.

Sid. 438. If *A.* takes the goods of *C.*, and *B.* takes them from *A.*, *C.* ſhall have his action againſt *A.* or *B.* at his election, becauſe both damnified *C.* in their taking.

If

If a man detains the goods of a feme covert which came to his hands before marriage, the husband can (*a*) only bring detinue, beause the law transfers the property to the husband, but both shall join in *trover*, because the wrong was originally commenced at the time when the wife was sole; and if such injury be punished, the wife herself, who received this injury, must be party to the action, and the wife's demand is sufficient to prove a conversion in the defendant, since one of the parties to the action is denied the goods; but if the possession be laid in both it is ill, because if both were possessed, the law will transfer in point of ownership the whole interest to the husband. Sid. 172. Keb. 641. Noy, 70. Styl. 261. Yelv. 165.

(*a*) So, if goods come to a feme covert before marriage, detinue lies against the husband only, but trover and conversion lies against both, because both were concerned in the trespass. Roll. Abr. 607.; but for this *vide* title *Trover and Conversion*.

If *A.* delivers goods to *B.* to be delivered over to *C.*, either *A.* or *C.* may have detinue against *B.*; for not delivering them over, according to the undertaking, is an injury done each of them. 9 H. 6. 58. b. 60. Roll. Abr. 606.

(B) For what Things it may be brought.

IT has been (*b*) holden formerly, that detinue will not lie for money, unless in a box or bag, nor for corn out of a sack, because these things have no mark whereby they may be known in order to be re-delivered to the plaintiff. (*b*) 7 H. 4. 3. b. Co. Lit. 286. Cro. Eliz. 457. Moor, 394.

N. Dyer, 22. 2 Bulst. 308. Roll. Rep. 59, 60. Lit. Rep. 241. Noy, 12. Q. & *vide* title *Trover and Conversion*, that *trover* will lie for money out of a chest or purse.

It seems, however, clear, that if a man (*c*) lends a sum of money to another, detinue does not lie for it, but he must bring debt on the contract, or *assumpsit*. 18 H. 6. 20. b. Roll. Abr. 606.

(*c*) Where, if a wife loses money at play, the husband may maintain trover for it. Title *Trover and Conversion*.

So, where a man comes to buy goods, and they agree upon a price, and *a day for the payment*, and the buyer takes them away, detinue does not lie, but an *assumpsit* for the money, because the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due; but if a man comes to buy goods, and they agree on a price *for present money*, and the buyer takes the goods away without payment, detinue lies, because the property is not altered; and, therefore, the taking away the goods without payment of the money is an injurious taking, for which the action lies: but if a man sell goods on payment of money on a day to come, and the money be paid, and the goods not delivered, detinue lies, because the property is in the buyer. Cro. Eliz. 867.

Detinue lies for writings in a box, or for writings themselves though not in a box, and though the date be not mentioned, or the delivery of the writings, as a deed; and it lies for a husband and wife, for a deed by which an annuity is granted to the wife, Co. Lit. 286. 17 E. 3. 45. Roll. Abr. 606.

for

for every man that has a property in deeds may bring his action for the (*a*) detaining of them.

(*a*) In detinue of charters, if the iſſue be upon the detinue, and it be found that the defendant hath burnt the charters, the judgment ſhall not be to recover the charters, for it appears he cannot have them; but he ſhall recover the value of the land in damages. 17 E. 3. 45. b. Roll. Abr. 607.

Cro. Jac. 39. Coupledike and Coupledike.

Detinue lies not for a houſe, and therefore where the plaintiff had declared *de una domo vocat.* a bee-houſe, upon a writ of error the judgment for this default was reverſed.

Salk. 223. Roberts and Wetheral, adjudged. 5 Mod. 193.

By the act of navigation 12 *Car.* 2. *cap.* 18. certain goods are prohibited to be imported here, under pain of forfeiting them, one part to the king, another to him or them that will inform, ſeize, or ſue for the ſame: it was adjudged, that, in this caſe, the ſubject may bring detinue for ſuch goods, as the lord may have replevin for the goods of his villein diſtrained, for the bringing of the action veſts a property in the plaintiff.

Deviſes.

For the learning upon this head, ſee title ~~*Wills and Teſtaments.*~~ *Legacies & Deviſes.*

Diſcontinuance.

For diſcontinuance of proceſs, *vide* heads of *Proceſs* and *Error.*

DIſcontinuance of an eſtate in lands, ſignifies (*a*) ſuch an alienation of the poſſeſſion, whereby he, who has a right to the inheritance, cannot (*b*) enter, but is driven to his action.

—Co. Lit. 325. and note (1), *ibid.* 13th edition. (*a*) To every diſcontinuance it is neceſſary there ſhould be a deveſting or diſplacing of the eſtate, and turning the ſame to a right; for if it be not turned to a right, they that have the eſtate cannot be driven to an action. Co. Lit. 327. b. and 332. ſame rule. (*b*) But he, who claims by title paramount above the diſcontinuance, may enter. Co. Lit. 327.

[It began in the caſe of huſbands' alienations of their wives' land. By the civil law, the father gave the *dos*, which was the eſtate of the wife given on the marriage; and if it conſiſted of matter moveable, the huſband had the poſſeſſion, but was bound to reſtitution at his death; and even an action was allowed to the wife, in caſe the huſband fell to decay, to recover during his life. If

If it conſiſted of things immoveable, the huſband could not alien without the conſent of his wife, by the Julian law. And by Juſtinian's reformation, he could not alien, though with her conſent. *Conſtante matrimonio rei dotalis dominium civile penes maritum eſt, naturale penes uxorem.* Dig. li. 23. tit. 2. *De jure dotium.* Ibid. tit. 5. *De fundo dotali.*]

Under this Head we ſhall conſider,

(A) Of Diſcontinuances made by Eccleſiaſtical Perſons.

(B) Made by Tenants in Tail.

(C) By Huſbands ſeiſed in Right of their Wives.

(D) Of Diſcontinuances by Women of Lands of the Gift of their Huſband, or his Anceſtor.

(E) What Eſtate or Intereſt may be diſcontinued.

(F) By what Act or Conveyance a Diſcontinuance may be made, and the Effect thereof.

(A) Of Diſcontinuances made by Eccleſiaſtical Perſons.

IN ancient days, abbots and prelates were ſuppoſed to be married to the church; and as huſbands and repreſentatives of the church, were allowed to have a fee in right of the church, that they might maintain actions, and hold courts within their manors and precincts; therefore at common law, a biſhop, abbot, or any other perſon, ſeiſed in fee in right of his houſe or church, might have diſcontinued, and thereby put his ſucceſſor to his action to recover the right of poſſeſſion. Co. Lit. 325. b. Comb. Incumb. 484. Gilb. Ten. 102.

But as the right of property was in the church, the biſhop could not alien without the conſent of the chapter, who repreſented the clergy of the dioceſe; nor could the abbot alien without the conſent of his houſe. Co. Lit. 325.

And at this day, by the 1 *Eliz. c.* 19. & 13 *Eliz. c.* 10. and 1 *Jac. c.* 3. neither a biſhop, dean, maſter of an hoſpital, *&c.* can diſcontinue any of their poſſeſſions, or bar their ſucceſſors of their right of entry. Co. Lit. 325. b. 342. Roll. Abr. 633.

As to parſons, vicars, prebendaries, and others who are preſentative, they were conſidered only as having a qualified right, and their eſtate by the common law only an eſtate for life, the fee being in abeyance; and therefore could not diſcontinue, or do any other act to the prejudice of their ſucceſſors, though they could alien with the conſent of the patron and ordinary *. Co. Lit. 341. a. Dyer, 239. pl. 41. Hetl. 88.

* By 13 El. c. 20., charges made upon benefices with cure are declared void.

If

2 Roll. Abr. 58. But for this *vide* under head of *Leaſes and Terms for Years, Leaſes made by Eccleſiaſtical Perſons.*

If a biſhop leaſes parcel of the demeſnes of a manor for life, not warranted by the ſtatute of 1 *Eliz. c.* 19. and after leaſes the manor to another for life; the parcel ſo leaſed ſhall paſs with attornment of the firſt leſſee; for the ſaid leaſe did not make any diſcontinuance, but the reverſion thereof continued parcel of the manor.

(B) Of Diſcontinuances made by Tenants in Tail.

See 2 Burr. 1074. in the caſe of Doe on. demiſe of Adams v. Whitehead.

Lit. § 598. (*a*) Alſo, the entry of the iſſue is taken away, becauſe the

IF tenant in tail makes a *feoffment* in fee; this is a diſcontinuance, for he has the right of poſſeſſion inheritable in him; for although the ſtatute *de donis* preſerves the right of the inheritance to the iſſue; yet it does not preſerve the right of poſſeſſion, and (*a*) therefore the iſſue is put to his action.

feoffment had anciently a warranty annexed unto it, which defended ſuch right of poſſeſſion; and when a man had a warranty to cover his poſſeſſion, it was not fit he ſhould be put out of poſſeſſion by any act in *pais*, without bringing in his warrantor by voucher; and therefore the entry was diſallowed in ſuch caſes, that a man might not be obliged to the expence of getting his judgment in the writs of *warrantia chartæ*. Co. Lit. 327.

13 H. 7. 22. b. Roll. Abr. 633. Cro. Car. 387. 405, 406. Jon. 358. Hut. 126. S. C. and S. P. admitted.

So, if tenant in tail, remainder to his right heirs, makes a *feoffment* in fee; this is a diſcontinuance.

Lit. § 598, 599. 3 Co. 85. S. P. But Q. after ſuch releaſe, what eſtate or intereſt the diſſeiſor has; and Saund. 261.

If tenant in tail be diſſeiſed, and *releaſe* to the diſſeiſor all his rights; this works no diſcontinuance; for a *releaſe* being a conveyance in ſecret cannot paſs the poſſeſſion; and therefore a conveyance, that cannot paſs the poſſeſſion, cannot paſs the right of poſſeſſion.

Lit. § 601. 3 Co. 85. S. P. (*b*) So that it is not the warranty

But if tenant in tail being diſſeiſed releaſes all his right to the diſſeiſor, and binds himſelf and his heirs to warranty, and dies; and the warranty deſcends (*b*) upon the iſſue in tail, this is a diſcontinuance, (*c*) by reaſon of the warranty.

only that makes the diſcontinuance, but the warranty and deſcent upon him that hath right to the lands. Co. Lit. 328. a. (*c*) *Viz.* That if aſſets deſcend, he to whom the releaſe is made may plead the ſame, and bar the demandant. Co. Lit. 328. a. b.

Co. Lit. 332. a. Bulſt. 162. 2 Roll. Rep. 484.

If tenant in tail leaſes for years, and after levies a fine, this is a diſcontinuance, for fine is a feoffment upon (*d*) record, and the freehold paſſes.

(*d*) But if tenant in tail levies a fine *ſur conuzance de droit tantum*, this is not any diſcontinuance till execution; for if he dies before execution, the tenant may enter. 36 Aſſ. 8. Roll. Abr. 672. S. C. So, if a fine be levied to tenant in tail, and he grant, and render the land to the conuzor and his heirs, and die before execution, this is no diſcontinuance; otherwiſe, if executed in the life of tenant in tail. Co. Lit. 333. b.

Co. Lit. 332.

But if tenant in tail leaſes for his own life, and after levies a fine, this is no diſcontinuance, becauſe the reverſion expectant upon an eſtate of freehold, which lies only in grant, paſſed thereby.

If

If tenant in tail leaſes for the life of the leſſee, by this the tail and reverſion thereupon is diſcontinued; and if the tenant in tail by deed grants his reverſion in fee to another, and the tenant for life attorns; and (*a*) after the tenant for life dies, (*b*) living the tenant in tail, &c. (*c*) this is a diſcontinuance in fee. Lit. § 620.

(*a*) So, if tenant for life ſurrenders to the grantee, or the grantee recovers in waſte, and enters for the forfeiture, &c. Co. Lit. 333. b. Lit. § 621. 629. Jon. 210. Latch. 65. (*b*) If tenant in tail leaſes for the life of the leſſee, and after levies a fine with warranty; though this is not any diſcontinuance, ſo as to take away the entry of him in reverſion after the death of the tenant for life, unleſs executed in the conuſee by the death of tenant for life in the life of tenant in tail; yet the grantee hath an abſolute fee, to which the warranty being annexed, and deſcending upon the reverſioner, will be a bar. Jon. 210. adjudged. Cro. Car. 156. adjudged. For by the eſtate for life the tail was diſcontinued, and a new fee gained; which reverſion in fee being granted with warranty, the warranty was annexed to the fee, and bound thoſe that had right. *Vide* Latch. 64. 72. Salk. 245. Lutw. 770. 782. (*c*) Where the reverſion is executed in the life of tenant in tail, it is equivalent in judgment of law to a feoffment, for the eſtate for life paſſed by livery. Co. Lit. 333. b.

If tenant in tail leaſes for (*d*) life, the remainder in fee, this is an abſolute diſcontinuance, though the remainder is not executed in the life of tenant in tail, becauſe all is but one eſtate, and paſſeth by one livery. Co. Lit. 333. b.

(*d*) So, if he leaſes for years, the remainder in fee, and makes *livery of ſeiſin* accordingly. Lit. § 631.

But if tenant in tail leaſes for three lives, according to 32 *H.* 8. *c.* 28. this is no diſcontinuance of the eſtate-tail, or of the (*e*) reverſion, (*f*) becauſe it is authoriſed by act of parliament, wherein every man's conſent is involved. Co. Lit. 333. a. But for this *vide* head of *Leaſes*.

(*e*) But if tenant in tail levies a fine, and after dies without iſſue, the donor is put to his formedon. 4 Leon. 191. Co. 96. Cro. Jac. 696. Sid. 83. (*f*) Dyer, 57. pl. 1. Owen, 28. 2 Leon. 46.

If tenant in tail leaſes for life, and after diſſeiſes leſſee for life, and makes a feoffment in fee, and the leſſee dies, and then tenant in tail dies, though the fee was executed, yet, becauſe it was not executed by (*g*) lawful means, it is no diſcontinuance. Co. Lit. 333. b.

(*g*) Where by cuſtom an infant above the age of 15 may make a feoffment, and being tenant in tail, he makes a feoffment; it is no diſcontinuance, becauſe the cuſtom will not enable one to do a tort. Cro. Jac. 80.

If there be tenant for life, remainder in tail, remainder in tail, &c. and tenant for life, and he in the firſt remainder in tail levy (*b*) a fine, this is no diſcontinuance of either of the remainders, becauſe each of them paſſed only what he lawfully might. Co. 76. a. Co. Lit. 302. b. Cro. Eliz. 827. Moor, 634. Owen, 129.

vide 2 Lev. 254. 2 Jon. 58. (*b*) So, if they made a feoffment. Co. 76. Cro. Eliz. 135. Leon. 127. But Q. and *vide* Dyer, 124. And. 286. Cro. Eliz. 36. 6 Co. 15. and Sid. 83., where this opinion is denied; becauſe a feoffment differs in its nature from a fine. ——If ſuch feoffment be made by parol, it will be the ſurrender of tenant for life, and the feoffment of him in remainder, *ut res magis valeat*, and, conſequently, a diſcontinuance. Co. 77. ——But a naked conſent of the tenant for life will not amount to a ſurrender, ſo as to make it a diſcontinuance. Carth. 110.

If tenant in tail enfeoff the donor, this is not any diſcontinuance, becauſe the donor hath the (*i*) immediate eſtate, and it operates as a ſurrender; it paſſes no more than it lawfully may paſs. Lit. § 65. Co. 140. S. P.

(*i*) But if there be tenant in tail, the remainder in tail; and the tenant in tail enfeoff him in reverſion in fee, this is a diſcontinuance, Co. 140. Co. Lit. 335. S. P. becauſe there is a meſne eſtate. Keilw. 42. a. S. P. *per* Frowick *con.* Dyer 10. pl. 32.

Co. Lit. 335. a. (a) Conditionally, *viz.* if the ſtranger ſurvive. Dyer. 12. pl. 53. Cro. Car. 406.

If the donee enfeoff the donor and a ſtranger, (a) this is a diſcontinuance of the whole land.

Lev. 36. Stephens and Bittridge. Raym. 36. S. C. Sid. 83. S. C. adjudged. But it was agreed, that if the eſtate-tail had been executed, this fine had been a diſcontinuance of the remainder in tail, and ſo the warranty deſcending upon him in remainder, would have barred.

If a man covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to his wife for life; the remainder to the heirs male which he ſhall beget on the body of his wife, remainder to his eldeſt ſon by a former wife, *&c.* and after the huſband and wife levy a fine with warranty, and die without iſſue; this is no diſcontinuance of the remainder, becauſe the eſtate-tail was not executed, by reaſon of the intervening eſtate limited to the wife, which eſtate is not drowned, but remains diſtinct.

Lit. § 637. 641. Carth. 110. S. P. *poſt.* letter (E). (b) As if tenant in tail is diſſeiſed, and dies, and the iſſue in tail releaſes to the diſſeiſor with warranty, though the iſſue was never ſeiſed by force of the entail, yet it hath the effect of a diſcontinuance by reaſon of the warranty. Co. Lit. 339. Dyer 55. Moor 256.

If a man has the right of poſſeſſion, and is not poſſeſſed by virtue of the entail, he cannot diſcontinue otherwiſe than by (b) warranty.

Lit. § 658. Roll. Abr. 634. Raym. 37.

As, if there be grandfather, father, and ſon, and the grandfather be ſeiſed in tail, and the father diſſeiſe the grandfather, and make a feoffment in fee, and die, this works no diſcontinuance, becauſe the father was not poſſeſſed of the entail, but of a fee-ſimple by diſſeiſin, which was ſubject to the entry of the tenant in tail; and, conſequently, the alienee is ſubject to the entry of the iſſue in tail, inaſmuch as the father, who made the alienation, had only the naked poſſeſſion by diſſeiſin, and not the right of poſſeſſion by virtue of the entail.

Lit. § 638. (c) So, though the grant had been with warranty. Co. Lit. 339.; yet *vide* Jon. 210. Cro. Car. 156. Latch. 62.

So, if tenant in tail leaſe to one for life, and have iſſue and die, and the reverſion deſcend to the iſſue, and the iſſue (c) grant the reverſion to another in fee, and the tenant for life attorn, and die, and the grantee enter, and be ſeiſed in fee in the life of the iſſue, and the iſſue in tail have iſſue a ſon, and die, this is no diſcontinuance; but the ſon may enter, *&c.* for that his father had never any thing in him by force of the entail.

Roll. Abr. 634. *& vide* 2 And. 110. Roll. Rep. 188. Moor, 747.

So, if there be tenant for life, the remainder in tail, and he in remainder enter upon the leſſee, and diſſeiſe him, and make a feoffment over, this is not any diſcontinuance, becauſe he was never ſeiſed by force of the entail.

Styl. 158. Bulſt. 162.

Roll. Abr. 634. (d) So, if he make a deed of feoffment with a letter of attorney to *J. N.*, to make livery, and he enter and oust the leſſee, &c. Moor 91. pl. 226. Dyer 363. pl. 22. (e) Though the leſſee re-enter. Moor 281. pl. 6.

But if there be leſſee for years, the remainder in tail to *J. S.* and (d) *J. S.* enter upon the leſſee, and make a leaſe for life, or feoffment in fee, (e) this is a diſcontinuance, for he was ſeiſed by force of the entail at the time of the feoffment.

(C) Of Diſcontinuances by Huſbands ſeiſed in Right of their Wives.

ANY alienation made by the huſband of the wife's land, whether by feoffment, or fine, was a diſcontinuance, and after his death, ſhe was put to her *cui in vita* to reinſtate herſelf. 2 Inſt. 681.

But now by the 32 *H.* 8. *cap.* 28. "No fine, feoffment, or "other act, made, (*a*) ſuffered, or done by the huſband (*b*) only, "of any manors, &c. being (*c*) the (*d*) inheritance or freehold "of his wife, during the coverture, ſhall make a diſcontinuance "thereof, or ſhall be prejudicial to the (*e*) wife or her (*f*) heirs, "or to ſuch as (*g*) ſhall have right, title, or intereſt to the ſame by "the death of ſuch wife; but that the (*h*) wife or her heirs, and "(*i*) ſuch other to whom ſuch right ſhall appertain after her "death, may enter into ſuch manors, &c. according to their "rights and titles therein; any fine, feoffment, or other act of "the huſband notwithſtanding; fines levied by the huſband and "wife (whereunto the wife is party and privy) only excepted."

(*a*) The huſband cauſes a *præcipe* to be brought againſt him and his wife upon a feigned title, and ſuffers a recovery without any voucher, and execution to be had againſt him and his wife, this is an act within the ſtatute, ſuffered by the huſband. Co. Lit. 326. (*b*) Though a feoffment be made by the huſband and wife, for this in ſubſtance is the act of the huſband only. Co. Lit. 326. a. (*c*) Where during the coverture lands are given to the huſband and wife, and the heirs of their two bodies, this is the inheritance of the wife within the act; ſo that if the huſband makes a feoffment, and dies, ſhe or her iſſue may enter. 9 Co. 138. 2 Inſt. 681. Cro. Car. 477. Co. Lit. 326. 2 Inſt. 681. 8 Co. 72. Brown. 131.——But if the huſband levies a fine with proclamations, the iſſue is barred, though the wife is helped by this ſtatute. Keilw. 205. 213. Dyer, 351. pl. 24. And. 39. 8 Co. 72.——But if the huſband is tenant in tail, remainder to the wife in tail, and the huſband makes a feoffment in fee, if the huſband die without iſſue the wife may enter. Co. Lit. 326. a. 8 Co. 72. But there ſaid, if he ſuffers a recovery, ſhe is barred. (*d*) This extends not to the wife's copyhold of inheritance. Moor, 596. ——But though the ſtatute does not extend to it, yet the huſband cannot at common law diſcontinue the wife's copyhold. 4 Co. 23. Cro. Jac. 105. Poph. 138. Moor, 596. Roll. Abr. 632. (*e*) If after a feoffment made by the huſband they are divorced *cauſa præcontractus*, ſhe may enter within this act, and is not driven to her *cui ante divortium*, as at common law; though by the ſtatute the entry is given to the wife, and now upon the matter ſhe was never his lawful wife; yet at the time of the alienation ſhe was his wife *de facto*; and where the huſband dies, ſhe is not his wife at the time of the entry. Co. Lit. 326. a. 8 Co. 73. a. She may enter though her huſband is living, but *vide* Moor, 58. pl. 164. (*f*) But her heirs by the common law could have no remedy, nor by this act can enter during the life of the huſband. Co. Lit. 326. 8 Co. 72, 73. (*g*) But if the wife before entry dies without heirs, the lord by eſcheat ſhall not enter; for though an entry is given by the act, yet the feoffee, &c. is in by title as before. Hob. 243. 261. (*h*) But if the huſband makes a feoffment, and dies, and the wife before entry levies a fine, this ſo ſtrengthens and fortifies the diſcontinuance, that ſhe or thoſe in remainder can never enter; and though, by the ſtatute it is enacted, that the feoffment of the baron ſhall not be a diſcontinuance, but the wife may enter, yet it is a diſcontinuance till entry. 2 Roll. Rep. 311. Cro. Car. 320. and *vide* Roll. Abr. 632. (*i*) By theſe words the entry of him in reverſion or remainder is preſerved. Co. Lit. 326. Hob. 261.

Although the words of this act are very general, and ſeem to give the wife and her iſſue an entry, to avoid any fine levied by the huſband of her lands, yet if the huſband levies a fine with proclamations, and five years paſs after his death, without any entry or claim by the wife, her entry is not only taken away, but her right is for ever extinguiſhed; becauſe the ſtatute was intended to provide only againſt the diſcontinuance, which was a grievance particular to feme coverts, but not to invalidate fines duly levied, according to 4 *H.* 7. *c.* 24. as to femes covert; becauſe they by that ſtatute have a remedy in common with others, which is by entry Co. Lit. 326. Dyer, 72. 162. 191. Plow. 373. 8 Co. 72. 2 Inſt. 681. 9 Co. 140.

or claim to avoid the fine; whereas before the ſtatute of 32 *H.* 8. *c.* 28. it was not in their power to prevent the diſcontinuance; and therefore the ſtatute relieves them in that particular. Beſides, though the words of the act be general, that ſuch fine ſhall not be prejudicial to the wife of her heirs, yet the following words, *viz. but that ſhe may lawfully enter according to her right and title therein*, are explanatory, and allow her an entry only in caſes where ſhe had a right before the ſtatute, and it is plain that by 4 *H.* 7. *c.* 24. ſhe had no right after the five years were lapſed from the death of the huſband.

Co. Lit. 326. 8 Co. 71 b. (*a*) If lands are given to baron and feme, and the heirs of the body of the baron, and the baron makes a feoffment in fee, this is a diſcontinuance; for the baron is ſeiſed by force of the entail. Cro. Car. 320. Jon. 324. 3 Co. 5. Roll. Abr. 632, 633. 2 Roll. Rep. 311.

If huſband and wife are tenants in (*a*) ſpecial tail, and the huſband aliens in fee, this is a diſcontinuance, for though the words of the ſtatute are, *of any lands being the freehold and inheritance of the wife*; yet as this joint eſtate may without any impropriety be called the inheritance of the wife, the miſchief being equal, it ſhall be intended to be provided againſt.

2 Inſt. 681.

If a huſband levies a fine of the wife's lands to the king, ſhe may after the death of her huſband enter upon the king; for though the ſtatute does not expreſsly name the king, yet being made to prevent an injury and wrong, he ſhall be bound by it, the rather becauſe it is his moſt immediate concern to relieve his ſubjects from any grievance or wrong.

(D) Of Diſcontinuances by Women of Lands of the Gift of their Huſband, or his Anceſtor.

Dan. Abr. 579.

THE learning hereof depends upon the ſtatute 11 *H.* 7. *c.* 20. which provides againſt diſcontinuances and diſherifons by the wife, to the prejudice of the heir of the huſband, and ſeems to be well explained by the following notes and obſervations of Mr. *Danvers*.

(*b*) So, if a woman, having only title of dower, enters before ſhe is endowed, and levies a fine. 2 Leon. 168. 3 Leon. 78. cited by Rhodes to have been adjudged. (*c*) But this extends not to eſtates in fee. Dyer 248. pl. 78. 4 Co. 3.

By 11 *H.* 7. *c.* 20. "If any woman having an (*b*) eſtate in "dower, or for life, or (*c*) tail jointly with her huſband, or only "to herſelf, or to her uſe in any manors, (*d*) &c. of the (*e*) in- "heritance or (*f*) purchaſe of the huſband, or (*g*) given to the "huſband and wife in tail, or for life, by any anceſtor of the "huſband, or other perſon ſeiſed to the uſe of the huſband, or "his anceſtor, and being ſole, or with (*h*) other after taken huſ- "band (*i*) diſcontinue, (*k*) alien, releaſe, or confirm with (*l*) "warranty, or by covin ſuffer (*m*) any recovery againſt them; all "ſuch recoveries, diſcontinuances, &c. ſhall be (*n*) void, and (*o*) "every (*p*) perſon to whom the intereſt, &c. after death of the "woman, in manors, &c. ſhould belong, may enter, &c. as if no "diſcontinuance, &c. had been; and if ſuch huſband and wife "make ſuch diſcontinuance, the (*q*) perſon to whom the manors, "&c. ſhould belong after the death of the woman, may enter and "hold, according to ſuch title as he ſhould have had, if the wo- "man

" man had been dead, and no diſcontinuance, &c. as againſt the " huſband during his life; provided the woman after the death of " her huſband may re-enter, &c. but if ſole when the diſcontinu- " ance, &c. ſhe ſhall be barred for ever, and the perſon, to whom " the intereſt belongs, may enter, &c. *Provided* the act ſhall " not extend to any recovery or diſcontinuance, to be had (r) " with the (s) heir next inheritable, nor where he, that next " after the death of the woman ſhould have an eſtate of inherit- " ance, ſhall be aſſenting to the ſaid recovery, where the aſſent " is of record or enrolled."

Moor 716. pl. 1000. Bridg. 136. Cro. Eliz. 524. adjudged. For it may go to a collateral heir. (d) Extends not to copyholds. 2 Sid. 41. 73. adjudged. [But it

does to a uſe or an equity of redemption, for uſes are here expreſsly mentioned, and a truſt is now, what a uſe was then. 2 Vern. 489. 1 Ab. Eq. 220.] (e) If one ſeiſed in the right of his wife levies a fine, and the conuſee grants and renders the land to the huſband and wife in ſpecial tail, the remainder to the heirs of the wife, and they have iſſue, and the huſband dies, and the wife takes another huſband, and they levy a fine, this is directly within the words, but out of the meaning of the act, becauſe the eſtate of the land moved from the wife. Co. Lit. 366. a. Eaſton and Stud. Plow. 459. adjudged. Keilw. 214. adjudged. N. Bendl. 230. pl. 266. and with this agrees Cro. Eliz. 524. Moor 715. pl. 1000. Nay Cro. Eliz. 2. it is ſaid to have been adjudged, if baron and feme levy a fine of ſuch land, and the conuſee grants a rent to them in tail, it is out of the act, for the rent is in lieu of the land. ——So, if the anceſtor of the baron makes a feoffment in fee, upon condition that the feoffee ſhall give it to the baron and feme in tail, &c., this is within the meaning of the act, though out of the words, for they are in by the feoffment, and not by the anceſtor of the baron. Moor 93. pl. 231. *Per* Plowden ſaid to have been ſo adjudged, Linch and Spencer, Cro. Eliz. 514. 2 And. 44. Moor 455. 3 Co 50.——It is within the act, though the gift by the huſband or his anceſtors, by which the feme takes, was made as well in conſideration of money paid by the feme, or her father, as of the marriage. Dyer 146. a. b. Keilw. 208. Moor 93. pl. 231. Cro. Jac. 474.——Otherwiſe, if the lands had moved from the anceſtor of the feme, as, if ſettled by the father of the feme in conſideration of the marriage, and of money paid by the baron for the lands moving from her father, it ſhall be intended that her advancement was the principal cauſe of the gift, and not the money. Kynaſton and Lloyd, Cro. Jac. 624. adjudged. Jon. 13. adjudged. Palm. 213. 218. adjudged, Copland and Pyot. Cro. Car. 244. adjudged, Jon. 254. adjudged, and *vide* Moor 93. pl. 231. 2 And. 45.——But where conveyed by a ſtranger in conſideration of the wife's fortune paid by her father to the vendor, and other money paid by the baron; this is the purchaſe of the huſband within the act. Moor 250. pl. 398.——If *A.* in conſideration of good ſervice done by *B.*, conveys lands to *B.* his man, and *C.* his couſin, and the heirs of their bodies, &c. This is not within the act, not being made by the baron or his anceſtor, and being in conſideration of ſervice done, it is not ſuch a purchaſe as the act intends. Ward and Warthew, Cro. Jac. 173. adjudged; and though *C.* was named couſin by the deed, it was ſaid that was not material, becauſe it did not appear to be any part of the conſideration; but however being found in fact that ſhe was his couſin, and that a marriage was intended; it was ſaid it ſhould be preſumed the marriage was as well the cauſe of the gift as the ſervice. Noy, 122. adjudged. Yelv. 101. adjudged Moor 683. pl. 943. adjudged. (f) Baron and feme being joint copyholders in fee, the baron purchaſes the freehold thereof to him and his wife, and the heirs of their bodies, they have iſſue, the baron dies, and the feme enters and ſuffers a recovery, &c., this is a forfeiture within the act, for the copyhold by the acceptance of the new eſtate, was extinct. Cro. Eliz. 24. agreed *per cur.* (g) If a man deviſes lands to his wife in tail, this is within the words, but not within the meaning of the act. Foſter and Pitfal, Leon. 261. Cro. Eliz. 2. [Hughes v. Clubb, Com. Rep. 369. S. P.] (h) A man ſeized in fee levied a fine to the uſe of himſelf for life, and after to the uſe of his wife, and the heirs male of her body, by him begotten, for her jointure; and after he and his wife levied a fine, and ſuffered a recovery, and the huſband and wife died; and it was held, the iſſue upon this act might enter, for though it was not within the words, yet it was within the remedy intended to prevent the diſheriſon of heirs. Co. Lit. 365. But in the caſe of Kirkman and Thompſon, Cro. Jac. 474. this point is adjudged *con.* and that ſuch alienation was neither within the words nor intention of the act, which ſeems clearly to be law. (i) *Vide* Jones and Philpot, Lev. 49. Sid. 63. (k) If ſuch feme tenant in tail accepts a fine *ſur conuſance de droit*, and thereby renders the land for 1000 years, &c. this is an alienation within the act, elſe it would be to little purpoſe. 3 Co. 51. ſaid to have been ſo reſolved. Moor 250. pl. 398. adjudged. 2 Leon. 168. adjudged. 3 Leon. 78. adjudged, & *vide* Cro. Eliz. 514. 2 And. 58.——Diverſity where ſuch leaſe made by fine, where by deed only. Cro. Jac. 629. Bridg. 28. 1 Jon. 60. & *vide* 2 Roll. Rep. 490. Where it is ſaid by two judges, that though ſuch leaſe be made by fine, yet it not being any diſcontinuance, or prejudicial to the iſſue, he cannot enter till after her death. (l) This relates only to releaſes and confirmations, which are no diſcontinuance without, ſo that a leaſe by ſuch feme tenant in tail made for three lives without warranty, if not purſuant to 32 H. 8. c. 28. is a forfeiture within the act. Sir George Brown's caſe, 3 Co. 50. b. Cro. Eliz. 514. (m) Extends to ſuch, where ſhe comes in only as vouchee. Moor 716. pl. 1000. (n) Yet it continues as to the parties, and all others, except him to whom the intereſt, &c. by whoſe entry it is to be avoided. 3 Co. 59. b. 60. Hob. 166. (o) Unleſs he hath diſabled himſelf by levying a fine, ſuffering a recovery, &c. Ward and Walthoe, Cro. Jac. 175. adjudged.

adjudged. Yelv. 101. adjudged. Noy, 122. adjudged. ——— And where he hath concluded himſelf by ſuffering a recovery, &c., his iſſue whom he had power to bar ſhall not enter. Lincoln College, 3 Co. 61. 2 And. 31. ——But if after ſuch feme tenant in tail ſuffers a recovery, the iſſue in tail releaſes to the recoveror, yet the iſſue of that iſſue is not barred thereby. 3 Co. 59. cited from Doctor and Student, and 3 Co. 61. agreed to be law.—But, if the iſſue in ſpecial tail, the remainder being to him in fee, levies a fine with proclamations, (though not found,) and after his mother (being tenant in tail within this act) leaſes for three lives, (not warranted by 32 H. 8. c. 28.) living the iſſue, the conuſee may enter; for the tail was extinct by the fine, and the conuſee was the perſon to whom the intereſt, &c. belonged after the death of the woman. Sir Geo. Brown's caſe, 3 Co. 51. adjudged. Cro. Eliz. 514. adjudged. Moor, 455. adjudged. 2 And. 44. adjudged. And there ſaid that the record of the fine being in the ſame court, they might inſpect it to ſee the proclamations. Roll. Abr. 878. pl. 7. 3 Co. 61. But if the reverſion in fee had been in another, then the conuſee taking nothing by the fine, but by eſtoppel, could not enter; nor could the heir, becauſe concluded by the fine. Ward and Walthoe, Cro. Jac. 175. adjudged. Yelv. 101. adjudged. Noy, 122. adjudged. But in this laſt book the caſe is not fully ſtated, for there is no notice taken of the laſt fine levied by the woman alone after the death of her ſecond huſband, which made the forfeiture. (*p*) The ſtatute intended only to prevent ſuch prejudice as might ariſe to the heirs of the baron, by whom advanced, and not where the immediate intereſt upon the death of the wife was ſo limited, as to belong to a ſtranger. Foſter and Pitfal, Cro. Eliz. 2. Leon. 261. [Hughes v. Clubb, Com. Rep. 369. S. P.] (*q*) But if ſuch woman be tenant for life—remainder for life, remainder in fee; and two tenants for life join in a feoffment, the entry of him in remainder in fee is lawful by this act, *per* Leon. 262. But this ſeems to be ſuch a forfeiture, for which the remainder-man in fee might by the common law enter. Co. Lit. 251. b. (*r*) If the baron, being ſeiſed to him and his feme, and the heirs of the body of the feme, dies, and in the life of the wife his iſſue (then being tenant of the freehold, as pleaded, which muſt be intended by diſſeiſin, no ſurrender or forfeiture being alledged) ſuffers a recovery, (which binds not the tail, he being in of another eſtate,) by agreement that the recoverors ſhould enfeoff *J. S.*, and that the wife ſhould releaſe to him with warranty, which ſhe does accordingly, and dies, and the warranty deſcends, &c., this ſhall bind; for not being prejudicial, but intended to perfect the aſſurance of the heirs, it is not reſtrained by this act; for the woman, joining with the heir by fine or recovery, might have barred the tail; and it was never intended to prevent a warranty being made to him that had the land, by the conveyance of the heir himſelf. Lincoln College's caſe, 60. a. b. adjudged. (*s*) But if ſuch heir being a daughter joins, and after a ſon is born, he may enter. 3 Co. 61. b.

[By ſtat. 32 *H.* 8. *c.* 36. § 2. it is enacted, that no fine levied by any woman of any ſuch eſtate as is mentioned in the above ſtatute, 11 *H.* 7., ſhall be of any effect.]

(E) What Eſtate or Intereſt may be diſcontinued.

Lit. § 627, 628. Co. Lit. 327. 3 Co. 85.

THERE can be no diſcontinuance of things which lie in grant; and, therefore, if tenant in tail of a rent, (*a*) advowſon, common, or remainder, or reverſion expectant on a freehold, make a grant by deed or fine, or diſſeiſe the tenant of the land out of which the rent is iſſuing, whereof he is ſeiſed in tail, and make a feoffment with (*b*) warranty; this is no diſcontinuance of the entail, for nothing paſſes but during the life of tenant in tail, which is lawful, but every diſcontinuance works a wrong.

(*a*) Tenant in tail of an advowſon in groſs grants the ſame in fee, and after, a collateral anceſtor releaſes to the grantee with warranty, and dies, this is a good bar for ever. 1 Leon. 111. ſaid by *Anderſon* to have been adjudged, but *vide* 2 And. 110. (*b*) But where the iſſue by bringing a formedon admits himſelf out of poſſeſſion, and ſhall be barred by the warranty and aſſets, *vide* Co. Lit. 332. b.

Roll. Abr. 632. Co. Copyh. 141. 4 Co. 23. a.

A copyhold eſtate cannot be diſcontinued by ſurrender, for the tenant gives up no more than he had, and the ſurrendree is in by the lord's admittance; and this is not (*c*) like a feoffment at common law, which being ſo notorious a way of conveying eſtates, takes away the entry for the benefit of ſtrangers, who otherwiſe would be at a loſs to know againſt whom to bring their *præcipe*.

(*c*) For a warranty is uſually annexed to it; and if the rightful owner might enter, the benefit of the warranty would be loſt, but warranty cannot be annexed to copyhold eſtates. Leon. 95. 352.

But

But by cuſtom, a copyhold eſtate may be diſcontinued by ſurrender, and by ſuch ſurrender an eſtate-tail in copyhold lands for ever. For this *vide* Cro. Eliz. 484. 717.

Moor 358. 753. Leon. 95. Cro. Eliz. 90. 148. 4 Co. 25. Roll. Abr. 632. Brownl. 44. 79.

Alſo, if there hath been a cuſtom in a manor, that plaints ſhould be proſecuted there in the nature of real actions; if a recovery be had upon ſuch plaint againſt tenant in tail, it is a diſcontinuance; for ſince the cuſtom warrants the recovery, it is an incident to ſuch a recovery by the common law, that it ſhould be a diſcontinuance, which it ſeems is drawn from the nature of the thing, that a judgment given in a court of judicature ought not to be avoided, but by matter of as high nature, *viz.* a recovery by a court of juſtice, and not by the entry of the party that hath right. 4 Co. 23. a. Cro. Eliz. 372. 380. 392.

If the reverſion or remainder be in the king, the tenant in tail cannot diſcontinue the eſtate-tail. Co. Lit. 335. 2 And. 156. 2 Leon. 157.

3 Leon. 75. For this *vide* heads of *Fines* and *Recoveries*.

But if there had been tenant in tail, the reverſion in the king, before 34 & 5 *H.* 8. *c.* 20. he might have (*a*) barred the tail by a common recovery, but that common recovery neither barred nor diſcontinued the king's reverſion. Co. Lit. 335. (*a*) And where ſuch tail may now be barred by fine, without diſcontinuing the king's remainder, *vide* Moor 115. pl. 258. 2 Leon. 57. And. 64. Keilw. 213. 4 Leon. 40.

If *A.* being tenant in tail makes a gift in tail to *B.*, and *B.* makes a feoffment in fee, and dies without iſſue, and *A.* hath iſſue and dies, the iſſue of *A.* may enter; for though the feoffment of *B.* did diſcontinue the reverſion of the fee-ſimple, which *A.* had gained upon the eſtate-tail made to *B.*, yet it could not diſcontinue the right of entail which *A.* had, which was diſcontinued before; and therefore, when *B.* dies without iſſue, the diſcontinuance of the eſtate-tail of *B.* which paſſed by his livery ceaſes, and conſequently the entry of the iſſue of *A.* is lawful. Co. Lit. 327.

If huſband and wife are ſeiſed of lands, remainder to the heirs of the body of the huſband, with remainder over, they make a leaſe for years, not warranted by the ſtatute, the huſband dies, leaving iſſue *J. S.*, who at the age of 16, with the conſent of the wife and ſecond huſband, with his own hands makes a feoffment to the leſſee; this is no diſcontinuance of the remainder over, for *J. S.* had (*b*) only a reverſion expectant upon an eſtate for life, and ſo (*c*) no freehold in him at the time of making the feoffment. Carth. 109. Swift and Heath, adjudged. (*b*) And it is a maxim in law, that he who hath no freehold in the land cannot by any means diſcontinue the eſtates therein. Carth. 110. *per Curiam*, *vide ſupra* letter (B). (*c*) For though the tenant for life conſented, yet ſuch a naked aſſent will not amount to a ſurrender. Carth. 140. *per Curiam*.

(F) By what Act or Conveyance a Diſcontinuance may be made, and the Effect thereof.

Co. Lit. 325. a.

A Man may diſcontinue by five ſorts of conveyances, *viz.* (*a*) fine, recovery, (*b*) feoffment, releaſe, or confirmation with warranty.

(*a*) But if he dies before execution, it is no diſcontinuance. Roll. Abr. 632. Co. Lit 333. b. (*b*) But a feoffment with livery in law works no diſcontinuance. Roll. Abr. 632.

Co. Lit. 328. b.

A feoffment made by tenant in tail is a diſcontinuance, with or without warranty; but a releaſe or confirmation is not, for a man can paſs no more thereby than he may lawfully paſs: but a warranty added to a releaſe, or confirmation to a diſſeiſor, works a diſcontinuance, if it deſcend on him that hath the right.

Co. Lit. 328. b.

But if one having a ſon marry a ſecond wife, and land be given to the huſband in ſpecial tail, and he have iſſue by his ſecond wife, and be diſſeiſed, and releaſe with warranty, and die; or if tenant in tail of *borough-engliſh* land have iſſue two ſons, and be diſſeiſed, and releaſe with warranty to the diſſeiſor, and die; yet is not the entail diſcontinued in either caſe; becauſe the warranty always deſcends to the heir at law.

Perk. § 294. 9 Eq. 22. Co. Lit. 332. b. S. P.

If tenant in tail exchanges with another, (*c*) this is not a diſcontinuance.

Lit. 332. b.

Roll. Abr. 632. S. P. (*c*) Becauſe no livery of ſeiſin is requiſite thereupon. Co. Co. 44. b. ——So, of partition between parceners. Co. Lit. 173. a.

2 Inſt. 644. Moor, 42.

If tenant in tail bargains and ſells his lands in fee, this is no diſcontinuance, for only a freehold which determines within the compaſs of a life, paſſes.

10. A. 2 Co. 96. b. Seymour's caſe. Bulſ. 162. S. C. [But in this caſe it was agreed, that if the fine had been levied

So, if tenant in tail by indenture enrolled bargains and ſells to *J. S.* and his heirs, and after levies a fine with proclamations to the bargainee and his heirs, and dies without iſſue; this is no diſcontinuance of the remainder, becauſe the remainder is not touched or (*d*) diſplaced thereby; for no freehold paſſes by the fine; but the fine only corroborates the eſtate of the bargainee by the ſtatute.

before the bargain and ſale was enrolled, it would have been a diſcontinuance. So, where a fine is levied in purſuance of a covenant in a prior conveyance, as, where a tenant in tail conveys his eſtate by leaſe and releaſe, and covenants in the releaſe to levy a fine, which is done accordingly; in this caſe, the leaſe, releaſe and fine will be conſidered as only one aſſurance, and the fine will, therefore, operate as a diſcontinuance of the eſtate tail. Doe v. Odiarne, 2 Burr. 704.] (*d*) For every diſcontinuance it is neceſſary there ſhould be a deveſting or diſplacing of the eſtate, and turning the ſame to a right; for if it be not turned to a right, they that have the eſtate cannot be driven to an action. Co. Lit. 327. b.——But there may be a diſcontinuance, which turns the eſtate to a right, and yet does not take away the right of entry; and a warranty may bar where the reverſion is only diſplaced, and turned to a right, though the right of entry is not taken away. *Vide* Salk. 245. *per* Powel J.

Co. Lit. 335. b. 336. a. Salk. 244. S. P.

Some diſcontinuances are for life only; as when tenant in tail makes a leaſe for the leſſee's (*e*) life: ſome are during the limitation of an eſtate-tail; as when tenant in tail makes a gift in tail: alſo, if he makes a leaſe for years, or for his own life, remainder in

(*e*) If a feme

in fee, with livery; this is a diſcontinuance in fee, becauſe the eſtate in fee paſſes by the livery.

tenant in tail within the ſtatute

11 H. 7. c. 20., accepts a fine *come ceo*, &c. and grants and renders it for 500 or 1000 years, rendering the antient rent, this is within the act; for though ſtrictly a term for years can work no diſcontinuance, yet they are in equal miſchief, and the ſtatute would be uſeleſs if ſuch leaſes were not within the remedy thereof, Moor 25. Piggot and Palmer. 3 Co. 51. b. Cro. Car. 689. 2 Leon. 168. Barker and Taylor. 3 Leon. 78. Dyer 148.

And none can make a diſcontinuance larger than the alienation of the tenant in tail, who made it; therefore, if *A.* tenant in tail make a gift in tail to *B.* and *B.* enfeoff *C.* and die without iſſue, *A.*'s iſſue may enter. Co. Lit. 327.

If the eſtate that cauſed the diſcontinuance is (*a*) defeated, the diſcontinuance is (*b*) defeated alſo. Co. Lit. 336, 337.

(*a*) As by entry for a condition broken, or otherwiſe. 8 Co. 44. a. (*b*) But the reverſion may be reveſted, and yet the diſcontinuance remain; as if a feme covert had been tenant for life, and the huſband had made a feoffment in fee, and the leſſor had entered for the forfeiture, the reverſion was reveſted, and yet the diſcontinuance remained at the common law. Co. Lit. 335. a.

Diſſeiſin.

(A) What Acts amount to a Diſſeiſin.

(B) What Perſons are capable of committing ſuch Diſſeiſins.

(A) What Acts amount to a Diſſeiſin.

A *Diſſeiſin* is where a man enters into any lands or tenements, where his entry is not congeable, and *ouſts* him who hath the freehold; ſo that it differs from an *abatement*, which is the entrance of a ſtranger into lands, of which an anceſtor died ſeiſed before the heir has entered; ſo that there is not properly an actual ouſter committed of the perſon that was ſeiſed of the freehold, as there is in caſe of a diſſeiſin; but the entry of the perſon who has the title to the freehold is prevented. In like manner, a diſſeiſin differs from an *intruſion*, which is when an anceſtor dies ſeiſed of any eſtate of inheritance expectant on an eſtate for life, and then tenant for life dies; and between the death of the tenant and entry of the heir a ſtranger interpoſes and intrudes, and ſo gets poſſeſſion of the freehold; ſo that it is rather a prevention

Lit. § 279. Co. Lit. 181. 277. and note, that by a diſſeiſin nothing more is acquired againſt the diſſeiſee but a bare poſſeſſion, though againſt all others a fee-ſimple.

prevention of the heir's entry, than an actual ouſter of him of his freehold.

Roll. Abr. 658. If huſband and wife purchaſe lands in fee, and then the huſband is attainted of felony, and the king ſeizes the land, and afterwards the lord of whom it is held hath it, upon his ſuggeſtion, delivered to him out of the hands of the king, as his proper eſcheat; this is a diſſeiſin of the wife who was jointenant with the huſband, for the lord got poſſeſſion of the freehold by his miſrepreſentation of the nature of the eſtate to the king, which being a manifeſt act of injuſtice and falſehood, the poſſeſſion acquired by it muſt be looked upon as an acquiſition of the ſame nature with a poſſeſſion gained by open and avowed violence, and ſo a diſſeiſin.

Roll. Abr. 659. A man has a houſe, and locks it, and departs, and another comes to the houſe, and takes the ring of the houſe in his hand, and ſays, that he claims the houſe to himſelf in fee, without making any entry into it, this is a diſſeiſin of the houſe; for the claim he made upon taking the ring into his hand, ſhews his intention in doing it to be a plain ſeiſin of the entire freehold, and conſequently a diſſeiſin of the true proprietor; and his non-entry into the houſe, upon his ſeiſing it, will not qualify the intention of what he has done, ſince his ſeiſin of part, in the name of the whole, gives him whatſoever an entry could have done, and therefore ſuch an entry was not neceſſary.

Bro. Diſſeiſin, 25. A man has a mill, and *A.* turns the water that uſed to ſerve the mill, ſo that it cannot grind; this is a diſſeiſin of the mill, for which an aſſiſe lies againſt *A.* for to deprive a man of the means he has of obtaining the profits of his freehold, is, in effect, to diſſeiſe him of his freehold.

Roll. Abr. 659. Bro. Diſſeiſin, 42. If *A.* cuts trees in his ſoil, and *B.* who has common there, ſays that the ſoil is his, and commands him not to cut there, whereupon *A.* departs out of the land, this is no diſſeiſin in *B.* for he who has no right to a freehold cannot be ſeiſed of it by bare words only, which are fleeting and tranſitory, and do not amount to ſuch an act of notoriety and ſolemnity, as is required in gaining poſſeſſion of a freehold, whereof ſtrangers are to take notice.

Roll. Abr. 659. If a man, who has right of entry into lands, in coming thither is diſturbed and hindered from entering, this is a diſſeiſin, ſuch hinderance of entry being equivalent to an actual ouſter of the freehold.

Roll. Abr. 659. Where a man enters into my houſe by my ſufferance without making any claim, this is no diſſeiſin.

Bro. title Diſſeiſin, 28. A man grants all his lands in *D.* to *A.* beſides the chamber he lies ſick in; and after livery made purſuant to the grant, by the ſufferance of *A.* the grantor removes into the hall without claiming any thing to his own uſe, and dies; this coming into the hall is no diſſeiſin, being by the permiſſion of the grantee, and ſo not unlawful.

If

If the king be ſeiſed in fee of the manor of *B.*, and a ſtranger erect a ſhop in a vacant plat of it, and take the profit of it without paying any rent to the king, and after the king grant over the manor in fee, and the ſtranger continue in the ſhop, and occupy it as before, this is no diſſeiſin; for the firſt entry of the ſtranger was no diſſeiſin, but an intruſion on the king's poſſeſſion; for that the king's title appearing of record, the entry *in pais*, which is not an act of equal notoriety, will not deveſt it out of him: if then the king is not diſſeiſed, his conveyance of the freehold is good, and the grantee is ſeiſed by virtue of it, and, conſequently, cannot be ſaid to be diſſeiſed by the ſtranger who has made no entry upon him after the king's conveyance, but only continued the old intereſt which he had before the grant, and ſo remains an intruder ſtill, and liable to an action of treſpaſs or ejectment for it. Roll. Abr. 659. Hob. 322. Bro. Diſſeiſin, 4.

So, if a man enters into certain lands, parcel of a manor which is in ward to the king, by reaſon of the nonage of *J. S.* and takes the profits as owner thereof, and *J. S.* after ſues livery, and the intruder ſtill continues in poſſeſſion, and takes the profits as formerly, this continuance after the livery is no diſſeiſin, but only an intruſion to be remedied by treſpaſs or ejectment; and the manor being in the king only as guardian makes no difference; becauſe, till it is relieved out of his hands, he is in actual poſſeſſion of it as much as if it were his own. Bro. title Diſſeiſin, 6. Roll. Abr. 659.

Baron and feme ſeiſed in tail, the baron goes out of the country, and in his abſence the feme enfeoffs *A.* in fee, [who enters,] this is a diſſeiſin of the huſband by *A.* becauſe the feoffment by the feme covert was void, and ſo his entry under it tortious. Bro. title Diſſeiſin, 24.

If a diſſeiſor makes a leaſe for years, or at will, and the diſſeiſee enters upon him, and then the leſſee re-enters, claiming by virtue of his leaſe, though that was only a term for years, yet he is a diſſeiſor, becauſe he enters upon the proprietor of the ſoil, and ouſts him of his poſſeſſion, and that by virtue of a former diſſeiſin, ſo that the poſſeſſion of the freehold cannot be ſuppoſed to be left in the diſſeiſee; and therefore, ſuch an entry muſt be equivalent to an avowed diſſeiſin. Roll. Abr. 662.

If a man enters into my land, claiming a leaſe for years, or enters as tenant by ſtatute merchant, when he has no right, he is a diſſeiſor, the entry being unlawful, and the pretence of title unjuſt. Roll. Abr. 662. Co. Lit. 271. a. Dyer, 134. pl. 11.

So, if a guardian in chivalry aſſigns dower to a woman, as wife of the deceaſed tenant, who in fact is not his wife, and ſhe enters thereupon, ſhe is a diſſeiſoreſs, for her falſe title being an act of fraud and injuſtice, and the poſſeſſion acquired by it tortious, the pretence of title, when it appears that ſhe has none, will not avail her; and *Q.* whether the guardian in this caſe is not a diſſeiſor likewiſe? Bro. title Diſſeiſin, 7. 1 Roll. Abr. 662.

A man makes a leaſe for years to another and his heirs, and the leſſee dies, and the heir claiming the term enters; though the term being a chattel muſt go to the executors, and not to the heir, yet the heir is no diſſeiſor, becauſe he claimed only a term Roll. Abr. 662.

and no freehold, and ſuch a term too as was in being, and actually limited to him; and therefore the heir in this caſe, that is named in the words of limitation, ſhall be only preſumed to enter on behalf of the executor, to continue the term that was in being, and not to commit a diſſeiſin on the freehold.

Roll. Abr. 659. Prenſon and Sone.

If there be tenant by ſufferance, and a ſtranger, who has no right to the land, make a leaſe thereof for years by indenture to the tenant, without making any entry upon ſuch tenant, previous to the demiſe, and the tenant thereupon pay the rent reſerved on this leaſe to the ſtranger, this is no diſſeiſin of the rightful proprietor; for the tenant at ſufferance was no diſſeiſor before the demiſe; and after the demiſe, or by virtue of it, he can be no diſſeiſor, becauſe he ſtill continued his old poſſeſſion, without committing any actual ouſter of him who had the freehold; for the acceptance of the deed of demiſe, and payment of rent thereupon, are not acts of ſufficient ſolemnity and notoriety, ſince they may be tranſacted in private, to change the poſſeſſion of a freehold.

Co. Lit. 57. b. 271. a.

If a guardian after the full age of the heir continues in poſſeſſion, he is no diſſeiſor, but an abator (*a*), and an aſſiſe of mort-danceſtor lies againſt him by the heir, for he does not actually ouſt the heir of his freehold, which is required in a diſſeiſin, but holds him out by an *intermediate entry* between him and his anceſtor, which makes the diſtinction between an abatement and diſſeiſin.

[(*a*) But on the argument of the caſe of Blunden and Baugh, commonly called Lord Nottingham's caſe, Juſtice Barclay ſaid, that he, whom Lord Coke calls in this place an abator, muſt be taken for a diſſeiſor, as he had actual poſſeſſion by the poſſeſſion of the guardian. Lord Nott. MSS. Co. Lit. 271. a. n. (2), 13th edit.]

Roll. Abr. 661. Cro. Car. 302. Blunden and Baugh.

If a man enters as guardian into the lands of an infant, who has no title to be guardian, it is at the election of the infant to make him a diſſeiſor, on account of his wrongful entry upon an actual ouſter of ſuch infant, or elſe to diſſemble the wrong, and call him to an account as guardian.

Bro. title Diſſeiſin, 34. 71.

An abſolute feoffment is made by deed, and a letter of attorney therein to deliver ſeiſin; the attorney makes livery upon condition; he is a diſſeiſor of the feoffor, becauſe not purſuing his commiſſion it is all one as if he had none at all, and then his livery is tortious, and amounts to a diſſeiſin.

Jon. 315. Cro. Car. 303, 304. Bro. title Diſſeiſin, 68. Dalſ. 46.

A. ſeiſed of lands in fee permits his ſon to enter into them by his conſent, and to occupy as tenant at will; the ſon after by indenture leaſes them for 21 years, rendering rent: this was holden no diſſeiſin, but at the election of the father, who may if he pleaſes call it ſuch, becauſe the leaſe for years was more than he could juſtify; but a diſſeiſin being an actual ouſter of another's freehold, the poſſeſſion of the ſon, being in poſſeſſion as tenant at will, gives room to the father to conſtrue his demiſe no diſſeiſin, if he thinks fit; and therefore, the ſon in this caſe ſhall be preſumed to act in behalf of the father, and to demiſe the land as attorney to him, eſpecially if the father afterwards demand and receive the rent, for the rule is, *Ratihabitio retrotrahitur et mandato*

dato æquiparatur: however, the firſt leſſor, before he hath received any rent, may take the demiſe to be a diſſeiſin at his election; for when the tenant at will takes upon him to make a greater eſtate than he has himſelf, this may be conſtrued a diſſeiſin, becauſe it is an uſurpation upon the right of the leſſor, and in effect a ſeizure of his freehold; and the great reaſon why the leſſor is allowed to make the other conſtruction, is to avoid the inconveniences which otherwiſe would follow; for if a leſſor was obliged to look upon leaſes for years of his tenant at will to be diſſeiſins; then if a tenant at will ſhould make a leaſe for a ſmall time, and the leſſor not knowing thereof ſhould levy a fine of ſuch lands for his wife's jointure, or other uſes, the leſſee of tenant at will would be neceſſitated to become a wrong-doer, perhaps contrary to his intent, and the diſſeiſee would be deprived by his fine of all remedy for recovering his right, as well as the perſon to whom he levied it; for he himſelf could not ſet up a title to ſuch lands, becauſe he had transferred it to another in a court of record, and the other could not claim, becauſe a naked right cannot be transferred.

In this caſe, if the leſſor takes ſuch a diſpoſition by his tenant at will to be a diſſeiſin, then both the tenant at will and his leſſee are diſſeiſors, ſince they both concur to the act that is the diſſeiſin; but in reſpect of all ſtrangers the tenant at will only is to be eſteemed tenant of the freehold, and the perſon who as ſuch is diſſeiſor; for as for the leſſee of tenant at will, he in reſpect of all ſtrangers, and likewiſe of tenant at will, has a fair and legal intereſt derived out of the inheritance of his leſſor, and ſo cannot be tenant of the freehold jointly with his leſſor, but muſt claim under him. Cro. Eliz. 830. Shaw and Barber *cont.* Jon. 317. Cro. Car. 302.

If a leſſee for years, or at will, makes a leaſe for life, or a gift in tail, that creates a good leaſe, or a good gift in tail among themſelves and all others, beſides the firſt leſſor, and as to him they are both diſſeiſors, for they both clearly concurred in ouſting him of his freehold, one by giving, and the other by receiving the livery, which paſſed the freehold. Jon. 317. Cro. Car. 302. Bro. title Diſſeiſin, 3. 64. 66.

Tenant at will, or for years, makes a feoffment in fee, and dies; his wife brings dower: the feoffee cannot plead that her huſband was never ſeiſed; for ſince the feoffee received his eſtate from him, he is eſtopped to ſay that the huſband was never ſeiſed: beſides, in reſpect of the feoffee, the feoffor had an eſtate, though in regard to the diſſeiſee he is to be conſidered as a wrong-doer. Jon. 317. Mat. Taylor's caſe. [*Vide* Cro. Jac. 615. 1 Atk. 442.]

If a man enters into the land of an infant by his aſſent, the infant may proceed againſt him at full age as a diſſeiſor; for the contract made between them during the nonage of the infant may be conſidered by the infant as void, and, conſequently, the entry by virtue of it may be eſteemed illegal; or the infant, if he thinks it more for his advantage, may at full age ratify the contract between them, and ſo allow him as his tenant. Roll. Abr. 661. Cro. Car. 223. Bro. title Diſſeiſin, 30.

If *A.* be ſeiſed of lands in fee, and a ſtranger enter upon him by virtue of a leaſe for years, which is void, and pay rent to him, Dyer, 173. in margin. Roll. Abr.

A. can

661. Molineux's caſe. Dyer, 62. pl. 33. *cont.*

A. can never proceed againſt him as a diſſeiſor, for his acceptance of rent at his hands is a full and unconteſtable allowance of the leaſe he claims, and, conſequently, the entry by virtue of it purged and made rightful.

Palm. 201. Jon. 316. Cro. Car. 222. Roll. Abr. 661.

A. bargains and ſells lands by indenture enrolled to *B.* upon condition that on the payment of 300 *l.* at the end of three years it ſhall be void, and that in the mean time the bargainee ſhould not meddle with the profits of the land: the bargainor occupies, and makes a leaſe for five years, and at the day does not pay the 300 *l.* the bargainee does not enter, but (the bargainor occupying it) deviſes the land: it was adjudged a good deviſe, for the bargainor in this caſe was tenant at will; and, therefore, his leaſe does not put the bargainee under the neceſſity of being a diſſeiſee.

Roll. Abr. 659.

If a guardian by nurture makes a leaſe by indenture to one who is already in under the title of the infant, rendering rent to the guardian, which is paid accordingly; this is no diſſeiſin, for there is no actual ouſter conſequent on ſuch demiſe; and the rent paid to the guardian muſt be accounted for to the infant.

Taylor v. Horde, 1 Burr. 60. 5 Br. P. C. 247. Cowp. 689. See Co. Lit. 330. b. n. 1. 13th edit. where the law of the caſe is queſtioned with great ability.

[*A.* tenant for life, remainder to *B.* in tail; *B.* recovers in ejectment againſt *A.* and has an *habere facias poſſeſſionem*, and whilſt in poſſeſſion makes a feoffment of the eſtate to *D.* with livery of ſeiſin, that he might become tenant of the freehold, in order for the ſuffering of a common recovery. A recovery is accordingly ſuffered, and afterwards *A.* brings an ejectment, and obtains a verdict. It was adjudged, that *B.* by his entry in this caſe under the judgment was not an actual diſſeiſor, and therefore had not in him any eſtate of freehold; and that the feoffment gave *D.* an eſtate of freehold only at the election of *A.* but did not give him an actual eſtate of freehold.]

Lit. § 278.

If two or more diſſeiſe another of any lands to their own uſe, they are all jointenants, and all diſſeiſors; but if they diſſeiſe another to the uſe of one of them only, he to whoſe uſe the diſſeiſin is made is ſole tenant, and the others have nothing in the tenancy, but are called coadjutors to the diſſeiſin.

Co. Lit. 180. Roll. Abr. 663. Bro. tit. Diſſeiſin, 12. 40. 45.

There are others who are called counſellors and commanders in a diſſeiſin, *viz.* when any perſon counſels or commands another to diſſeiſe a third perſon; here we are to take notice, that though the perſons that concur in a diſſeiſin have theſe ſeveral names given them from the nature of that part of the diſſeiſin that they commit, yet co-adjutors, counſellors, and commanders, are diſſeiſors in reſpect of the perſon diſſeiſed, as well as the perſon to whoſe uſe the diſſeiſin is made, and all equally liable to the aſſiſe of the diſſeiſee; nay, though the diſſeiſor, who is tenant of the land, dies, yet the aſſiſe lies againſt the co-adjutors, counſellors, &c. and tenant of the land, although he be no diſſeiſor; and this is a moſt equitable proceeding; for ſince they all concur in committing the injury, it is but reaſonable they ſhould all anſwer for it; and though the perſon, that ſucceeds the diſſeiſor that was tenant in the tenancy, had no hand in the diſſeiſin, yet, claiming under it, he muſt be liable to the remedy the law gives the diſſeiſee for recovering his right.

A man

A man makes a leaſe for life, rendering rent, and goes into foreign parts; tenant for life dies, and *A.* counſels *B.* who is not heir to the leſſor, to enter, who does it accordingly, and enfeoffs *A.* the counſellor; the leſſor returns, and is hindered to enter by *A.*, whereupon he brings his aſſiſe againſt *A.* without naming *B.*, and well; for *A.* by his counſel is a diſſeiſor, and being tenant of the land, and the perſon who diſturbed the leſſor of his entry, the leſſor who was abſent when the diſſeiſin was committed, and ſo unacquainted with the manner of it, is not obliged to bring his remedy againſt any other but the perſon who is actually in poſſeſſion, and defends that poſſeſſion with force and violence. Bro. tit. Diſſeiſin, 37.

A. diſſeiſes one to the uſe of *B.*, who knows not of it, and *B.* afterwards aſſents to it; in this caſe, till the agreement, *A.* was tenant of the land, and after agreement *B.* is tenant of the land, but both of them are diſſeiſors. Co. Lit. 180. b. Bro. tit. Diſſeiſin, 59.

A man diſſeiſes tenant for life, to the uſe of him in reverſion; and after he in the reverſion agrees to the diſſeiſin: by the better opinion, he in the reverſion is a diſſeiſor in fee; for by the diſſeiſin made by the ſtranger, the reverſion was deveſted, which cannot be reveſted by the agreement of him in reverſion, for his agreement to the diſſeiſin makes him a party to it; and therefore if he gets any thing by ſuch agreement, he muſt get it as a diſſeiſor; and ſo in this he is not ſeiſed of his old eſtate, but of an eſtate by diſſeiſin. Co. Lit. 180, 181. [Why diſſeiſin of tenant for life makes a fee in the diſſeiſor is thus accounted for by Lord Hobart:

"A grant to *J. S.* and his heirs during the life of *J. D.* is no fee, but a ſpecial occupancy, as is reſolved "in Chudleigh's caſe. But a diſſeiſin of an eſtate for life by neceſſity in law makes a *quaſi* fee; becauſe "wrong is unlimited, and ravens all that can be gotten, and is not governed by terms of the eſtates, be- "cauſe it is not contained within rules." Hob. 323.]

The demandant and others, in a *præcipe*, diſſeiſed the tenant to the uſe of others, and the writ did not thereupon abate; for though the demandant was a diſſeiſor, yet he gained no tenancy in the land, being only a co-adjutor, and ſo his remedy to gain the freehold ſtill continues; for the deſign of ſuch remedy being to recover the freehold, till that be obtained there is no reaſon to abate it; and that is not obtained by the diſſeiſin, for he gains no freehold by it, ſo that the writ muſt ſtill continue. Co. Lit. 180.

If a man commands *J. S.* to enter into certain lands in his name, provided he has a right to them; if *J. S.* enters accordingly, yet if the commander has no right to the lands, he is not the diſſeiſor, but *J. S.* only, for *J. S.* was not abſolutely commanded to enter, but only conditionally, if the commander had right; ſo that it was incumbent on *J. S.* to enquire into the commander's title before he entered; and the commander having no title, the entry of *J. S.* was his own act, and not the execution of the command. Roll. Abr. 663. Bro. tit. Diſſeiſin, 57.

For the ſame reaſon, if a man ſays to *J. S.* that his anceſtor died ſeiſed of certain lands, and thereupon commands him to enter into thoſe lands in his name, if his anceſtor died ſeiſed in fee, otherwiſe not; and thereupon *J. S.* enters, and yet the anceſtor did not die ſeiſed in fee; *J. S.* is the ſole diſſeiſor, and the commander has no ſhare in it. Roll. Abr. 663.

If

Bro. tit. Diſſeiſin, 15. If a man ſays to me, that he will diſſeiſe *J. S.* to my uſe, and I tell him that I am content; this does not amount to a command, but is only a ſufferance of what is to be done, and ſo does not make me a diſſeiſor, without an actual command; but he only that ouſts *J. S.* is the diſſeiſor.

Dyer, 141. pl. 47. A diſſeiſor makes a leaſe for years, and the termor enters, the diſſeiſor after leaves the kingdom, and at his departure commands his termor, that if the diſſeiſee enter upon him, not to ſuffer him to continue in poſſeſſion, but to maintain the poſſeſſion againſt him as termor of the diſſeiſor; the diſſeiſee enters on the termor in the abſence of the diſſeiſor, and the termor re-enters, ouſts him, and pays his rent after to the uſe of the diſſeiſor, being abſent; it ſeems the leſſor is party to this ſecond diſſeiſin, though he did not expreſsly agree to it after it was done, for the precedent command and inſtructions ſufficiently ſhew his intent and concurrence to it.

Roll. Abr. 663. Floyd and Bethell. A man recovers ſeveral houſes in an aſſize, and after the tenant reverſes the judgment in a writ of error, and a writ iſſues thereupon to the ſheriff to put him in poſſeſſion of thoſe houſes; in this caſe, though the tertenants are ſtrangers to the recovery, and therefore ought not to be ouſted without a *ſci. fa.* yet if the ſheriff executes the writ, and ſo puts them out of poſſeſſion by virtue of it, he is no diſſeiſor; for he acts under the authority of the court, which he is ſworn to obey, under the penalty of being fined, if he does not.

Roll. Abr. 664. The ſame law in all caſes where execution is of a judgment wherein the demand is made of a thing certain: but if an execution is to be executed without mentioning any thing in particular, there the ſheriff, at his peril, ought to make execution of the thing in demand, otherwiſe he will be a diſſeiſor; for he is obliged to take notice of the thing in demand, and has no authority from the court to make execution of any thing elſe.

Co. Lit. 276. Palm. 202. Bro. tit. Diſſeiſin, 74. Leaſe for life, remainder for life, remainder in fee; the remainder-man for life diſſeiſes the tenant for life, and then tenant for life dies, the diſſeiſin is purged; for then the remainder-man for life is ſeiſed of his own rightful eſtate for life, which was to take place upon the death of tenant for life, and the fee veſts in the remainder-man in fee.

[For upon the death of the diſſeiſee, that wrongful fee is turned into a rightful eſtate for life by operation of law. 8 Mod. 53. *arguendo*.]

Goodtitle v. Riſden, Vin. Abr. tit. Diſſeiſin (N), pl. 6. [Rights and the purging of wrongful acts are always favoured in law; and therefore, where a diſſeiſin or abatement is made, and the diſſeiſee brings his ejectment, and has a verdict and judgment for him, (but no execution,) yet an entry by the plaintiff being found as being in the declaration in ejectment, that entry will purge the diſſeiſin, and the continuer in poſſeſſion afterwards is only as a treſpaſſer.]

Bro. tit. Diſſeiſin, 43. 76. Two co-heirs, one an infant, and the other of full age; ſhe of full age enters upon the feoffee of their father, claiming the land to her and her ſiſter; her entry being unlawful, the land veſts entirely

entirely in her of full age, and nothing in the infant; and ſo ſhe of full age muſt be the diſſeiſor; for an infant can never be made a wrong-doer by the act of another, or injure himſelf by any contract entered into during his minority.

If my tenant at will enters into another's land contiguous to his own, claiming it to my uſe, and feeds his cattle there, and fells the trees, upon which the tenant of the freehold is obliged to quit his poſſeſſion, and ſo brings his aſſiſe; and it is found that I never commanded my tenant to commit this diſſeiſin, nor ever ſhared in any of the profits of it, I ſhall be acquitted of the diſſeiſin, ſince it would be apparent injuſtice to charge me with the guilt of an act I never concurred in. Bro. tit. Diſſeiſin, 59.

A. demiſes the land of *B.* to *C.* for years, rendering rent, *C.* enters and pays the rent to *A.*: it ſeems *A.* by this tranſaction is a diſſeiſor; for his demiſe to *C.* is tantamount to a command to enter into the lands of *B.*, and he that commands the diſſeiſin is the diſſeiſor. Bro. tit. Diſſeiſin, 77.

A. has common in the land of *B.*, and *B.* comes with his family and incloſes the land, ſo that *A.* cannot have the uſe of his common: *B.* and his family are diſſeiſors; for they ouſt *A.* of his common by the incloſure, which is plainly a diſſeiſin. Bro. tit. Diſſeiſin, 79.

A man leaſes for life, rendering rent, with a clauſe of re-entry for non-payment, and for arrears of rent diſtrains; and being poſſeſſed of the diſtreſs, re-enters; and adjudged a diſſeiſor; for though he had an election upon non-payment of the rent to re-enter or diſtrain, yet by diſtraining he had determined his election, and ſo put it out of his power to re-enter; therefore when afterwards he re-enters, it is unlawful, and, conſequently, ſuch an ouſter of him who has the freehold, as amounts to a diſſeiſin. Bro. tit. Diſſeiſin, 81.

Land deſcends to an infant, and *A.* enters as guardian only, and deviſes it to *B.* and dies, *B.* enters, and the infant brings an aſſiſe againſt him, and he was adjudged a diſſeiſor; for though *A.* was the firſt that entered, yet he entered as guardian, ſo that it was in the election of the infant to charge him as a diſſeiſor, or call him to an account as a guardian; and therefore when the infant charges the deviſee as a diſſeiſor, it ſhall be preſumed that he looked upon *A.* as his guardian, otherwiſe *B.* could not be charged as the diſſeiſor, but as the deviſee of the diſſeiſor; for if he had reckoned *A.* as his diſſeiſor, then *B.* muſt have been eſteemed a perſon who claimed under the diſſeiſor by legal conveyance, and ſo not to be charged as the actual diſſeiſor of the infant. But if the infant is ſuppoſed to look upon *A.* as his guardian, then he may charge *B.* as a perſon who ouſted him by wrong of his freehold, ſince he, and not the guardian, was the perſon who ſeiſed the poſſeſſion without title. Bro. tit. Diſſeiſin, 85.

The father enfeoffs his ſon within age, and after enters as his guardian, and enfeoffs *J. S.* and dies; the infant brings his aſſiſe againſt the feoffee, who was adjudged a diſſeiſor for the reaſons before-mentioned; and likewiſe, becauſe it is provided by *Weſtm.* 2. *c.* 25. that if leſſee for years, or guardian, alien in fee, the remedy for recovering the freehold ſhall be by an aſſiſe of *novel* Bro. tit. Diſſeiſin, 94. 2 Inſt. 409. 413.

diſſeiſin, and both the feoffor and feoffee ſhall be eſteemed diſſeiſors, and the ſurvivor of them ſhall be liable to this remedy: ſo, if either happens to die, he that ſurvives may be conſtrued as a diſſeiſor, and as ſuch liable to this action.

2 Inſt. 413. Not only guardians in chivalry, but in ſocage, and by nurture, come within this law of *Weſtm.* 2. So alſo their alienations not only in fee, but in tail, or for life, are within this act; for wherever a freehold is transferred by the ſolemnity of livery, by a perſon who has no right to make ſuch a conveyance, there is an actual ouſter of him that has the freehold, and ſo a diſſeiſin.

2 Inſt. 413. Here it will be proper to obſerve, that though the ſaid ſtatute mentions only tenant for years, yet tenant by elegit, ſtatute-merchant, or ſtaple, as alſo tenant at will or at ſufferance, are by an equitable conſtruction brought within it, as being all equally capable, by the poſſeſſion which they enjoy, of committing diſſeiſins, by transferring the freehold by livery: but a bailiff is not within the act, becauſe it mentions and intends only thoſe perſons who have ſome intereſt, and thereby a poſſeſſion in the lands, which a bailiff has not.

2 Inſt. 413. Bro. tit. Diſſeiſin, 86. If tenant for years, or a guardian, make a leaſe for life, remainder for life, remainder in fee, and tenant for life enters, he is a diſſeiſor, for he accepts of the livery, which transfers the freehold, and ſo produces the diſſeiſin, and therefore makes himſelf a party to the wrong. The ſame law of him in remainder, if he in remainder for life or in fee enters, for ſuch entry is an agreement to that act which makes the diſſeiſin.

Bro. tit. Diſſeiſin, 95. If a guardian accepts of a feoffment from his ward, the ward may bring an aſſiſe againſt him as a diſſeiſor; for the guardian acts contrary to his duty when he aſſents to any alienation made by his infant; for it is his duty to protect the inheritance of his ward, and to deliver it up to him at full age, and not to bring it into his own family.

Cro. Eliz. 169. Alexander and Dyer. *A.* lets lands for 21 years, from *Michaelmas* next enſuing, rendering rent, and the leſſee enters 29th *September*, and occupies for one year; the leſſor brings debt for the rent reſerved; and adjudged, that though his entry, which was without title, made him a diſſeiſor, and that this diſſeiſin was not purged by the accruing of the term after, yet debt lay upon the contract; for though his entry, being made the day before the leaſe commenced, cannot be ſuppoſed to be made by virtue of the contract, yet it does not diſannul the contract, for that muſt remain till defeated by an after-agreement of equal notoriety with it; and therefore the action in this caſe may well be formed upon it: and the reaſon why in this caſe the accruer of the term after entry did not purge the diſſeiſin, is becauſe when the leſſee enters before his title accrued, he is preſumed to diſclaim the title of a termor, and ſet up another; and therefore ſuch title ſhall not protect him from the notice of the law; for that would be to conſider him under a title which by an expreſs overt-act he diſowns.

(B) What Perſons are capable of committing ſuch Diſſeiſins.

AS to femes covert, if a huſband diſſeiſe another to the uſe of his wife, this does not make her a diſſeiſoreſs, ſhe having no will of her own: nor will any agreement of hers to the diſſeiſin, during the coverture, make her guilty of the diſſeiſin, for the ſame reaſon: but her agreement after her huſband's death will make her a diſſeiſoreſs, becauſe then ſhe is capable of giving her conſent, and that makes her tenant of the freehold, and ſo ſubject to the remedy of the diſſeiſee. Roll. Abr. 660. Bro. tit. Diſſeiſin, 67.

So, if a man diſſeiſe another to the uſe of a feme covert, her agreement to it ſignifies nothing; and though the huſband's agreement to it ſettles the eſtate in the wife, yet it makes her no ſharer in the guilt of the diſſeiſin. Roll. Abr. 660. Bro. tit. Diſſeiſin, 67.

But if a feme covert actually enter and commit a diſſeiſin, either ſolely or together with her huſband, then ſhe is a diſſeiſoreſs, becauſe ſhe gains thereby a wrongful poſſeſſion: but yet ſuch actual entry cannot be to the uſe of her huſband or a ſtranger, ſo as to make them diſſeiſors; becauſe though by ſuch entry ſhe gains an eſtate, yet ſhe has no power of transferring it to another. Co. Lit. 357. b. Lit. § 678. Roll. Abr. 660, 661. Bro. tit. Diſſeiſin, 15. 67. 8 H. 6. 14. *cont.*

As to infants, they are under the ſame reſtrictions with feme coverts; ſo that their *agreement* during minority to a diſſeiſin committed to their uſe does not bind or make them diſſeiſors, any more than if an infant *commands* a diſſeiſin to be made; becauſe no acts, during their minority, are ſo binding, but that they may at full age revoke and cancel them. But an *actual entry* by an infant into another's freehold gains the poſſeſſion, and makes him a diſſeiſor as well as it does a feme covert. Bro. tit. Diſſeiſin, 5. 16. 35. Roll. Abr. 660.

Two infants jointenants, one releaſes to the other, by which the other holds the whole: this ſeems a diſſeiſin, becauſe the releaſe, being in no manner for the advantage of the infant, is utterly void, and then the entry of the other being without title is tortious and a diſſeiſin. But if there had been livery made upon it, though between jointenants, this is void, yet it ſeems no diſſeiſin, for the regard the law has for the ſolemnity of livery, which ſhall continue till defeated by act of equal notoriety. Bro. tit. Diſſeiſin, 19.

If a man carries an infant into the lands of *J. S.* and there claims the lands to the uſe of himſelf and the infant; yet the infant ſeems no diſſeiſor, becauſe he made no claim of it himſelf, and then ſhall not be charged with the tort of another perſon. Roll. Abr. 651.

If the king enters without title, or ſeiſes lands by a void or inſufficient office, he is no diſſeiſor; for being the fountain of juſtice, and engaged in multiplicity of affairs, his acts are not to be charged with injuſtice. But this privilege does not extend to any of his ſubjects; and therefore if the king by letters patent grants land ſo ſeiſed, and the patentee enters, he is a diſ- Bro. tit. Diſſeiſin, 65.

ſeiſor, becauſe he has time and leiſure to inquire into the legality of his title, which the prince is ſuppoſed to want leiſure for.

Vide head of Corporations.

If a corporation aggregate diſſeiſe to the uſe of another, they are diſſeiſors in their natural capacity, and the perſons who committed the wrong ſhall be charged therewith, and not the corporation, which conſiſts of a conſtant ſucceſſion of various perſons, and as a corporation can do no act without writing.

Diſtreſs.

Bacon of Government, 77. Vigellius, 257. 271. 326. Gilb. Diſt. and Replev. 2. His Rents, 3.

THE remedy for recovery of rent, by way of diſtreſs, ſeems to have come over to us from the civil law; for anciently, in the feudal law, the not paying attendance on the lords courts, or not doing the feudal ſervice, was a forfeiture of the eſtate: but theſe feudal forfeitures were afterwards turned into diſtreſſes, according to the pignorary method of the civil law, that is, the land that is let out to the tenant is hypothecated, or as a pledge in his hands to anſwer the rent agreed to be paid to the landlord, and the whole profits ariſing from the land are liable to the lord's ſeizure, for the payment and ſatisfaction of it.

Under this Head I ſhall conſider:

(A) Who, in reſpect of his Eſtate or Intereſt, may diſtrain for Rent.

(B) What Things may be diſtrained.

(C) Of the Manner of diſtraining as to Time and Place.

(D) Of the Diſtreſs when ſeiſed: And herein of the Diſtrainer's Intereſt therein, and what he is to do therewith.

(E) Where a Diſtreſs ſhall be ſaid to be wrongful and exceſſive: And herein of the Remedy which the Party injured hath.

(F) Of diſtraining Things Damage-feaſant.

(G) Of Diſtreſſes for Amercements.

(A) Who, in reſpect of his Eſtate or Intereſt, may diſtrain for Rent. *See Co. Litt. 162. a.*

IF a man ſeiſed in fee makes a gift in tail, or a leaſe for life, years, or at will, ſaving the reverſion to himſelf, with a reſervation of rent, or other ſervices; the law gives the donor or leſſor, without any expreſs proviſion, remedy for ſuch rent or ſervices by diſtreſs. For this *vide* head of Rent. Lit. § 214. Bro. tit. Diſtreſs, 5. 15., and this my Lord Coke calls a rent diſtrainable of common right. Co. Lit. 142. a. 8 H. 4. 15. Mo. 36. Cro. Eliz. 636. The bailiff that diſtrains muſt ſhew in whoſe right he does it. Bro. Diſtreſs, 78. [A receiver under the court of Chancery has power, it ſeems, to diſtrain without applying to the court for particular directions for that purpoſe, unleſs there be a doubt who has the legal right to the rent; for the diſtreſs muſt be in the name of the perſons entitled to the legal eſtate. Pitt v. Snowden, 3 Atk. 750. Hughes v. Hughes, 3 Br. Ch. Rep. 87.]

But if the donor or leſſor reſerve not the reverſion, he cannot diſtrain of common right: but he may reſerve to himſelf a power of diſtraining, or the reſervation of the rent may be good to bind the leſſee by way of contract, for the performance whereof the leſſor ſhall have an action of debt. Co. Lit. 47. a. 5 Co. 3. Jewell's caſe. 2 Saund. 303.

A rent diſtrainable of common right, or by the common law, cannot iſſue out of an incorporeal inheritance: as if I have a right of common in another man's ſoil, and I grant it to *A.* reſerving rent, if the rent be behind, I cannot diſtrain the beaſts of *A.* becauſe the right of common, which every man has, runs through the whole common. Co. Lit. 47. a. 142. a. 2 Roll. Abr. 446. So, of tithes, becauſe there is no place where the diſtreſs can be taken. Cro. Jac. 111. 173. 2 Roll. Abr. 446. 451. Co. Lit. 47. 142. Bro. tit. Diſtreſs, 67. 80. 11 H. 4. 40. 5 Co. 5. *vide* Chan. Ca. 79.

A rent granted for equality of partition by one coparcener to another, is good: ſo, is a rent granted to a widow out of lands whereof ſhe is dowable, in lieu of her dower: the like law of a rent granted in lieu of lands upon an exchange: and for theſe the law gives a remedy by diſtreſs, without any proviſion of the parties, though they have no reverſion. Co. Lit. 169. b. 3 Co. 22. b. Keilw. 104. 126.

If a termor grants all his term, rendering rent, he cannot diſtrain for it. Bro. Diſtreſs, 7. Latch. 211. Bro. Debt, pl. 39. Freem. 228. pl. 226. Cro. Jac. 487. Stra. 405. Al. 57. [2 Wilſ. 375. —— v. Cooper. Where a leaſe came back to the original leſſor by an agreement entered into between him and the aſſignee of the leſſee, that the leſſor ſhould have the premiſes on the terms mentioned in the leaſe, and further ſhould pay a certain ſum annually over and above the rent towards the good will already paid by the aſſignee, it was adjudged, that ſuch agreement operated as a ſurrender of the whole term, and that the aſſignee could not diſtrain either for the original rent, or the ſum to be paid in groſs annually. Smith v. Mapleback, 1 Term Rep. 441.]

[Although a term be veſted in an annuitant himſelf for ſecuring an annuity, yet he may diſtrain for the arrears: as where lands were conveyed to truſtees and their heirs to the uſe of *A.* for 99 years, if he ſhould ſo long live, upon truſt that he ſhould receive and take thereout an annuity or yearly rent of 250 l. with power of diſtreſs, and ſubject thereto, to the uſe of the grantor for life, remainder over—it was holden that *A.* might diſtrain, Fairfax v. Gray, 2 Bl. Rep. 1326.

for that the grantor during the term was merely an under-tenant to him at the above rent, to which rent diſtreſs was incident by law, excluſive of the clauſe in the deed.]

7 Co. 23-4. Butt's caſe. Co. Lit. 147. b. Cro. Jac. 396. Roll. Rep. 330. Cro. Eliz. 607. 622.

If a man ſeiſed of land in fee, and poſſeſſed of other land for years, grant a rent-charge for life out of both, with a power to diſtrain in both, if the rent be in arrear, the leaſehold as well as the lands of inheritance are ſubject to the diſtreſs, becauſe a man may oblige his chattels to the diſcharge of the rent: but the rent being a freehold, ſhall iſſue only out of the inheritance, becauſe the leaſehold, being only a temporary and periſhing intereſt, is not a fund commenſurate to the charge, and therefore the rent ſhall iſſue out of the inheritance, which for its duration is a more competent eſtate to ſupport the charge, and render the grant effectual: and hence it was adjudged, that though the grantee might diſtrain in the leaſehold lands, yet he muſt avow for a rent iſſuing out of the inheritance.

27 Aſſ. 24. Bro. Heriot, 6. Fitz. Avowry, 177.

For an heriot ſervice due after the death of the tenant, the lord may either diſtrain or ſeize the beſt beaſt of the tenant. Cro. Eliz. 32. 590. Cro. Car. 260. Jon. 300. Roll. Abr. 665. n. 5. So, may the lord diſtrain for relief. [Co. Lit. 83. if he claims the relief not by tenure, but by cuſtom, it ſeems there muſt be a preſcription to warrant the diſtreſs. Lat. 37. 95. 130. 3 Bulſtr. 323. 1 Jon. 132.] If he dies, his executors cannot diſtrain, but may have an action of debt for it. 4 Co. 49. Ognel's caſe. [Co. Lit. 83. b. 47. b. 1 Show. 36.] Where a diſtreſs might have been taken for aid to marry his daughter, or make his ſon a knight. Roll. Abr. 665. 2 Inſt. 234.

Co. Lit. 96. a.

The ſervices or rent, for which the lord or leſſor may diſtrain, muſt be certain, or ſuch as may be reduced to a certainty; for otherwiſe the lord cannot, in his avowry, recover damages for the non-performance or non-payment, when the jury cannot determine what injury he has ſuſtained. But if the tenant holds of his lord to ſheer all his ſheep feeding in ſuch a manor; this is certain enough, becauſe it is eaſy to compute the number within the precincts of the manor; and conſequently, what expence the lord is at in employing other hands to that work, and what damages he ſuſtained by the omiſſion of his tenant.

4 Co. 50. b. Ognell's caſe, Vaugh. 40, 41. S. C. cited; the ſame law of a rent ſervice. Roll. Abr. 672.

If a man ſeiſed in fee, or for life, of a rent-charge, after arrearages incur, grants over the rent to another, he cannot diſtrain for theſe arrearages, becauſe they are by the grant divided from the freehold of the rent.

Moſs v. Gallimore, Dougl. 266. 1 Term Rep. 384. See Powell's Mortgage, 84.

[If the mortgagee give notice of the mortgage to a tenant in poſſeſſion under a leaſe prior to the mortgage, he may diſtrain for all arrears of rent in his hands at the time of the notice, as well as for what accrues ſubſequent to it.]

For this *vide* 14 H. 4. 31. 23 H. 7. 96. 6 Co. 64. Co. Lit. 47. Cro. Jac. 442. (*a*) But might diſtrain the cattle damage-feaſant. Keilw. 96. a.

If tenant *pur auter vie*, or tenant for years, held over, yet the leſſor could not diſtrain them for (*a*) rent that became due before the determination of their reſpective leaſes, though they continued in poſſeſſion of the land afterwards; for when the leaſe was determined, the leſſor could not avow on them as his tenants, claiming under a leaſe, which was determined.

To

To remedy this, it is provided by the 8 *Ann. c.* 14. "That "whereas tenants *pur auter vie*, and leſſees for years, or at will, "frequently hold over the tenements to them demiſed, after the "determination of ſuch leaſes; and whereas after the determi- "nation of ſuch, or any other leaſes, no diſtreſs can by law be "made for any arrears of rent that grew due on ſuch reſpective "leaſes, before the determination thereof; it is enacted, That it "ſhall and may be lawful for any perſon or perſons, having any "rent in arrear, or due upon any leaſe for life or lives, or for "years, or at will, ended or determined, to diſtrain for ſuch ar- "rears after the determination of the ſaid reſpective leaſes, in "the ſame manner as they might have done, if ſuch leaſe or "leaſes had not been ended or determined; provided that ſuch "diſtreſs be made within the ſpace of ſix kalendar months, after "the determination of ſuch leaſe and during the continuance of "ſuch landlord's title or intereſt, and during the poſſeſſion of the "tenant from whom ſuch arrears became due." *Vide* alſo 4 Geo. 2. c. 28. 11 Geo. 2. c. 19.

[Where there is a cuſtom that a tenant may leave his away-going crop in the barns, &c. of the farm for a certain time after the leaſe is expired, and he has quitted the premiſes; the landlord may diſtrain the crop ſo left after the expiration of the ſix months, and within the time limited by the cuſtom. Beavan v. Delahay, 1 H. Bl. 5.

If a leſſee dies before the expiration of the term, and his perſonal repreſentative continues in poſſeſſion during the remainder and after the expiration of it, the landlord may diſtrain under this act for rent due for the whole term.] Braithwaite v. Cookſey, 1 H. Bl. 465.

(B) What Things may be diſtrained.

THERE muſt be a valuable property in ſome body in the things diſtrained; therefore, no diſtreſs can be of dogs (*a*), deer (*b*), coneys, &c., which are *feræ naturæ*. Co. Lit. 47. [(*a*) *Qu.* as to dogs, now that the legiſlature hath paſſed an act to prevent the ſtealing of them. See ſt. 10 Geo. 3. c. 18. (*b*) But deer kept in a private incloſure for the purpoſe of ſale or profit may be diſtrained for rent. Davis v. Powell, C. B. Hila. 11 G. 2. 3 Bl. Com. 8.]

Things fixed to the freehold, or part of the freehold, as furnaces, chauldrons, doors, windows, fixed to the freehold, or corn* growing, cannot be diſtrained. 18 E. 3. 4. Co. Lit. 47. 2 Inſt. 82. S. P.

2 Mod. 61. [So, an anvil in a ſmith's ſhop, and a millſtone in a mill, are privileged from this diſtreſs: and a temporary removal of the anvil out of the ſtock, or of the millſtone out of the mill, for the purpoſe of its being picked, does not deſtroy the privilege. 14 H. 8. 25. b.] * Cattle on the common, and corn growing, may be diſtrained for rent, by 11 Geo. 2. c. 19. § 8.

No man can be diſtrained for rent by the utenſils of his trade (*c*), as the axe of a carpenter, the books of a ſcholar, the materials for making cloth in a weaver's ſhop; for theſe the law protects under a preſumption, that without them the tenant could neither be uſeful to others, nor gain a livelihood for himſelf. Co. Lit. 47. (*c*) But where by preſcription a toll is due for repairing a key or harbour, which is to be levied by diſtreſs, ſuch diſtreſs may be of thoſe implements, by which the party gets his livelihood, for the maintaining of thoſe is for the public good; and therefore the taking part of the loading has been adjudged good. Mod. 104. Lev. 96, 97. S. C. Raym. 232. Ld. Raym. 385. 2 Stra.

2 Stra. 1228. So, has the diſtraining part of the tackle of the ſhip, as where the anchor, cable, and ſails were taken. Carth. 357. Ld. Raym. 384. 12 Mod. 216. 5 Mod. 359. Salk. 248. pl. 4. for this *vide plus*, 2 H. 7. 16. 2 Roll. Abr. 202. 3 Co. 710. Dyer 352. The cart of a huſbandman may be diſtrained, though an implement of his occupation. Carth. 359. admitted *per cur.* [And implements of trade may be diſtrained if not in actual uſe at the time, and no other ſufficient diſtreſs can be found. Gorton v. Falkner, 4 Term Rep. 565. Simpſon v. Harcourt, C. P. Mich. 18 Geo. 2. cited by Buller, J. *Id.* 569. The like law with reſpect to *averia carucæ*. But *averia carucæ*, or implements of trade, may be diſtrained for a poor's rate, although there be other ſufficient diſtreſs: for the diſtreſs in this caſe is in nature of an execution. Hutchins v. Chambers and others, 1 Burr. 579. Com. Dig. tit. Diſtreſs (C). Saund. on Conventicles, p. 39.]

10 H. 7. 21. b. Bro. Diſtreſs 99. Co. Lit. 47. 3 Bulſt. 270. Roll. Abr. 668. Cro. Eliz. 549. 596. [Noy, 68. But a chariot ſtanding at a livery-ſtable is not privileged from diſtreſs. Francis v. Wyatt, 3 Burr. 1498. 1 Bl. Rep. 483. Nor is a race-horſe in a ſtable belonging to an inn keeper, a mile diſtant from the inn. Croſier v. Tomlinſon, Hertford Aſſizes, *coram* Ryder, C. J. cited in 3 Burr. 1500.]

Alſo, for the benefit of trade and commerce, ſome things are privileged from being diſtrained, as an horſe in a ſmith's ſhop, an horſe in an inn, ſacks of corn or meal in a mill, cloth or garments in a taylor's ſhop, or ſacks of corn or meal in a market.

Cro. Eliz. 550. *per curiam arguendo.* (*a*) 2 Vent. 50. But *vide* 2 Vern. 130. [*Infra*, note on the laſt caſe.]

So, if an horſe carries corn to a mill, and is tied to the mill door, during the grinding of the corn, he ſhall not be diſtrained (*a*). But cattle driving to a market, and by the way put into a paſture, may be diſtrained.

Roll. Abr. 668.

And theſe things are privileged, though they continue there three or four days, or are retained never ſo long by the tenant for his ſatisfaction in ſome thing he has done about them.

Roll. Abr. 668. *equus, palfridus*, or a horſe which a man keeps for journies cannot, as is ſaid, be diſtrained. 2 Inſt. 133. 2 Roll. Abr. 160. Roll. Abr. 668. *Sed qu?* Nor an horſe upon which another rides. Co. Lit. 47. Cro. Eliz. 552. But an horſe upon which a man is riding, may be diſtrained damage-feaſant, and led to the pound with the rider on him. Vent. 36. Sid. 440. [But this is not law. Things in actual uſe cannot be diſtrained, becauſe the taking of them would occaſion a breach of the peace. See what is ſaid by Willes, C. J. on the caſe of Webb v. Bell, 1 Sid. 440. in 4 Term Rep. 567. and Storey v. Robinſon, 6 Term Rep. 138.]

If a man rides to a place, and is there taken ſick, by means whereof he is obliged to tarry there two or three days, his horſe cannot be diſtrained for rent.

Co. Lit. 47. In debt againſt an executor he pleads *riens in ſes mains*, but certain goods diſtrained and impounded: adjudged no aſſets to charge him. Cro. Eliz. 23. [So, it ſeems that goods under an attachment cannot be diſtrained. Monk's caſe, 1 Ventr. 221. *arguendo.*]

Things diſtrained damage-feaſant cannot be diſtrained for rent, becauſe they are in the cuſtody of the law.

Cro. Eliz. 549. 596. adjudged. 3 Lev. 261. S. C. cited. A private perſon, who undertakes to carry all perſons goods, thereby becomes a common carrier, and the goods in his poſſeſſion are privileged. Salk. 249, 250.

If a clothier having put his wool to ſpin comes with an horſe to carry it back, but becauſe there is no beam or weights at the ſpinner's houſe to weigh it, the clothier and ſpinner, with the leave of a neighbour, who had a beam and weights in his houſe, bring the horſe thither, and enter the houſe to weigh the yarn, the lord of the houſe, whilſt they are there, cannot diſtrain the horſe for ſervices.

Roll. Abr. 667. Keilw. 145. 2 Inſt.

Things for which a replevin will not lie, ſo as to be known again, as money out of a bag, cannot be diſtrained, for this reaſon; and

and alſo for the damages, that ſhocks of corn, * hay, &c., might ſuſtain, it was held that they could not be diſtrained. 82. [But money in a bag ſealed may be diſtrained; for the bag ſealed may be known again. 22 E. 4. 50. b.] * But for this *vide* 2 W. & M. c. 5. ſet forth at large, letter (D), *poſt*. [But notwithſtanding this act, ſheaves of corn, it ſeems, cannot be diſtrained for the arrears of an annuity. Horton v. Arnold, Fort. 361.]

Averia carucæ, or beaſts of the plough, or any thing belonging to it cannot by common law be diſtrained while there are other goods or beaſts (which *Bracton* calls *animalia otioſa*), which may be diſtrained. Alſo, a covenable diſtreſs is not of armour or veſſel, or apparel, or jewels, ſo long as there are other ſufficient or covenable, nor of ſheep, ſaddle-horſe, poultry, or fiſh. Co. Lit. 47. 2 Inſt. 133. See *ſupra* in this chapter.

By the ſtatute *de diſtrictione ſcaccarii* made 51 *H.* 3. *ſt.* 4. "No "man ſhall be diſtrained by the beaſts that gain his land, nor by "his ſheep, but until another diſtreſs or chattels ſufficient be "found, except for damage-feaſant." This ſtatute extends not only to diſtreſſes between Lord and tenant, but to all other diſtreſſes, as well at the ſuit of the king, as at the ſuit of the ſubject. 2 Inſt. 133. Dal. 84. In an action on this ſtatute, it is not neceſſary to ſhew that there was a ſufficient diſtreſs, *præter*, &c. But it muſt come on the other part, *ſi* to plead that there was not a ſufficient diſtreſs, *præter*, &c. Dyer, 312. pl. 86. It muſt be intended there was cattle ſufficient at the time of the diſtreſs, and it is not material what was before or after. 2 Inſt. 133.

It is agreed that the cattle of a ſtranger eſcaping into his neighbour's grounds, and there being *levant* and *couchant*, may be diſtrained by the lord or leſſor of thoſe grounds for rent or ſervices due to him; for it ſhall be imputed the owner's folly that he did not provide againſt this miſchief by proper bounds and fences. 27 E. 3. 80. 2 Inſt. 296. Palm. 43. Dyer 317a 318. 2 Leon. 7, 8. Co. Lit. 47. 2 Brownl. 170. But ſuch cattle ſhall not be liable to a diſtreſs for an amercement. Noy, 20. Nor to a rent-charge iſſuing out of thoſe lands, unleſs they were *levant* and *couchant*. Roll. Abr. 668. 1 Mod. 63. And by the better opinion of the books, it ſeems not to be material whether they were *levant* or *couchant* or not. *Vide* Co. Lit. 47. 2 Sand. 290. 2 Brownl. 170. Palm. 43. Hob. 265.

Cattle which are in certain land by way of agiſtment may be diſtrained for rent. Roll. Abr. 669.

If the tenant ought to incloſe againſt the highway by preſcription, and in driving my cattle by the way, by default of the incloſure they eſcape into the land of the tenant, the lord cannot diſtrain them: ſo, if he ought to incloſe by preſcription againſt my land, and my cattle eſcape. 22 E. 4. 49. 15 H. 7. 17. b. Roll. Abr. 668. But for this *vide* 2 Leon. 7. Dyer 317.

If *A.* and *B.*, have two cloſes lying contiguous, and *A.* by preſcription is bound to repair the fences between both the ſaid cloſes, and *A.* leaſes his cloſe to *C.* for years, rendering rent; and the fences between the two cloſes being out of repair, the cattle of *B.* eſcape into the cloſe of *A.*, he may diſtrain them for rent arrear; and it is not material whether they are levant and couchant or not: adjudged, and the judgment affirmed upon a writ of error, though objected that they eſcaped there through the default of *A.* who ought to have taken care that the hedges were repaired: and by *Sanders; nota;* this was a hard caſe to maintain, there being a vaſt difference between the lord's taking a diſtreſs within his ſeignory, and the leſſor's diſtraining for rent reſerved upon his own leaſe; for the lord had nothing to do with the land or fences, and ſo it concerns not him whether they are in repair or not; otherwiſe of the leſſor; for he ought to repair them, elſe he will have advantage of his own wrong. 2 Sand. 289, 290. Pool and Longueville.

[The

Kimp v. Crewes, 2 Lutw. 1573.

[The various caſes upon this point were very fully conſidered in a later caſe, where the following diſtinctions were made. If a ſtranger's beaſts eſcape into the land, by the default of the owner, they may be diſtrained for rent, without being levant or couchant. But if their eſcape be in conſequence of the default of the tenant of the land in not repairing his fences, the leſſor cannot diſtrain them, though they have been levant and couchant, unleſs he have given notice to the owner, and he ſuffer them to remain there afterwards. But the lord of the fee, or the grantee of a rent-charge, may in this laſt caſe diſtrain them, without giving notice, after they have been levant and couchant.]

2 Vent. 50. Fowkes and Joice. 3 Lev. 260, 261. S. C. But *vide* 2 Vern 129. Where in this very caſe the party had

If a man, that is driving his cattle to *London* to ſell, aſks leave of the leſſor to put his cattle into the ground for a night, and he gives him leave ſo to do, with the conſent of the leſſee, and the cattle are put in accordingly; the leſſor is not concluded by this licence, but that he may diſtrain them for rent; adjudged upon demurrer; and it not appearing by the pleading that the ground belonged to a common inn, it came not in queſtion whether in that caſe they might have been diſtrained.

relief in equity, the conſent of the head landlord being looked upon as a fraud and contrivance to ſubject the cattle to a diſtreſs, and there cited the caſe of Bredon and Pierce, where there being two years arrear of a rent-charge, and cattle came by eſcape out of the next ground, and were diſtrained, &c. The Lord Nottingham relieved againſt it. Preced. in Chan. 7. S. C. decreed for the plaintiff with coſts, at law, and in equity.

(C) Of the Manner of diſtraining, as to Time and Place.

Co. Lit. 142. 7 Co. 7. a. 9 Co. 66. a.

A Diſtreſs for a rent-ſervice, or a rent-charge, cannot be in the night, but one may diſtrain cattle damage-feaſant in the night, otherwiſe they may be gone before morning.

4 Leon. 218. But if before the ſtat. 8 Ann. c. 14. and 11 Geo. 2. c. 19.

If the tenant, when the lord is in view of the cattle, to avoid the diſtreſs, chaſes them into a place not within the lord's diſtreſs, yet the lord may take them freſhly; for the tenant ſhall not have advantage of his own wrong.

the tenant, before the lord had view of them, had chaſed them away, or if the tenant for other lawful reaſon, even after view, had chaſed them away, or if after view the cattle went out of themſelves, the lord could not diſtrain them. 44 E. 3. 20. Co. Lit. 161. a. 268. a. 2 Inſt. 131. [But now by 11 Geo. 2. c. 19., goods, &c. may be diſtrained in 30 days, after removal.]

Buckley v. Taylor, 2 Term. Rep. 600. 6 Mod. 214.

[If by the cuſtom of the country, or by expreſs ſtipulation between the parties, the rent be payable on the day on which the tenant enters, the landlord may diſtrain for it on that day. So, it ſeems, by the uſage of a pariſh, a quarter's rent may be diſtrained for before the end of the quarter.]

(*a*) This is declarative of the common law. 2 Inſt. 104. (*b*) This is intended of

By the ſtatute of *Marlbrige* made (*a*) 52 *H.* 3. *c.* 2. "None "ſhall diſtrain any to come to his court, (*b*) which is out of his "fee, or upon whom he has no juriſdiction, by reaſon of a "hundred or bailiwick, nor take diſtreſſes out of the fee or place "where he hath (*c*) juriſdiction."

ſuit-ſervice in reſpect of a ſeignory, and not of ſuit-real in reſpect of reſiance. 2 Inſt. 104. (*c*) But no diſtreſs is prohibited by this act in any place where he hath power, by cuſtom or otherwiſe, to diſtrain. 1 And. 71, 72.

By

By the ſame ſtatute, *c.* 15. it is enacted, "That from (*a*) "thenceforth (*b*) it ſhall be lawful for no man (*c*) for any man- "ner of cauſe to take diſtreſſes out of his fee, or in the king's "highway, or in the common ſtreet, but only to the king and "his officers, having ſpecial authority ſo to do."

(*a*) But this is only in affirmance of the common law. 2 Inſt. 131.

(*b*) This muſt not be taken *ſimpliciter*, ſo as to take advantage thereof in bar of an avowry, but *ſecundum quid*, viz. that the tenant may have an action againſt the lord upon this ſtatute, in which he ſhall be fined. 2 Inſt. 132. And if it may be pleaded in bar of the avowry, the king ſhall loſe his fine.

(*c*) This muſt be intended only of diſtreſſes by reaſon of a ſeignory, and not of diſtreſſes for rent-charges, &c. or by reaſon of a leet. 2 Inſt. 131. And. 72. Nor of ſuch things for which no diſtreſs can be taken but in the highway, as for toll-thorough due by cuſtom. Cro. Eliz. 710. But an heriot cuſtom may be ſeiſed in the highway, for that is not a diſtreſs but a ſeiſure: but a diſtreſs cannot be taken there for an heriot-ſervice. 2 Inſt. 132. Goulſ. 97.

If the lord coming to diſtrain hath a view of the beaſts within his fee, and before he can diſtrain them the tenant chaſes them into the highway, the lord, notwithſtanding the ſtatute of *Marlbridge*, *c.* 15. may diſtrain them there. 2 Inſt. 232.

A diſtreſs for rent may be taken in a houſe, if the door be open; ſo may it be taken out of a window. 46 E. 3. 26. b. Roll. Abr. 671.

5 Co. 92. One cannot break open the outer door to diſtrain; and Ld. Hardwicke C. J. held, that a padlock put on a barn door could not be opened by force, to diſtrain the corn. 9 Vin. Abr. 128. pl. 6. If the outer door be open, one may break open the inner door to diſtrain. Comb. 17. [See the ſtat. 11 G. 2. c. 19. § 7., which empowers the landlord in the caſe of goods being fraudulently removed to prevent a diſtreſs, to break open a dwelling-houſe, taking a conſtable with him, and having firſt made oath before a juſtice of a reaſonable cauſe to ſuſpect that they are therein. See *infra*, tit. Rent, (K).]

[If the demiſes are ſeveral, there muſt be ſeparate diſtreſſes upon the ſeveral premiſes ſubject to each diſtinct rent; for one diſtreſs cannot be taken diſtributively, and the law gives no right to enter into any premiſes but thoſe whence the rent iſſues.] Rogers v. Berkmire, Ca. temp. Hardw. 245. 2 Str. 1040.

(D) Of the Diſtreſs when ſeiſed: And herein of the Diſtrainer's Intereſt therein, and what he is to do therewith.

BY the common law, a man might have driven a diſtreſs whither he pleaſed, which was very miſchievous; 1ſt, Becauſe the tenant was bound to give the beaſts ſuſtenance, if impounded in an open pound, and being driven into another county, he could not by intendment of law know where they were. 2dly, He could not tell where to have a replevy; but now, 2 Inſt. 106.

By the ſtatute of *Marlbridge*, made 52 *H.* 3. *c.* 4. "None ſhall "cauſe a diſtreſs to be driven out of the county where taken, on "pain of fine," *&c.* This ſtatute is confirmed by *Weſtminſter* the 1ſt, made 3 E. 1. 2 Inſt. 191. Yet if the tenancy is in one county, and the manor in another, the lord may drive the diſtreſs taken in the tenancy unto the manor in the other county; for the tenant doing ſuit to the manor, by common intendment knows what is done there. 2 Inſt. 106. Keilw. 50. Bro. Diſtreſs, 33. Where he who will take advantage of this act muſt do it by way of action, ſo as to entitle the king to a fine, *vide* 3 Lev. 48.

Alſo by the ſtatute of the 1 & 2 of *Ph. & Mary*, *c.* 12. "No "diſtreſs ſhall be driven out of the (*d*) hundred, rape, wapentake, "or

(*d*) Not into the county of the city

Litchfield, though till 1 Mar. part of the hundred in which, &c. Goulſ. 100. (*a*) Godb. 11. Goulſ. 101.

" or lathe, where taken, except to a pound overt within the ſame " ſhire, not above (*a*) three miles diſtant from the place where " taken; and no diſtreſs ſhall be impounded in ſeveral places, " (*b*) whereby the owner ſhall be conſtrained to ſue ſeveral replevins, upon pain that (*c*) every perſon offending ſhall forfeit to " the party grieved 5 *l.* and treble damages."

(*b*) As if impounded in ſeveral liberties, &c. elſe it is no offence within the ſtatute. Noy, 52. Dyer, 177. in margin. (*c*) But where three perſons diſtrain a flock of ſheep, and ſeverally impound them in three ſeveral pounds, whereby, &c. yet they ſhall forfeit but one five pounds and one treble damage. Cro. Eliz. 480. Moor, 453. pl. 620. Noy, 52. 62. Dyer, 177. in margin. But Noy, 62. by Fenner, if the plaintiff brings his action againſt them ſeverally, every one ſhall pay 5*l.* But Q. [Treſpaſs will not lie for impounding a diſtreſs in another county, but the action muſt be upon this ſtatute. Gimbart v. Pelah, 2 Str. 1272.]

Co. Lit. 47. A pound overt is a pinfold made for ſuch purpoſes, or the cloſe of him that diſtrains, or the cloſe of a ſtranger with his conſent, where the diſtreſs is taken: a pound covert or cloſe is when the diſtreſs is impounded in a houſe. Co. Lit. 47.

If a man diſtrains dead goods, as utenſils of a houſe, or ſuch like, which may take damage by wet or weather, and the like, he ought to impound them in an houſe or other pound covert within three miles in the ſame county; for if he impounds them in a pound overt he ought to anſwer for them.

Co. Lit. 47. 2 Inſt. 106. S. P.

If a man diſtrains cattle, and puts them in a pound overt, the owner ought to keep them at his peril, for it is lawful for him to come there for this purpoſe; but if put in a pound covert or cloſe, there the diſtrainer ought to keep them at his peril, and yet he ſhall not have any ſatisfaction for it.

Owen, 124. Dyer, 280. pl. 14. But cattle taken *in Withernam* may be uſed.

He who diſtrains cannot make uſe of the diſtreſs, ſo as to work a horſe, *&c.* for he hath no property therein, but a bare power by act of law to take it: ſo, if a man hath a return irrepleviſable, yet he cannot work it, for the judgment is to remit it to the pound *ibidem remanſur. &c.*

Owen, 46. 1 Leon. 220.

Roll. Abr. 648. 879. Owen, 124. Cro. Jac. 147. Yelv. 96. Where a man diſtrained a trunk for rent, and being informed that there were things of value in it, he cauſed it to be corded to prevent damage; he was for this adjudged a treſpaſſor *ab initio*; cited by Twiſden to have been adjudged before Roll, C. J., 1 Ventr. 37. [It is ſaid by Popham, C. J. that the diſtrainor may meddle with a diſtreſs where it is for the owner's benefit, as by ſcouring armour, or fulling raw-cloth. Cro. Eliz. 783.] A hide diſtrained cannot be tanned, for the property is thereby *quaſi* altered; the marks whereby the owner might not know it, being thereby taken away. Cro. Eliz. 783. If a man diſtrains for ſeveral barrels of beer, and draws beer out of one of them, he is a treſpaſſer *ab initio* as to that barrel only. 6 Mod. 216. *per* Holt, C. J. [It is provided by the 11 G. 2. c. 19. § 19, 20. that for any unlawful act done, the diſtrainor ſhall not be a treſpaſſer *ab initio*; but that the party grieved ſhall only have an action for the real damage ſuſtained; and not even that, if tender of amends is made before any action is brought.]

If a man takes a cow for a diſtreſs, he cannot milk her; for though the cow be the better for this, yet he ought not to do good to the owner without his conſent, and perhaps the owner would have come before any damage came by this to the cow; and if it periſh by this, he who took the diſtreſs may diſtrain again.

27 Aſſ. 64. Roll. Abr. 673. Where one diſtrained a hog damage-feaſant, which afterwards eſcaped, but it did not appear that it was by the diſtrainer's fault; in an action of treſ-

If a man diſtrains a horſe, and impounds him, and the horſe leaps three times over the pound, which is as high as it uſed to be, and thereupon he who diſtrained ties the horſe to a poſt in the pound, by reaſon whereof he ſtrangles himſelf, the owner may have an action of treſpaſs.

paſ-

paſs brought by him for the treſpaſs done by the hog, it was adjudged that the action would not lie, for he might chooſe what pound he pleaſed, and it was his folly not to chuſe one that would hold him; which is not like a diſtreſs dying in pound, that being the act of God; and his default muſt not entitle him to another action, nor ſubject the defendant to a double puniſhment for the ſame cauſe, viz. the loſs of his pig, and the damages and coſts in this action. Salk. 248. pl. 3. Ld. Raym. 719.

Diſtreſſes for rent being in nature of pledges, and the perſon diſtraining having no power to ſell or diſpoſe of them, they oftentimes proved of little or no benefit towards haſtening the payment of the rent; for remedy whereof it has been enacted,

" That where any goods or chattels ſhall be diſtrained for any " rent reſerved and due upon any demiſe, leaſe, or contract what- " ſoever, and the tenant or owner of the goods ſo diſtrained ſhall " not, within five (*a*) days next after ſuch diſtreſs taken, and no- " tice thereof (with the cauſe of ſuch taking) left at the chief " manſion-houſe, or other moſt notorious place on the premiſes " charged with the rent diſtrained for, replevy the ſame, with " ſufficient ſecurity to be given to the ſheriff according to law; " that then after ſuch diſtreſs and notice as aforeſaid, and expira- " tion of the ſaid five days, the perſon diſtraining ſhall and may " with the ſheriff, or under-ſheriff of the county, or with the con- " ſtable of the hundred, pariſh, or place where ſuch diſtreſs ſhall " be taken, (who are hereby required to be aiding and aſſiſting " therein,) cauſe the goods and chattels ſo diſtrained to be appraiſed " by two ſworn appraiſers (whom the ſheriff, under-ſheriff, or " conſtable, are hereby empowered to ſwear) to appraiſe the ſame " truly, according to the beſt of their underſtanding; and after " ſuch appraiſement ſhall and may lawfully ſell the goods and " chattels ſo diſtrained, for the beſt price that can be gotten for " the ſame, towards ſatisfaction of the rent for which the ſaid " goods and chattels ſhall be diſtrained, and of the charges of ſuch " diſtreſs, appraiſement, and ſale, leaving the overplus (if any) in " the hands of the ſheriff, under-ſheriff, or conſtable, for the " owner's uſe. 2 W. & M. ſeſſ. 1. c. 5.

[(*a*) The five days are incluſive of the day of ſale. 1 H. Bl. 14.]

" And that upon any pound-breach or reſcous of goods or chat- " tels diſtrained for rent, the perſon or perſons grieved thereby, " ſhall, in a ſpecial action upon the caſe, for the wrong thereby " ſuſtained, recover (*b*) treble damages and coſts of ſuit againſt " the offender or offenders in any ſuch reſcous or pound-breach, " any or either of them, or againſt the owner of the goods " diſtrained, in caſe the ſame be afterwards found to have come " to his uſe or poſſeſſion. Lawſon v. Story. Carth. 321. Ld. Raym. 19. § 4.

[(*b*) The plaintiff under this clauſe is entitled to treble *coſts* as well as damages.]

" Provided, that in caſe any ſuch diſtreſs and ſale be made by " virtue or colour of this act, for rent pretended to be arrear, and " due, where in truth no rent is arrear, or due to the perſon or " perſons diſtraining, or to him or them in whoſe name or names, " or right, ſuch diſtreſs ſhall be taken, that then the owner of " ſuch goods or chattels diſtrained, and ſold as aforeſaid, his ex- " ecutors or adminiſtrators ſhall and may, by action of treſpaſs, " or upon the caſe, to be brought againſt the perſon or perſons " ſo diſtraining, any or either of them, his, or their executors or " adminiſtra- § 5.

" adminiſtrators, recover double the value of the goods or chat-
" tels ſo diſtrained and ſold, together with full coſts of ſuit.

§ 3. Alſo, the ſame act empowers " any perſon, having rent arrear,
" to ſeiſe and ſecure any ſheaves or cocks of corn, or corn looſe, or
" in the ſtraw, or hay in any barn or granary, or upon any hovel,
" ſtack, or rick, or otherwiſe upon any part of the land charged
" with ſuch rent, and to lock up or detain the ſame in the place
" where the ſame ſhall be found, in the nature of a diſtreſs, till
" the ſame ſhall be replevied, upon ſuch ſecurity to be given as
" aforeſaid; and in default of replevying the ſame within the time
" aforeſaid, to ſell the ſame after ſuch appraiſement thereof to be
" made; ſo as ſuch corn, grain, or hay, be not removed by the
" perſon diſtraining, to the damage of the owner thereof, out of
" the place where the ſame ſhall be found and ſeiſed; but be
" kept there *as impounded*, till the ſame ſhall be replevied or ſold,
" as aforeſaid."

4 Mod. 231, 232. Salter and Brundſen. An action was brought, wherein the plaintiff declared againſt *A.* and *B. in cuſtod. mar., &c. de eo quod ipſi*, ſuch a day and year, *apud, &c. in com. prædict vi & armis, &c. bona & catalla, viz. quadraginta quarteria hordei ipſius* C. (*pl.*) *ad valentiam* 40 *librarum adtunc & ibidem invent. nomine diſtrictionis pro redditu per ipſum* C. *præfat.* A. *ſuper dimiſſion. meſſuag. & quarundem terrar. eidem* C. *per ipſum* A. *ante tunc. fact. debit. & in arretro fore ſuppoſit. & pretenſ. colore cujuſdam actus parliamenti in hujuſmodi caſu nuper edit. & proviſ. ceper. & diſtrixer. & bona & catalla illa ſic diſtrict. adtunc & ibidem detinuer. quouſq; poſtea ſſ.* 23 *die, &c. præd. bona & catalla colore actus illius vendider. & diſpoſuer. ubi revera & in facto tempore captionis bonorum & catallor. præd. aut tempore venditionis eorundem nullus redditus per ipſum* C. *eidem* A. *debit. aut in arretro fuit, & alia enormia, &c.* B. One defendant pleads not guilty, and iſſue thereupon, and judgment is given againſt the other defendant by default, *&c.* and it was now moved in arreſt, *&c.* that there muſt be a leſſor and leſſee to bring this caſe within the act, and that if there be no demiſe, this act gives no remedy; and here no demiſe is ſufficiently ſet forth in the declaration; nor is it ſaid that the goods were diſtrained for rent arrear, but that they were taken *nomine diſtrictionis*, which is not a good averment that they were diſtrained; but *per cur.*, the declaration is good.

4 Mod. 385. to 395. Walter and Rumball. Comb. 336. S. C. Ld. Raym. 53. 55. Salk. 247. pl. 1. 12 Mod. 76. * Who was the owner of the goods diſtrained, though not the tenant of the land. In trover, on not guilty pleaded, it was found, that *A.* was ſeiſed in fee of certain lands lying in two hundreds, and demiſed them to the plaintiff's father for two years at 40 *l. per annum* rent, and that for 50 *l.* arrear of rent, the defendant, by order of the bailiff or ſteward of *A.* who was beyond ſea, diſtrained the goods in the declaration, being *levant* and *couchant* upon the lands, and gave notice thereof to the plaintiff, * who did not replevy them; and that after five days after ſuch notice, the defendant, with the conſtable of one hundred, in the preſence of the conſtable of the other hundred, cauſed the ſaid goods to be appraiſed by two perſons, ſworn for that purpoſe, by the conſtable of one hundred, in the preſence of the conſtable of the other hundred; and that he after ſold ſome part, but not to the

value

value of the rent arrear, and carried away the other goods in order to ſell, when he ſhould have an opportunity, *& ſi, &c.* The firſt exception taken to the verdict was, That it was not found, that the goods were ſold with the concurrence of the ſheriff or conſtable, who ought to be preſent as well at the ſale as at the appraiſement; becauſe if any overplus, it is to be left in their hands. 2*dly*, That it was not found the goods were ſold for the beſt price that could be gotten; and if ſold at an under-rate, the party ſhall not be concluded. 3*dly*, That it was not found that the defendant had any direction to ſell the goods, but only to take them, and it may be the landlord would have kept them ſtill as a diſtreſs. But principally it was inſiſted, that notice to the plaintiff himſelf, who was owner of the goods, was not ſufficient, but it ought to have been left at the moſt notorious place, by the expreſs words of the act; and ſo the authority given by this act not purſued; and then the defendant is a treſpaſſer *ab initio*, as he who works a diſtreſs: and the notice ought to have been given to the tenant of the land, becauſe he might have paid the rent and ſaved the goods; or if not, he might have replevied them, which he might have done, though he were not the owner thereof. Alſo the goods are not duly appraiſed, for they were appraiſed by two perſons, ſworn by the conſtable of one hundred only; and though it were in the preſence of the conſtable, yet that was not ſufficient, becauſe this diſtreſs was in the name of an execution; and being taken in ſeveral hundreds, the conſtables of both hundreds ought to have cauſed the appraiſement to be made; this act being an authority to them both for that purpoſe, where the diſtreſs happens to be in two hundreds, the conſtable of one hundred having no power over the goods taken in another hundred, out of his own. But *per cur.* This ſtatute was made for the benefit of the landlord, not of the tenant; and therefore notice to the owner of the goods was ſufficient; for the only reaſon of directing the notice to be left at the manſion-houſe was, that the owner might have notice by the tenant to replevy them, and no need of notice to both, becauſe either of them might replevy them; and as the owner of the goods is principally concerned, notice to him is much the beſt. And though the diſtreſs be taken in two hundreds, yet it is but one diſtreſs taken at one time, and for one entire rent; and both conſtables being preſent, there is a ſufficient concurrence of both, though one only adminiſter the oath, for two oaths were not to be adminiſtered; and the chief deſign of directing the preſence of the conſtable, was for the ſake of the landlord, to prevent any breach of the peace; and the preſence of the other conſtable made it his act, though he were out of his own hundred; for the ſtatute to this purpoſe gives him power to act in any place. It was therefore adjudged for the defendant.

If a landlord comes into a houſe, and ſeiſes upon ſome goods as a diſtreſs, in the name of all the goods in the houſe, that is a ſufficient ſeizure of all; and though by the common law the landlord was to remove them in a convenient time; yet ſince the ſtatute 2 *W. & M. c.* 5. they are to be removed immediately, except

6 Mod. 214. *per* Holt, C. J. Ld. Raym. 54. 2 Ld. Raym. 1424. Barnard.

K. B. 3. 4. 2 Stra. 717. (a) By 11 Geo. 2. c. 19. § 10., except corn or hay, though the things in their own nature are not eaſily, or without damage removeable, as barrels of beer, &c. (a) they may be ſecured and ſold on the premiſes chargeable with the rent.

(E) Where a Diſtreſs ſhall be ſaid to be wrongful and exceſſive: And herein of the Remedy which the Party injured hath.

This ſtatute made 52 H. 3. c. 4.; *vide* alſo 51 H. 3. ſtat. 4. the ſtatute *de diſtrictione ſcaccarii*. If the landlord takes an unreaſonable diſtreſs, an action lies upon this ſtatute, but not an indictment or information, becauſe a private offence. Mod. 71. 288. Lev. 299. Raym. 205. Vent. 104. [Nor will treſpaſs lie for an exceſſive diſtreſs, except in one caſe, where the things diſtrained are of certain known value, as gold or ſilver; in all other caſes the action muſt be on the ſtatute. Hutchins v. Chambers, 1 Burr. 590. Moit v. Munday, Hil. 28 G. 2. B. R. cited in the laſt caſe. Lynne v. Moody, Fitzgib. 85. 2 Str. 851.] No diſtreſs for homage or fealty ſhall be ſaid to be exceſſive, for the high eſteem theſe are of in the law; but Q. & *vide* 42 E. 3. 26. 4 Co. 8. b. Bevill's caſe, 2 Inſt. 107., where, notwithſtanding it is ſaid, that the ſtatute of Marlbridge is general, *vide* 13 H. 4. Fitz. tit. Avowry, 239., it was held, that a diſtreſs of more than the value ſhall not be ſaid exceſſive, for the expences of knights of parliament; becauſe the king is in a manner party.

BY the ſtatute of *Marlbridge*, diſtreſſes muſt be reaſonable, and not too great.

41 E. 3. 26. 1 Roll. Abr. 674. If forty ſheep are taken for 2 *d.* and ſixteen oxen for 9 *d.* this is exceſſive.

29 E. 3. 24. Roll. Abr. 674. So, if two oxen are diſtrained for four pair of gloves, ten ſheep for one pair, and ten for another, it is an exceſſive diſtreſs.

8 H. 4. 15. 2 Vent. 183. S. P. But if a man takes five horſes joined in a cart for 3 *d.* rent, this is not exceſſive for the entirety.

2 Inſt. 107. So, if the lord diſtrain an ox or an horſe for a penny, if there were no other diſtreſs upon the land holden, the diſtreſs is not exceſſive; but if there were ſheep or ſwine, &c. then the taking of the ox or horſe is exceſſive, becauſe he might have taken a beaſt of leſs value.

Moor, 7. pl. 26. Cro. Eliz. 13. S. C. Bro. Diſtreſs, 98. *vide* 17 Car. 2. c. 7. § 4., by which it is enacted, If for 10 *l.* rent due at one day, a man diſtrains goods of the value of 40 *s.* only, and at the time of taking the diſtreſs there are goods of a ſufficient value upon the premiſes, he cannot, for the ſame rent, diſtrain again; for it was his folly, that at the firſt he diſtrained no more; but if there be rent in arrear at ſeveral days, a diſtreſs may be taken for what was due at the other days.

That where the value of the cattle diſtrained ſhall not be found to be to the full of the arrears diſtrained for, the party, to whom the arrears were due, his executors or adminiſtrators, may from time to time diſtrain again for the reſidue of the ſaid arrears. [Whether or not there ſhall be more diſtreſſes than one depends upon the entirety and identity of the thing diſtrained for, not upon the value of the goods taken. One entire duty, or ſum, ſhall not be ſplit, and diſtrained for, part at one time, and part of it at another time; for inſtance, if, as was the caſe in Lutwyche, the whole ſum due be 77 *l.* 10 *s.*, a man ſhall not diſtrain for 62 *l.* 10 *s.* at one time, and afterwards diſtrain again for 15 *l.* the reſidue of the 77 *l.* 10 *s.*, but he ſhall diſtrain for the whole 77 *l.* 10 *s.* at once. But if, from miſtake or ignorance of their value, the goods at firſt diſtrained for the whole 77 *l.* 10 *s.* be not ſufficient to ſatisfy it, he may diſtrain again in order to ſupply the deficiency, and to make up that ſame ſum. Wallis v. Savill, 2 Lutw. 1532. Hutchins v. Chambers, 1 Burr. 589.]

[A diſtreſs

[A diſtreſs may be taken for rent under a leaſe, though the tenant entered before the commencement of it.] Macdonnel v. Welder, 1 Str. 550.

If a diſtreſs be taken of goods without cauſe, the owner may reſcue them. Co. Lit. 47. b.; but a ſtranger cannot. 39 E. 3. 35. b. 1 Roll. Abr. 673. If a man diſtrains my cattle, together with the cattle of *J. S.* without cauſe, *J. S.* or I may juſtify the reſcue of all. 39 E. 3. 35. b. *per* Thorpe.

But if a diſtreſs be taken without cauſe, and put into a pound, the owner cannot break the pound and take them out, becauſe they are in the cuſtody of the law. Co. Lit. 47. b. And. 31. S. P. N. Bendl. 30. pl. 48. S. P. *vide* ſtat. 2 W. & M. ſeſſ. 1. c. 5. and Co. Lit. 47., where the writ *de parco fracto* will lie. F. N. B. 100. Winch, 80, 81.

If the lord, or another that has a rent, diſtrains ſeveral times for his ſervice or rent, where none is in arrear, the tenant may by the common law have an *aſſize de ſovent diſtreſs*. F.N.B. 178. But if the lord diſtrains for homage or fealty ſo often, that the tenant cannot manure his land, yet the tenant ſhall not have an *aſſize &c.*, &c. 4 Co. 8. b.

This action lay at common law, in which the writ is general and count ſpecial, that the lord diſtrained, *&c.* and judgment, not that the demandant *recuperet ſeiſinam*, for he hath that, but *quod teneat abſque multiplici diſtrictione*. 8 Co. 50. a. b.

(F) Of diſtraining Things Damage feaſant.

SHOCKS of corn may, by the common law, be taken damage-feaſant. 21 H. 7. 39. b. 11 H. 7. 14. a. Lat. 8. S. P. admitted *per cur.* Fitz. Avowry, 363. S. C. Bro. Diſtreſs, 30. S. C.

A greyhound may be taken damage-feaſant running after conies in a warren: ſo may a ferret brought into a warren, 2 E. 3. Fitz. Avowry, 182. Roll. Abr. 664.

But if a man brings nets and gins through my warren, I cannot take them out of his hands. 7 E. 3. Roll. Abr. 664. Cro. Eliz. 552. S. P.

If men are rowing upon my water, and endeavouring with their nets to catch fiſh in my ſeveral piſcary, I may take their oars and nets, and detain them as damage-feaſant, to ſtop their further fiſhing. Cro. Car. 228.; but adjudged he could not cut their nets.

If a man rides upon my corn, I cannot take his horſe damage-feaſant. 7 E. 3. Avowry. Roll. Abr. 664.; but *per* Sid. 410., it is ſaid by the Chief Juſtice, that the horſe upon which one is riding may be diſtrained damage-feaſant; and it ſeems he ſhall be led to the pound with the rider upon him. See Vent. 36. *Vide ſupra*, letter (B), *contr.*

If a man takes my cattle, and puts them into the land of another man, the tenant of the land may take theſe cattle damage-feaſant, though I who was the owner was not privy to the cattle's being damage-feaſant; and he may keep them againſt me till ſatisfaction of the damages. Roll. Abr. 665. Robinſon and Waller, *per totum curiam*, Roll. Rep. 449. S. C. and S. P. *per* two juſtices.

Co. Lit. 161. 9 Co. 22. a. S. P. that the owner of the ſoil is not obliged to take the cattle damage-feaſant, but may chaſe them out with a little dog. *Vide* 4 Co. 38. b. 2 Roll. Abr. 566. pl. 15.

If a man coming to diſtrain damage-feaſant, ſees the beaſts on his ſoil, and the owner, on purpoſe, chaſes them out before they are taken, he cannot diſtrain them.

30 E. 3. 27. *vide* head of *Common*, vol. 1. 624.

A commoner may juſtify the taking of the cattle of a ſtranger upon the land damage-feaſant.

46 E. 3. 12. b. Bro. Avowry, 29. S. C. [*Secùs*, where the number is uncertain. Hall v. Harding, 4 Burr. 2426.]

So, if a man hath common for ten cattle, and he puts in more, the ſurpluſage above the ten may be taken damage-feaſant.

Co. Lit. 142. 7 Co. 7. a. S. P. 9 Co. 66. a. S. P.

A man may diſtrain cattle damage-feaſant in the night, for otherwiſe, perhaps, the cattle will be gone before he can take them.

2 Jon. 193. [The commoner's power of diſtraining is not mentioned in the caſe cited.]

If turfs lie upon a common damage-feaſant; though for this a commoner may diſtrain them, yet he cannot burn them.

Wigley v. Peachy and others, 2 Ld. Raym. 1589. Sawyer v. Wilkinſon, Cro. El. 628.

[Goods brought to a market to be ſold, cannot be diſtrained by the owner of it for toll as damage-feaſant.

Mayor of Launceſton's caſe, Cro. El. 75.

If a man hath a freehold in a market, and corn is brought thither on the market-day, and ſet down, he cannot juſtify the taking it there damage-feaſant.

Burt v. Moore, 5 Term Rep. 329.

A. demiſed to *B.* the milk of twenty-two cows, to be provided by *A.*, and to be fed at *A.*'s expence, on certain cloſes belonging to *A.*; and *A.* covenanted that *B.* might turn out a mare, and that no other cattle ſhould be fed there. *B.* may diſtrain other cattle of *A.* there, for the ſeparate herbage and feeding of the cloſes paſſed to *B.*]

(G) Of Diſtreſſes for Amercements.

Roll. Abr. 665, 6. Roll. Rep. 201. 11 Co. 45. a. Cro. Jac. 382. 10 H. 7. 15. pl. 12. 10 H. 6. 7. *cont.* 11 H. 7. 14. a. 21 H. 7. 40. b. Salk. 175. Doct. and Stud. 138.

OF common right, a diſtreſs is incident to every fine and amercement in a ſheriff's torn or court-leet, whether the ſame belong to the king or to a ſubject; if the offence, for which they were impoſed, be of common right incident to the juriſdiction of ſuch courts.

Vent. 105. Raym. 204. 2 Keb. 701. 739. 745. By the report of the caſe in Vent. the court inclined, that where a cuſtom only en-

But if ſuch offences were only the neglect of a duty created by cuſtom, it is queſtionable whether it doth not require the like cuſtom for a diſtreſs, though the duty be of a publick nature: as, if there be a leet belonging to the manor of *A.*, and by cuſtom, time out of mind, the inhabitants of *B.* have uſed to ſend a conſtable to the ſaid leet, and they make default, upon which they are fined by the ſteward; whether a diſtreſs could be taken for this fine, without a ſpecial cuſtom to diſtrain, was doubted; and

and the caſe adjourned, no ſpecial cuſtom to diſtrain being alleged. abled to ſet a fine, it cannot be diſtrained for without a cuſtom: alſo in Raym. it is ſaid by Twiſden, that when a duty is raiſed by cuſtom, a diſtreſs for that duty muſt be maintained by the like cuſtom.

But if it be for the private benefit of a ſubject, no diſtreſs is incident to it without a ſpecial cuſtom. Roll. Rep. 76. 11 Co. 44. b. 2 Hawk. P. C. 60.

The ſheriff or lord of a leet may, for ſuch fines or amercements, diſtrain the goods of the offender in (*a*) any lands within the county or precinct of the leet, of whomſoever they ſhall be holden, except (*b*) only in ſuch lands which ſhall be in the king's hands; theſe being wholly out of the juriſdiction of ſuch courts. (*a*) 2 H. 4. 24. b. 47 E. 3. 13. a. Bro. Leet, 28. 41. Fitz. Avowry, 194.

Roll. Abr. 670. 2 Inſt. 104. (*b*) 47 E. 3. 12, 13. Fitz. Diſtreſs, 15. Roll. Abr. 670.

And ſuch a diſtreſs may be taken in the highway; for the ſtatute of *Marlbridge*, *c.* 15. which prohibits the taking of a diſtreſs there, is to be intended only of diſtreſſes taken for ſervices due by way of tenure of lands. 2 Inſt. 131. 47 E. 3. 13. And. 72.

Such fines and amercements being for a perſonal offence, no ſtranger's beaſt can lawfully be diſtrained for them, though they have been *levant* and *couchant* on the lands of the offender. 47 E. 3. 13. a. 41 E. 3. 26. b. Bro. Diſtreſs, 3. F. N. B. 100. Owen, 146. Noy, 20. *contra*. Roll. Abr. 669. pl. 20. [Roll. cites for the contrary opinion the caſe in 41 E. 3. 26. b. which ſeems an authority (if any) *the other way*.]

It ſeems to be agreed, that where any ſuch court is in the king's hands, the goods diſtrained for ſuch fines and amercements may lawfully be ſold, after they have been kept a reaſonable time, as the ſpace of ſixteen days: and it ſeems the better opinion, that where any ſuch court is in the hands of a common perſon, if the goods were diſtrained for an offence of a publick nature, they may be ſold of common right, without any ſpecial cuſtom for that purpoſe. Hetley, 62. Finch, 476. 3 H. 7. 4. b. 1 Roll. Rep. 76. Noy, 17. 1 Bulſt. 53.

No bailiff can lawfully diſtrain for any ſuch fine or amercement, without a ſpecial warrant for ſo doing; which muſt be ſet forth by him in an avowry or juſtification of ſuch a diſtreſs. 3 Mod. 138. Cro. Eliz. 698. 748. Moor, 574. 2 Keb. 745. Salk. 107. pl. 2. [In replevin the officer muſt ſtate that "the defendant was guilty;" in treſpaſs the conviction is a ſufficient juſtification. It muſt appear too, that the amercement was by the jury, and not by the court. Stephens v. Haughton, 2 Str. 847.]

[By preſcription there may be a diſtreſs for toll in a fair or market. But toll is not incident of common right to a fair; and, therefore, if the fair is a new one, and toll is not expreſsly granted, a cuſtom cannot ſupport it. Hob. 187. Roll. Abr. 66. Holloway v. Smith, 2 Str. 1171.

If goods are fraudulently ſold out of a market, in order to evade the toll, the owner of the market cannot diſtrain them for it.] Blakey v. Dinſdale, Cowp. 661.

Dower.

Vide 2 Bl. Comm. 129.

DOWER is the part of the huſband's eſtate that comes to the wife upon the death of the huſband.

Dower by the civil law, was the portion the wife brought to her huſband, either in land or money, whereof the *naturale dominium* belonged to the wife, and the *dominium civile* to the huſband; ſo that the huſband had only the *uſus fructus* during his life in things immoveable, but could not alien them; in things moveable he might alien them, but muſt reſtore to the value; for theſe, upon the diſſolution of the marriage, by the death of the huſband, or divorce, came back to the wife. *Vide* Vin. 249. Corvin. *lib.* 23. *tit.* 3. Honorius, 114, 115. Donations *inter ſponſum & ſponſam propter nuptias* began about the time of *Conſtantine*, and were made before marriage; but by the *Juſtinian* conſtitution they were good after marriage, and were gifts from the huſband to the wife, which, upon the diſſolution of the marriage, came back to the huſband as the dower did to the wife. Vin. 245. Inſt. of Imperial law, 43. 117, 118, 119. Among the feudiſts, the rule was, *non uxor marito ſed uxori maritus offert*; and the reaſon was that the huſband and eldeſt ſon of the family being brought up in military exerciſe, the wife and youngeſt ſons tilled and improved the land, and in their expeditions found proviſions for the army; and having the third part in labour, ſhe had the third part of the feud for the maintenance of her and her younger children during her life. *Spelm.* tit. *Doarium*, 175.

Co. Lit. 33. b. 39. b.

Dower is of five ſorts: 1. At common law. 2. By cuſtom. 3. *Ad oſtium eccleſiæ.* 4. *Ex aſſenſu patris.* 5. *De la pluis beal.* We ſhall begin with the firſt and chief.

Co. Lit. 30. b. Perk. 301.

Dower, at common law, is the third part of all the lands whereof the huſband has been ſeiſed during the coverture, of ſuch an eſtate as the children by ſuch wife might, by poſſibility, have inherited, and to which by the death of the huſband, the wife is entitled for her life. For the better underſtanding thereof, I ſhall conſider it under the following heads:

(A) Who may have Dower, and who not: And herein of the Age, and other Diſabilities of the Huſband or Wife.

(B) Of what Eſtate a Woman may have Dower.

1. Of the Quarentine.
2. Of the different Kinds of Inheritances.
3. Of the Nature and Quality of ſuch Eſtate, whether ſole, joint, or in common.
4. Of its Continuance; wherein, of Eſtates conditional, ſuſpended, determined, or extinguiſhed; and herein of Remitter to the Heir, and Recoveries by Title Paramount.
5. Of the Value and Improvement of the Huſband's Eſtate, either in his Lifetime, or after his Death.

(C) Of

(C) Of the Things requiſite to the Conſummation of Dower, *viz.* Marriage, Seiſin, and the Death of the Huſband.

1. Of the Marriage, how long it muſt continue; and herein of the ſeveral Sorts of Divorces.
2. Of the Seiſin, either in Fact or in Law; and herein of the Seiſin in Fact, as it is continuing, or not continuing, as inſtantaneous.
3. Of the Death of the Huſband.

(D) Of the Aſſignment of Dower.

1. By what Perſons.
2. Of the Manner; and herein of aſſigning of it by Metes and Bounds, *&c.*
3. By what Court.

(E) Where the Wife ſhall have her Election to be endowed of one Thing or another, and where of both: And herein of Endowment *de novo*, and the *Dos de Dote*.

(F) What ſhall be a Bar of Dower, and what not: And herein of Acts done or ſuffered by the Huſband ſolely, or by the Huſband and Wife jointly, or by the Wife ſolely, either during the Coverture, or after: And herein of Elopement, and Detinue of Charters, or Heir. *P.* 304.

(G) Where the Wife ſhall hold her Dower, ſubject to the Charges of her Huſband, and where not: And herein of the Privileges of Tenant in Dower, and the Nature of her Eſtate as to Alienations made, or Actions brought by or againſt her.

(H) To whom the Tenant in Dower ſhall be attendant, and by what Services.

(I) Of the Proceedings and Damages in Dower *unde nihil habet*.

(K) Of the Admeaſurement of Dower.

(A) Who may have Dower, and who not: And herein of the Age, and other Diſabilities of the Huſband or Wife.

Lit. § 36. Co. Lit. 33. a. Doct. & Stud. lib. 1. c. 7. F. N. B. 149.

AS to the age of the huſband it is not material, but only the age of the wife; and if ſhe be of the age of nine years or more at the death of her huſband, ſhe ſhall have dower, though her huſband be then but four years old. The reaſon the law would not allow women before this age to demand dower ſeems from their incapacity of having iſſue ſooner.

1 Roll. Abr. 675. 2 Inſt. 234. Leon. 53. Brook, tit. Dower, 36. 45.

The ſupport of the children is part of the conſideration whereon this allowance of dower is founded; and, as on the one hand it would be unreaſonable to extend it to ſuch women as are incapable of performing the conditions; ſo on the other hand it would not be reaſonable to exclude women of ſufficient age, by reaſon of the incapacity of their huſbands; ſince that is the act of God, which ought in no ſort to prejudice the wife: much leſs can the huſband by his own act prevent his wife of dower, if ſhe attains the age of nine years during the coverture; and therefore, though he aliens his land before, yet if ſhe after arrives at nine years of age, her title is now conſummate *ab initio*, and over-reaches his alienation: for dower being intended a proviſion for the wife and children, whenever ſhe attains ſuch an age, as the law adjudges her capable of children, nothing farther is required: and therefore though the huſband die before he or his wife are of age of conſent, yet if ſhe be nine years old, this is a ſufficient marriage to entitle her to dower, and ſo ought to be certified by the biſhop.

13 Co. 22. Co. Lit. 33. a.

Dyer, 313. pl. 62. 369. pl. 48. Co. Lit. 33. a.

Co. Lit. 40. Roll. Abr. 675. S. P.

If a man marries a woman of 100 years old, and dies, ſhe ſhall be endowed; for the law cannot determine the preciſe time of the failure of her capacity to have iſſue, which may vary according to the ſtrength and other circumſtances of the woman.

7 Co. 7. Co. Lit. 31. a.

If a woman alien, be ſhe friend or enemy, marry a ſubject, ſhe ſhall not be endowed, becauſe by the policy of the law all aliens are diſabled from acquiring any freehold amongſt us; but for this *vide* head of *Aliens*.

But by the law of the crown, if the king marry an alien ſhe ſhall be endowed, becauſe princes cannot marry according to their dignity, unleſs to perſons abroad.

Co. Lit. 31.

If a Jew born in *England* marry a Jew born alſo here, and the huſband be converted to the Chriſtian faith, and after purchaſe lands, and enfeoff the other, and die, the wife ſhall not have dower.

For R. 1. erected a court where all the real and perſonal eſtate of the Jews was regiſtered, and upon the death of any Jew came to the king, though it was redeemable by their children paying a fine; and in this court ſhe could not demand dower but againſt a Jew, and ſhe could not demand it at common law againſt a Chriſtian; and for this reaſon it ſhews if the huſband had not aliened, yet ſhe could not recover againſt the heir of a Chriſtian. Hollingſhead, vol. 3. p. 15.

Women

Women Papiſts ſeem not diſabled to demand and recover dower within the words of 11 & 12 *W.* 3. *c.* 4.

If a woman be attainted of treaſon or felony *, ſhe ſhall not have her dower, but if pardoned ſhe ſhall be received to demand it, though the huſband has aliened in the mean time, becauſe by the marriage and ſeiſin of her huſband ſhe was entitled to dower, and when the impediment is removed, her capacity is again reſtored. Perk. 349. Co. Lit. 33. a. 13 Co. 23. But if ſhe be only convicted of treaſon or felony, this ſeems no impediment of her dower, for this forfeits no freehold, nor title to any freehold, though the king ſhall have the profits during the conviction. * See *infra*.

At common law if the huſband was attainted of treaſon, murder, or felony, the wife loſt her dower, becauſe it was a condition annexed to all feuds, that the feuditary ſhould not commit ſuch crimes. Perk. 308. 387. F. N. B. 150. Brook, 82. Co. Lit. 40. b. Plow. 262.

But afterwards the ſtatute 1 *E.* 6. *c.* 12. ordained, that in all caſes where the huſband was attainted of treaſon or felony, their wives ſhould notwithſtanding have their dower: but 5 *E.* 6. *c.* 11. repeals that in all caſes of treaſon; the words of which act being general, exclude the wife as well in caſe of petit treaſon as in caſe of high treaſon. But in caſe of miſpriſion of treaſon, or attainder of felony only, the other act ſtands in force, and therefore, they ſhall have dower in all ſuch caſes. Stanf. 195. Co. Lit. 37. a. 392. b. 13 Co. 19. 3 Inſt. 216. Finch, 71. Moor, 639. Dyer, 97. pl. 49. 263 pl. 36.

If the huſband ſeiſed of lands in fee makes a feoffment, and then commits treaſon, and is attainted of it, the wife ſhall not recover dower againſt the feoffee. Bendl 56. Gate's caſe. Dyer, 140. pl. 42. S. C. Co. Lit. 111. a. S. P. And though the huſband had been pardoned, yet ſhould not the wife recover dower. Leon. 3. Mayne's caſe. But of land purchaſed by the huſband after the pardon, the wife ſhall be endowed. Perk. 391.

The (*a*) wife of a *felo de ſe* ſhall have dower. (*a*) Plow. 261. a. 262. a. Dame Haſe's caſe.

So, (*b*) if the huſband be outlawed in treſpaſs, or any civil action; for this works no corruption of blood, or forfeiture of lands. (*b*) Brook, 82. Perk. 388. Co. Lit. 31. a.

So, (*c*) if the huſband be attainted of hereſy, yet his wife ſhall be endowed; for this works no corruption of blood, or forfeiture of lands, being only a ſpiritual offence. (*c*) Co. Lit. 31.

If the huſband or wife be excommunicated, yet the wife's dower is not hurt, becauſe being a ſpiritual puniſhment only, it does not affect their temporal poſſeſſions. If the huſband be attainted in the *præmunire*, my Lord *Coke* ſays that ſhe ſhall be endowed. Co. Lit. 31. a.

After the making of the ſtatute 1 *E.* 6. *c.* 12. it ſeems to have been doubted whether the wife ſhould not loſe her dower in caſe of any new felony made by act of parliament; and therefore, where ſeveral offences have been made felony ſince, care has been (*d*) taken to provide for the wife's dower. (*d*) As in 5 Eliz. c. 14., which makes a ſecond forgery, felony without clergy. So 8 Eliz. c. 3. which makes it felony to tranſport ſheep, &c. So alſo in 31 Eliz. c. 4. which makes it felony to embezzle the king's armour to the value of 20*s*. So in 3 Jac. 1. c. 4. which makes it felony to ſerve foreign princes without firſt taking the oath of obedience. So alſo in 1 Jac. 1. c. 31. which makes any one's going abroad with the plague upon him, felony. And this loſs of

dower being only part of the judgment by implication may well be ſaved by an expreſs proviſo, without any repugnancy. 3 Inſt. 47. 78. 80, 81. 90.

Perk. 313. Co. Lit. 30. But otherwiſe, if he had been villein to the king.

If a villein marry and then the lord enter, and then the villein die, his wife ſhall be endowed, for the lord's title began but by his entry, and the wife's title to dower began before.

If a freeman marries a nief, ſhe ſhall be endowed, but her lord may enter on the lands during her life. Co. Lit 31. a.

Perk. 365.

If a woman being a lunatick kill her huſband, or any other, yet ſhe ſhall be endowed, becauſe this cannot be felony in her who was deprived of her underſtanding by the act of God. So, though ſhe be of ſound mind, and refuſe to bring an appeal of his death, when he is killed by another, yet ſhe ſhall be endowed; Perk. 364. for this is only a waiver of that privilege the law has given her to be avenged of her huſband's murderer: ſo, it ſeems, if ſhe refuſe to viſit and aſſiſt her huſband in his ſickneſs, yet ſhe ſhall be endowed, for this is only undutifulneſs, which the law does not puniſh with the loſs of her entire ſubſiſtence.

Co. Lit. 31. a. And therefore if lands deſcend to an idiot or lunatick after marriage,

If an idiot or lunatick marry and die, his wife ſhall be endowed, for this works no forfeiture at all, and the king has only the cuſtody of the inheritance in one caſe, and a power of providing for him and his family in the other; but in both caſes the freehold and inheritance is in the lunatick, and therefore the wife dowable.

and the king on office found takes thoſe lands into his cuſtody, or grants them over to another as committee in the uſual manner; yet this ſeems no reaſon why the huſband ſhould not be tenant by the curteſy, or the wife endowed, ſince their title does not begin to any purpoſe till the death of the huſband or wife, when the king's title is at an end; but for this *quære*, & *vide* Plowd. 263. b. 4 Co. 124, 125. [The marriage of idiots muſt be void upon general principles of law, by reaſon of their incapacity to contract.]

(B) Of what Eſtate a Woman may have Dower.

1. Of Quarentine.

Co. Lit. 32. b. 34. b. 2 Inſt. 16, 17. Brook, 107. Hob. 153. and F. N. B. 161. (E.) the writ *de quarentinâ habendâ*. By the old law before the Conqueſt, the widow was to continue in her huſband's houſe a whole year

THIS is a privilege the law allows to women to continue in the capital meſſuage or manſion-houſe, or ſome other houſe whereof they are dowable, 40 days after their huſband's death, whereof the day of his death is counted one; and during this time they are to be provided with all neceſſaries at the expence of the heir, and before the end thereof to have their dower aſſigned to them. This privilege is confirmed by *Magna Charta*, *c.* 7. and ſeems to be only a compliance with that decency and ceremony, cuſtom has introduced upon ſo melancholy an occaſion, that widows, who are ſuppoſed to be under great affliction, may not be forced to appear abroad, and be put to their ſhifts for a maintenance; and for this reaſon, if they marry within the 40 days, their quarentine ceaſes, for then they have provided for themſelves, and their ſorrowful condition is ſuppoſed to be at an end.

after his death, within which time her dower was to be aſſigned; and if ſhe married before the year was out, ſhe forfeited her dower, and whatever her huſband had left her.

In

In a writ of dower the demand was of three manors, the tenant pleads in abatement entry in part *puis darrein continuance*, and ſhews it in certain; the demandant replies that her huſband in his lifetime was ſeiſed in fee of one of the ſaid manors, *&c. ſuper quo quidem manerio ipſe et eadem pet. cohabitabant ut vir et uxor uſque diem obitus ſui*, and that he died, and this deſcended to the defendant as heir, and he entered, and that he and the demandant continually after the huſband's death *hucuſque commorabant et cohabitaverunt ſuper dicto manerio*, and that ſhe claimed at the will of the heir, *et non aliter*; and this was held no plea for the quarentine, becauſe ſhe did not ſhew the time of her huſband's death in certain, and the 40 days after. Dyer, 76. pl. 32. Kettleby's caſe.

2. Of the different Kinds of Inheritances.

Of a Uſe a Woman ſhall not be endowed.

[This muſt mean a uſe not executed.]

[So, of a truſt-eſtate of inheritance, or of an equity of redemption of a mortgage in fee, a woman ſhall not be endowed.] Chaplin v. Chaplin, 3 P. Wms. 229. Attorney General v. Scott, Ca. temp. Talb. 138. Goodwin v. Winſmore, 2 Atk. 525. Burgeſs v. Wheate, 1 Bl. Rep. 138. 161. Dixon v. Saville, 1 Br. Ch. Rep. 326.

Of an *annuity* to a man and his heirs, after a writ of annuity brought, a woman ſhall not be endowed: but if a rent-charge be granted to a man and his heirs, and before any diſtreſs made the huſband die, and the wife bring her writ of dower, the heir cannot, by claiming it to be an annuity, defeat her of her dower thereof: but if he brings an annuity, and recovers judgment before the wife, then it is become an annuity *in perpetuum*, and the wife ſhall be barred. Perk. 341. Co. Lit. 32. a. Moor, 83. Poph. 87. Co. Lit. 144. b.

Of *copyhold lands* a woman ſhall not be endowed, unleſs there be a ſpecial cuſtom for it; but if there be a cuſtom to be endowed thereof, then ſhe ſhall have the aſſiſtance of ſuch laws as are made for the more ſpeedy recovery of dower in general, being within the ſame miſchief, and therefore ſhall recover damages within the ſtatute of *Merton*. 4 Co. 22. Hob. 216. 5 Co. 116. *Vide* title Courteſy of England, and the reaſons there given. 4 Co. 3. Cro. Eliz. 426. Moor, pl. 559. Co. Lit. 33. a. If the wife of a copyholder brings dower in C. B. the lord of the manor may plead *ne unques ſeiſie que*, &c. and give the ſpecial matter in evidence.

Of a *caſtle for defence of the realm*, or of the homage and ſervices appertaining to war, a woman ſhall not be endowed, becauſe of no ſervice towards her ſupport and maintenance, and ſhe is ſuppoſed unable to aſſiſt in the defence of the realm: ſo, of the capital meſſuage, being *caput baroniæ*, or *comitatûs*, a woman ſhall not be endowed, becauſe this diviſion would leſſen the grandeur of the family, and diſable the heir to ſupport the dignity of his character. Roll. Abr. 676. Co. Lit. 30. b. 165. a. Perk. 406. 2 Inſt. 17. Though this ſeems to be the doctrine of the books cited, yet it has been lately adjudged, that a woman ſhall have a dower of the capital meſſuage, though it be *caput baroniæ*: the reaſons given for the judgment are, 1ſt, That the *caput baroniæ* ſpoken of in the ancient books was held by military tenure, which is now extinct, and was a caſtle of defence. 2dly, That the huſband being made a baron after the marriage, this could not deprive the wife of her dower

dower in any thing ſhe was before dowable of; and therefore though ſhe had accepted 400*l. per annum* in lieu of her dower, as was pleaded; yet it not appearing to be in lieu alſo of her dower in the capital meſſuage called Bromley Hall, ſhe had judgment, and this judgment affirmed in a writ of error: alſo, the books before cited agree, that of a private caſtle for habitation only a woman may be endowed; ſo, of the capital meſſuage of her huſband, if it be not *caput baroniæ*. Lady Gerrard v. Lord Gerrard. 3 Lev. 401. Salk. 54, pl. 1. 253. pl. 3. S. C. 5 Mod. 64. S. C. Comb. 352. S. C. Ld. Raym. 72. Skin. 592. pl. 6.

Style's Practical Regiſter, 122. 11 Co. 25.

Of *tithes* women were not dowable till 32 *H.* 8. *c.* 7. for before that ſtatute tithes were not a lay fee, but now they are dowable of them.

Co. Lit. 32. a. 159. a. Roll. Abr. 682. And the beſt way to aſſign dower of tithes is the third ſheaf, or the third part of the tithes generally, becauſe it is uncertain what part of the land will be ſown; and therefore if the garbs of any third part of the land in certain ſhould be aſſigned, the tenant may perhaps not ſow that part at all, and ſo defeat the dower. [But the aſſignment is good, though tithes of the third yard-land be aſſigned. M. 9. Jac. C. B. Kettleby's caſe. Hale's MSS. Co. Litt. 32. a. n. 3. 13th edit.] How dower of tithes of wool and lambs is to be aſſigned, *vide* Brownl. 126. 2 Brownl. 143.

Perk. 341, 342. F. N. B. 122. Co. Lit. 30. Roll. Abr. 675. 11 Co. 45. Style's Practical Regiſter, 122.

Of *common of paſture in groſs*, which is certain, a woman ſhall be endowed, but not of common without number, becauſe it cannot be divided without ſurcharging the common by two, which before was only in the power of one by the grant; and when one has power by the grant to put in as many cattle as he pleaſes, he alone is made judge of the number, which to divide, or delegate to another, would be unjuſt.

Cro. Car. 300. Drake v. Pruet. Jon. 315. S. C. Roll. Abr. 675. S. C.

Dower of ſeveral lands, meadow and paſture, and common of paſture *cum pertinentiis* in *D.* and upon *ne unques ſeiſie que* dower pleaded, and verdict for the demandant, it was moved in arreſt, *&c.* that of common in groſs without number a woman could not be endowed, which the court agreed; but here it being after verdict ſhould be intended common appendant, ſince otherwiſe the judge could not have directed the jury to find for the demandant; for though it be not ſaid *eiſdem ſpectans*, and though if appendant it was included in *cum pertinent.*, yet it is not *bis petitum*, but only an enumeration of the ſeveral things demanded.

Godb. 21.

In dower the demand was *de tertiâ parte liberæ faldæ*, and held not good for want of ſetting out in certain, for what cattle, as to their number and kind, and ſo like common without number.

Godb. 135. Bragg's caſe. [Owen, 4. S. C.] But for this *vide* Perk. 341. 343, 344. Cro. Jac. 621. Palm. 264. Brook, 102. Co. Lit. 32. 165. For which *vide* Perk. 343, 344. F. N. B. 148. 150. 155.

A woman entitled to dower of a manor, in which were copyholders, demanded her dower by the name of certain meſſuages, certain acres of land, and certain rents, and not by the name of the third part of the manor, and recovered and kept courts, and granted copyholds, which the whole court held to be void, becauſe ſhe had no manor, having made her demand, as of a thing in groſs: but if the demand had been of the third part of the manor, then ſhe would have had a manor, and might have kept courts and granted copies.

Of an *advowſon*, be it appendant or in groſs, a woman ſhall be endowed, for this may be divided as to the fruit and profit of it, *viz.* to have the third preſentation.

Co. Lit. 32. Cro. Jac. 621. Cro. Eliz. 360. Roll. Abr. 683. Co. Lit. 379. 3 Leon. Cro. Jac. 691. Roll. Abr. 685.

Of

Of a *villein in groſs* or *regardant* a woman ſhall be endowed; as to have the third day, or week, or month's work of ſuch villein, and the writ ſhall be *de libero tenemento*. Perk. 342. F. N. B. 148. c. Roll. Abr. 675. Co. Lit. 32. a. 164. b. 307. a. Brook, 91. 2 Brownl. 143.

Of a *mill* a woman ſhall be endowed, though it cannot be divided, and therefore ſhe ſhall have the third toll-diſh, or *integrum molendinum per quemlibet tertium menſem*. Co. Lit. 32. a. 11 Co. 25. Perk. 342. 415. 2 Brownl. 143. Bendl. 120. 4 Leon. 202. F. N. B. 149. Brook, 39.

Dower was brought *de tertiâ parte* of a mill, a kiln-houſe, *&c.* and judgment to recover the third part *in ſeparalitate per metas et bundas*; and this judgment was reverſed upon error brought, for it ought to have been of the third part generally, and if *per metas & bundas*, none of them can make any uſe of it. Lev. 181. Gilpin v. Cookſon. 2 Keb. 8. S. C.

Of a *bailiwick* a woman ſhall be endowed, as to have the third part of the profits: ſo, of a fair or market, the third part of the ſtallage: ſo, of an office, as the office of the Marſhalſea, to have the third part of the profits, and in ſuch caſes ſhe ſhall be contributory to the third part of the charge: ſo, ſhe may be endowed *de tertiâ parte exituum provenient. de cuſtodiâ gaolæ Abbatiæ Weſtmon.* or of the third part of the profits of courts, fines, heriots, *&c.* Perk. 342. Style's Practical Regiſter, 122. Co. Lit. 32. Roll. Abr. 676. F. N. B. 149. Plow. 379.

A woman may be endowed of the third part of the *profits of a park-keeper*, or of the third part of the *profits of a dove-houſe*, or of the third part of the profits of a piſcary, as the third fiſh, or *tertium jactum retis*. Co. Lit. 32. a. Plow. 379. b.

[So, a woman is entitled to dower out of ſhares in the navigation of the river *Avon* under the ſtatute of 10th of *Anne*.] Buckeridge v. Ingram, 2 Vez. jun. 652.

3. Of the Nature and Quality of ſuch Eſtate, whether ſole, joint, or in Common.

The huſband muſt be ſeiſed of an eſtate in fee-ſimple, fee-tail general, or as heir of the ſpecial tail; which neceſſarily excludes deſcendible freeholds: therefore, if a man make a leaſe for life, rendering rent to him and his heirs, and after marry, and die, his wife ſhall not be endowed of this rent, becauſe it is but a deſcendible freehold; nor of the land, becauſe not ſeiſed during the coverture. Roll. Abr. 676. *ſee post. 365.*

But if tenant in tail bargains and ſells his land to the huſband, and his heirs, the wife of the bargainee ſhall be endowed againſt his heir, but not againſt the iſſue in tail: ſo, if tenant in tail grant all his eſtate to one and his heirs, though it be of things which lie merely in grant, as rent, common, advowſons, *&c.* yet the wife of the grantee ſhall be endowed till the grant be avoided by the iſſue in tail: the reaſon of which difference between thoſe deſcendible freeholds, and theſe eſtates made by tenant in tail, ſeems to be, that, in the firſt caſe, the eſtate in its creation ſeems to be no greater than a freehold; but in the other nothing appears Saund. 261. Plow. 556. Bulſt. 165. 3 Co. 84. 10 Co. 96. 98.

to the contrary, but that it may be an abſolute fee, and till the iſſue comes in to ſhew it otherwiſe, and claim his right, it ſhall, to all intents, be regarded as ſuch; and, by conſequence, the wife of ſuch grantee or bargainee is well dowable thereof till the contrary appears.

Plow. 557. If tenant in tail be attainted of treaſon, and the king grant the land to one and his heirs, the wife of the grantee ſhall be endowed; for the king had a qualified fee, ſo long as the tenant in tail had iſſue; and this qualified fee paſſed to the grantee.

Cro. Eliz. 279. Blythman's caſe. 2 Co. 72. S. C. Moor, pl. 305. S. C. Yelv. 51. Freſhwater v. Bois. Moor, pl. 940. S. C. but if leſſee for life leaſes to the leſſor and his heirs, or the heir of his body, for the life of the leſſee, and after the leſſor dies, living the leſſee, the wife of the leſſor ſhall be endowed, becauſe this amounts to a ſurrender. Roll. Abr. 677.

But if tenant in tail covenant to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of his eldeſt ſon in tail, and after marry, and die, yet his wife ſhall be endowed; becauſe when he limits an eſtate for his own life, he hath executed all the power he had over the eſtate by ſuch manner of conveyance, and the remainder is merely void; and he continues tenant in tail, as he was before: ſo, if he had covenanted that the land ſhould deſcend, remain, or come to his ſon after his death; yet his wife ſhould be endowed; for this is only a covenant to permit his ſon to have what he ought not to hinder him of, and makes no alteration of the father's eſtate.

Roll. Abr. 677. Brook, 25. Perk, 338. If there be tenant in ſpecial tail, remainder to him in general tail or fee, and his wife die without iſſue, and he marry again, and die, his wife ſhall be endowed; for by the death of his firſt wife without iſſue, he was become tenant in tail after poſſibility, *&c.* which being but an eſtate for life was merged by the acceſſion of the remainder in tail or fee; and ſo his ſecond wife dowable.

Between Flavil and Ventrice; but *q.* for the court was divided upon it. Roll. Abr. 676. If *A.* ſeiſed in fee covenant to ſtand ſeiſed to the uſe of himſelf and his heirs, till *C.* his middle ſon take wife, and after to the uſe of *C.* and his heirs; and after *A.* die, and this deſcend to *B.* his heir, who dies, and then *C.* take wife; it ſeems the wife of *B.* ſhall loſe dower, becauſe the eſtate of the huſband ended by expreſs limitation made before her title of dower began; and therefore her dower, which is derived out of it, cannot continue longer than the original eſtate.

Vide Brook 19. 36. Cro. Jac. 615. Lit. § 53. 8 Co. 36. Co. Lit. 19. a. 2 Inſt. 336. Co. Lit. 31. Leon. 66. 3 Leon. 80. Noy, 66. Brook, 9. Dyer, 41. a. Perk. 302. Of an eſtate to a man and his wife, and the heirs of their two bodies; if ſuch wife die, and he marry a ſecond wife, and die, ſuch ſecond wife ſhall not be endowed, becauſe the iſſue by her cannot inherit *per formam doni.*

Roll. Abr. 677. Perk. 335. Brook 6. *Vide* Cro. Eliz. 564. *A.* tenant for life, remainder to truſtees for ninety-nine years, remainder to *A.* in tail; *A.* dies; his wife ſhall be endowed, notwithſtanding the intermediate eſtate for years. Salk. 254. pl. 4. Bates's caſe. Ld. Raym. 326. See the next caſe but one. The huſband muſt have the freehold and inheritance in him *ſimul & ſemel*, otherwiſe the wife ſhall not be endowed; therefore, if lands are given to the huſband for life, remainder to *B.* in tail, remainder to the huſband in fee or in tail, and he dies living *B.* or any of his iſſue, his wife ſhall not be endowed.

If

If a leaſe is made for life, rendering rent; the leſſor marries and dies; his wife ſhall not be endowed either of the rent or of the land: not of the land, becauſe her huſband was not ſeiſed of the freehold thereof during the coverture, and the rent was but a freehold for life. But if a leaſe is made for years, rendering rent, and the leſſor marries, and dies, his wife ſhall have dower of the third part of the reverſion, and of the third part of the rent, as incident to it; becauſe he had the freehold and inheritance in the land *ſimul & ſemel;* but ſhe ſhall not be endowed of the rent *per ſe*, merely becauſe her huſband was not ſeiſed of any freehold or inheritance in it: but if no rent be reſerved on the leaſe for years, then *ceſſet executio* during the term; and therefore, if a leaſe be made for years, remainder to *J. S.* and his heirs, the wife of *J. S.* ſhall be endowed; but *ceſſet executio* during the time.

Perk, 348. *See ante*, Brook, 44. 363. 60. 89. Co. Lit. 32. a. Perk, 335, 6. Roll. Abr. 678. Brook, 6. But if a leaſe for life or years be made by the huſband after the marriage, then his wife ſhall have her dower diſcharged of them, as ſhe ſhall from other charges of her huſband. Co. Lit. 32. a.

In dower upon *ne unques ſeiſie que dower* pleaded, the caſe was thus: *A.* tenant for life, remainder to *B.* and his heirs for the life of *A.*, remainder to the heirs male of the body of *A.*, remainder over; *A.* marries, and dies without iſſue; and if the remainder to *B.* and his heirs, during the life of *A.*, was ſuch an interpoſing eſtate between the eſtate for life to *A.* and the remainder to him in tail, that his wife ſhould not be endowed, was the queſtion? And for the demandant it was ſaid, that all the eſtate was really in *A.*, and the remainder to *B.* for the life of *A.* was but a poſſibility; that if *A.* ſhould commit a forfeiture, then *B.* might take advantage of it to preſerve the remainder; and though, by reaſon of this poſſibility, the eſtate for the life of *A.* is not merged, yet the tail is executed to ſuch purpoſe that his wife ſhall be endowed: but the court, on the firſt argument, gave judgment againſt the demandant; the (*a*) reaſon ſeems to be, becauſe the huſband was not ſeiſed of the freehold and inheritance *ſimul & ſemel.*

Duncombe v. Duncombe, 3 Lev. 437. (*a*) The books give no other reaſon for this diſtinction, but that it would be giving the wife a larger eſtate than the huſband had, whereas ſhe is in only in the *per*, and continuance of her huſband's eſtate. a poſſibility.

[The true reaſon is, that the remainder to *B.* was an intervening *veſted* eſtate, and not Freme's C. R. 509-10. 4th ed.]

[Lands were conveyed to the uſe of *A.* and his wife for life, remainder to the uſe of *B.* the ſon of *A.* and his wife for life, remainder to the firſt and other ſons of *B.* in tail, remainder to *A.* in fee; *A.* and his wife died in the lifetime of *B.*, who afterwards died without iſſue, leaving a wife: the queſtion was, whether the wife of *B.* was entitled to dower in the lands? And it was decreed ſhe was; for that the eſtate for life in *B.* was merged by the deſcent of the inheritance upon him, and the contingent remainder deſtroyed.]

Hooker v. Hooker, Ca. temp. Hardw. 13.

If the huſband is ſeiſed of a joint eſtate, and dies, his wife ſhall not be endowed; as if lands are given to two men and their heirs, or the heirs of their two bodies, and one of them dies, his wife ſhall not be endowed, but it ſhall go to the ſurvivor, who is then in from the firſt feoffor or donor, and may plead it as an original feoffment or gift to himſelf; and ſo is paramount to her

Co. Lit. 37. b. Br. Dower, pl. 4. 84. Cro. Car. 191. which laſt book ſays it was

her title of dower, which is not complete till her huſband's death.

the ancient courſe in mortgages, to make the eſtate to two, in order to prevent the mortgagee's wife of dower.

Perk. 334. So, if lands are given to two men, and the heirs of the body of one of them, and he who hath the tail marries, and dies, leaving iſſue; yet his wife ſhall not be endowed, but the ſurvivorſhip ſhall take place: yet ſhall the wife be endowed upon the death of the ſurvivor, becauſe the huſband, during the coverture, was not ſeiſed of an eſtate whereof ſhe was dowable.

Cro. Eliz. 503. Broughton v. Randal. Noy, 64. S. C. But the caſe as reported, is upon another point. Father and ſon jointenant, to them and the heirs of the ſon, were both hanged in one cart for felony; the wife of the ſon brought dower, and upon *ne unque ſeiſie que dower* pleaded, this matter was given in evidence; and further, that the ſon ſurvived *, as appeared by ſhaking his leg; and adjudged ſhe would be dowable.

* I think there is a caſe in the civil law, where father and ſon were loſt at ſea in the ſame ſhip, and adjudged the ſon ſurvived, as being according to the courſe of nature, and it was reaſonable to ſuppoſe (being of full age) he was able longer to reſiſt the force of the waters, than a father, who, being much older, might be preſumed to be weaker.

Co. Lit. 34. b. 37. a. Lit. § 44, 45. Of a tenancy in common a woman ſhall be endowed, for there no ſurvivorſhip takes place, but each moiety deſcends to the reſpective heirs of the reſpective tenant in common; and in ſuch caſe a dower ſhall be aſſigned in common too, for ſhe cannot have it otherwiſe than her huſband himſelf had.

4. Of its Continuance; wherein of Eſtates conditional, ſuſpended, determined, or extinguiſhed; and therein of Remitters to the Heir, and Recoveries by Title Paramount.

See Co. Lit. 241. a. note 4. 13th edit. Perk. 317. Brook, 18. 86. Bulſt. 163. Vaugh. 40. F. N. B. 149. 8 Co. 34. Co. Lit. 31. 6 Co. 41. Co. Lit. 224. a. As to its continuance; in ſome caſes this is material, and in ſome not: and therefore if donee in tail of rent or land marries, and dies without iſſue, and the donor enters; yet the wife of the donee ſhall be endowed, though in this caſe the eſtate-tail has no continuance; for to have dower is ſuch an incident to an eſtate-tail, that if one make a gift in tail, upon condition, that the wife of the donor ſhall not be endowed; this condition is repugnant and void.

Dyer, 343. pl. 58. Perk. 348. Brook, 44. Co. Lit. 32. a. 241. a. Plow. 155. F. N. B. 149. But if a rent be reſerved to the donor and his heirs, upon ſuch gift in tail, the wife of the donor ſhall be endowed of ſuch rent no longer than the eſtate-tail continues.

Plow. 156. Co. 87. Brook, 51. Perk. 327. If one grant a rent out of his land to *J. S.* and his heirs, upon condition, that if the grantee die, his heir within age, that then, during ſuch nonage, the rent ſhall ceaſe; if the grantee die, his heir being within age, yet the wife of the grantee ſhall be endowed; but *ceſſabit executio* during the nonage of the heir; for ſuch

ſuch condition is part of the original conſtitution and nature of the rent, and then the wife can have it in no other manner than her huſband had it granted to him.

If the huſband ſeiſed of a rent in fee, or fee-tail, releaſe it to the tertenant, the rent is extinguiſhed by it; and yet, as to the wife, has ſuch continuance, that ſhe ſhall have dower thereof; which the huſband, by his own act, cannot debar her of. 6 Co. 79. 7 Co. 65. S. P.

If the huſband be ſeiſed of a defeaſible eſtate during the coverture, yet his wife ſhall be endowed thereof till it be actually defeated; as if the huſband and wife, leſſees for life, ſurrender to him in the reverſion; this is defeaſible by the wife, after the huſband's death; yet in the mean time, if the reverſioner dies, his wife ſhall be endowed. Roll. Abr. 677. (14, 15.) So, if a diſſeiſor die ſeiſed, and the diſſeiſee abate, yet

the wife of the diſſeiſor ſhall be endowed: ſo, if tenant for life ſurrender, or grant his eſtate to the huſband in reverſion, upon condition, the wife of the reverſioner ſhall be endowed till it be broken. Roll. Abr. 677. Brook, 74.

If a feoffment be made to the uſe of *J. S.* and his heirs, till *J. D.* hath done ſuch a thing, and then to the uſe of *J. D.* and his heirs; if *J. S.* die, his wife ſhall be endowed till the thing performed. Leon. 168. and Anderſon holds ſhe ſhall be endowed after, which

ſeems not reaſonable, becauſe his eſtate is then determined by expreſs limitation, to which it was at firſt ſubject; but for this *vide* Perk. 317. Lit. § 357. 2 Co. 59. 79. Roll. Abr. 678. Brook, 62.

If land be mortgaged to the huſband in fee, and the condition be broken; and after, upon agreement, the mortgagor have the land by payment of the money; yet the wife of the mortgagee ſhall be endowed; for by non-payment of the money at the day, the eſtate of the mortgagee was become abſolute, and his wife entitled to dower thereof: ſo, if the money was paid at the day, yet if paid by a ſtranger, who was no ways privy to the condition, the wife of the mortgagee ſhall be endowed; for conditions being in law taken ſtrictly, if they are not complied with, according to the terms thereof, it is as if they were not performed at all; and ſo the wife, who is a ſtranger, ſhall not be prejudiced thereby. Roll. Abr. 679. Perk. 392. Brook, 11. Cro. Car. 191. though this be the expreſs doctrine in the common law courts, yet in Chancery, when the mortgagor comes to redeem,

even the woman's dower is avoided; for the huſband's eſtate was *ab initio* incumbered with equity, and in that court the mortgagee is conſidered as a truſtee for the mortgagor. Hard. 465. Abr. in Equity, 311.

If tenant in tail diſcontinue in fee, and after take a wife, and diſſeiſe the diſcontinuee, and die ſeiſed, his wife ſhall not have dower, becauſe the iſſue is remitted to the ancient entail, which being a reſtitution to an ancient right, muſt take place of the dower of the wife of a ſubſequent wrongful eſtate, in as much as the eſtate of which ſhe is dowable is defeated. F.N.B. 149. Co. Lit. 331. a. 332. b.

So, if a man hath title of action to recover any land, and he enters, and diſſeiſes the tenant of the land, and dies ſeiſed, upon which his heir enters; now he is remitted to the ancient right which his anceſtor had; and, by conſequence, the wife of the anceſtor ſhall loſe her dower of the wrongful eſtate her huſband had, which is determined and gone by act of law. F.N.B. 149. In Dower, the tenant ſhews that land was entailed to his father, huſband of the

demandant, and his wife, mother of the tenant in ſpecial tail, and that after his father diſcontinued the tail

tail by fine to a ſtranger, and took back an eſtate by grant and render in general tail, and had iſſue the tenant; and the firſt wife died, and his father married the demandant, and died, and ſo he is remitted to the firſt entail, to which the court clearly agreed, and gave judgment that the demandant ſhould be barred. 44 E. 3. 26. Brook, 14. S. C. but Q. at this day, ſince the ſtatutes of 4 H. 7. c. 24. and 32 H. 8. c. 28. if the iſſue ſhall be remitted upon ſuch fine, for theſe ſtatutes ſeem againſt it, and then the wife ſhall be endowed.

Perk. 309. If there are father and ſon, and the father exchange lands with a ſtranger, and die, and the ſon marry, and enter into the land taken in exchange; and the ſtranger, being impleaded for his lands, vouch the ſon as heir, who enters into the warranty, and loſeth, and thereupon execution be had accordingly, and then the ſon die; his wife ſhall not been dowed of the lands taken in exchange; becauſe the recovery thereof againſt her huſband hath relation to the time of the exchange made, which was before her title of dower began.

Perk. 322. F.N.B. 150. If two coparceners in gavelkind make partition, and one marries, and the other is impleaded for his part, and prays in aid of the other coparcener, who joins in aid with him, and the demandant recovers, and the tenant hath *pro rata* of that which remains in the poſſeſſion of the other coparcener, who after dies; his wife ſhall not have dower of that which was recovered *pro rata*, becauſe the recovery hath relation to the death of the anceſtor, which was paramount to her title of dower.

If a diſſeiſor makes a feoffment in fee with warranty, and the feoffee marries, and the diſſeiſee brings a writ of entry in the *per* againſt the feoffee, who vouches the feoffor, &c. and each recovers in value againſt the other, and they have execution accordingly, and the feoffee dies, his wife ſhall have dower of the land recovered in value, but not of the land loſt, becauſe by title paramount: but if one recovers in value againſt the huſband by warranty of his anceſtor, and the huſband dies, his wife ſhall be endowed of the land recovered from him, becauſe this was by force of the warranty, and not by elder title.

5. Of the Value and Improvement of the Huſband's Eſtate, either in his Lifetime, or after his Death.

Co. Lit. 32. a. Perk. 328. If a diſſeiſor or feoffee upon condition, improve the lands of the huſband by building, &c. and the huſband enter on the diſſeiſor, or for the condition broken, he ſhall have all the improvements, becauſe the eſtate of the one was tortious, and the other uncertain; and it was their folly to make ſuch improvements; but if the huſband had died before ſuch entry, and his wife had recovered dower; Q. if ſhe ſhould have the third part of ſuch improvements, for her huſband was never ſeiſed.

If a feoffment in fee of lands, and the feoffee builds thereon, and improves the ſame greatly in value; yet the wife of the feoffor ſhall have dower only according to the value it was of in the huſband's time; for if ſuch feoffment were with warranty, the heir would be bound to render only the value as it was at the time of the feoffment.

Co. Lit. 32. a. 2 Inſt. 81. If the heir improve the land by building or ſowing it, the wife ſhall recover her dower with the improvement upon it, becauſe by her huſband's death her title to dower was conſummate, and the improvements as to her part were *quaſi* upon her land; for which reaſon likewiſe, if the land be impaired in value in the time of the heir, ſhe ſhall ſhare in the loſs, unleſs it were voluntary by the heir himſelf, and then ſhe ſhall recompence herſelf in damages againſt him.

If

If the husband himself, or his feoffee, pull down houses, &c. and then the husband die; it seems, the wife hath no remedy for those houses, because, before her title was consummate, the thing itself was destroyed. Perk. 329. If the husband sow part of the land, and die, and this part be assigned to the wife for dower, whether the wife or the executor of the husband shall have the crop, Q. & *vide* Dyer, 316. pl. 2. 2 Inst. 81.

(C) Of the Things requisite to the Consummation of Dower, *viz.* Marriage, Seisin, and the Death of the Husband.

1. Of the Marriage, how long it must continue; and therein of the several Sorts of divorces.

IF a man make a contract of matrimony with a woman, and die before the marriage be solemnized between them, she shall have no dower, because she never was his wife. Perk. 306. It was formerly held, that a woman married in a chamber should not have dower, 16 H. 3. and that the marriage should be celebrated *in facie ecclesiæ*; but the law is now altered, and marriages in private houses, if all circumstances are complied with, held good; and that God is not less present in such houses than in the most sanctified places. Perk. 306. F. N. B. 150. But see 26 Geo. 2. c. 33.

If a woman make a contract of matrimony with *J. S.*, and then marry with *J. D.*, who is seised of lands, and die, she shall have dower of the lands of *J. D.* But if a man marry a second wife, living the first, and die, such second wife shall have no dower: so, if a woman marry a second husband, living the first, and die, she shall have no dower. Perk. 304-5. Moor, 226.

Upon issue of *ne unques accouple en loyal matrimony*, the bishop ought to certify, that they were accoupled in lawful marriage, though the man be under fourteen, or the wife above nine, and under twelve years of age at his death, because it was a good marriage till avoided, which now cannot be after his death: but if either disagree to the marriage at their age of consent; then it is avoided *ab initio*, and the wife shall have no dower. Co. Lit. 33. a. Dyer, 305. 313. 369.

In dower, upon *ne unques accouple en loyal matrimony*, and issue thereupon, a writ was awarded to the bishop, who certified that the demandant was accoupled *in vero matrimonio cum prædicto* B. *sed clandestino*, & *quod* B. & E. (demandant) *thori & mensæ parti cipatione mutuo cohabitaverunt usq; ad mortem prædict.* B. and judgment thereon given for the demandant, and error brought and assigned (*inter alia*) that there was neither day nor place of the marriage mentioned in the bishop's certificate: but the court held it not material nor issuable, because the certificate from the bishop is concluding. 2. That the certificate is not good, because it did not answer to the words of the issue, *ne unques accouple en loyal matrimony*; for that it was a true matrimony, and that they lived together at bed and board, is but argumentative, that they were *legitimo matrimonio copulati*: but the court disallowed this exception; for *vero matrimonio*, though *clandestino*, *copulati fuerunt*, is as good as *legitimo matrimonio*, and hath all one intendment; and though Cro. Car. 351. Wickham v. Enfield. But for this *vide* Brook 54. Dyer, 313. pl. 92. 368. pl. 48. 9. 305. pl. 60. Co. Lit. 33. b. 9 Co. 19.

it be *clandeſtino*, yet it doth not vitiate the marriage; and when it is added, that *thori & menſæ participatione cohabitaverunt, &c.* this proves they continued as huſband and wife during his life, and therefore it is not to be queſtioned now; and the judgment affirmed.

Stowell v. Weeks, Noy, 108. adjudged. Godb. 145. Co. Lit. 32. a. 33. b.

If there be a divorce *cauſâ adulterii*, yet the wife ſhall be endowed; for this does not diſſolve the marriage, but only ſeparates the parties *a menſâ & thoro*, and the marriage ſtill ſo continues in force, that if either of them marry any other, ſuch marriage is void.

2 Leon. 171. Cro. Car. 463. 7 Co. 70. Roll. Abr. 680. *cont.*

Cro. Car. 492-3. Porter's caſe. A wife ſhall be endowed, notwithſtanding a divorce *cauſâ profeſſionis*, for which *vide* Roll. Abr. 681. 2 Leon. 169. Moor, 226. Cro. Car. 462. 2 Inſt. 687. Co. Lit. 32. but *vide* 32 H. 8. c. 38. by which it ſeems that this and other ſcrupulous divorces are taken away.

So, a divorce *propter ſævitiam* or *metum*, is of the ſame nature, and does not diſſolve the bond of matrimony, but is only a proviſion for the woman's ſafety, that ſhe may avoid her huſband's cruelty and ill uſage: and therefore, the wife in ſuch caſe ſhall be endowed the rather.

Roll. Abr. 681. Co. Lit. 32. a. 33. b. 7 Co. 70. 5 Co. 98. 2 Leon. 169.

But if there be a divorce *cauſâ præcontractus, cauſâ conſanguinitatis, cauſâ affinitatis*, or *cauſâ frigiditatis*, the wife ſhall not be endowed; for theſe diſſolve the *vinculum matrimonii*, and leave the parties at liberty to marry again: but if either of the parties die before ſuch ſentence of divorce be actually pronounced, it cannot be pronounced after; and therefore if the huſband die before ſuch divorce, his wife *de facto* ſhall have dower, for it was *legitimum matrimonium quoad dotem*, and the biſhop ought to certify that they were *legitimo matrimonio copulati*.

Cro. Car. 217. Fuſſiam v. Harris.

In dower, the writ was *præcipe* A. *quod reddat* B. *rationabilem dotem ſuam* of the lands, *&c. dudum* C. *quondam viri ſui;* and for not ſaying, *præcipe quod reddat* B. *quæ fuit uxor* C. *&c.* that ſo ſhe might appear to have title of dower as his wife, it was held ill; and that *quondam viri ſui* would not ſufficiently help it.

2. Of the Seiſin, either in Fact or in Law; and herein of the Seiſin in Fact, as it is continuing, or not continuing, as inſtantaneous.

Perk. 304. Co. Lit. 31. 358. Lit. § 681. 8 Co. 34. 36. F. N. B. 149. Stanf. Prer. 41. Brook, 66, 75. * Though a ſtranger abates. Perk. 371.

The huſband muſt be ſeiſed either in fact or in law, to entitle his wife to dower. But a ſeiſin in law is ſufficient for that purpoſe, becauſe otherwiſe it would be in the huſband's power to defeat his wife of a ſubſiſtence after his death, by his own negligence or malice, and ſhe cannot enter to gain a ſeiſin in his right, as he may do into lands deſcended to her; which is the reaſon, that of a ſeiſin in law a man ſhall not be tenant by the curteſy; and therefore if the anceſtor die ſeiſed, and the huſband * die before he enter into the land; yet his wife ſhall be endowed, though he had but a poſſeſſion or ſeiſin in law.

Perk. 372.

So, if a leaſe be made for life, remainder to *J. S.* in fee, who marries, and the leſſee die, and then a ſtranger enter and intrude upon

upon the poſſeſſion, and *J. S.* die before any entry made by him, yet his wife ſhall have dower.

If the huſband purchaſe rent, and die before the day of payment, yet his wife ſhall be endowed, nay, though the day of payment be come, and the rent be tendered to the huſband, who will not receive it, but utterly refuſes it, and dies before any receipt thereof by him, or any other for him, and before any thing paid in the name of ſeiſin thereof. Brook, 35. 66. 71. Perk. 373.

But if there be neither ſeiſin in fact nor ſeiſin in law in the huſband during the coverture, but only a right of entry or action, then his wife ſhall not have dower; and therefore, if a man be diſſeiſed, and then marry, and die before any entry made by him, his wife ſhall not be endowed of that land. Perk. 366. So, if the father die ſeiſed, and a ſtranger abate, and then after the heir marry, and die before entry, his wife ſhall not have dower; becauſe by this abatement the ſeiſin in law, which he had, was deveſted before his marriage; and ſo he was neither ſeiſed in fact nor in law, during the coverture. Perk. 367.

So, if exchange be of lands between *A.* and *B.*, and *A.* enter into the lands of *B.*, and then *B.* marry, and die before any entry into the lands of *A.*, his wife ſhall not have dower of thoſe lands. Perk. 369.

If one enfeoff a ſtranger, upon condition to be performed on the part of the feoffee, and after marry, and then the condition be broken, and the feoffor die before any entry made, his wife ſhall not have dower; becauſe there was no ſeiſin at all in the huſband, during the coverture. Perk. 368.

So, if a man make a bargain and ſale to one and his heirs by indenture enrolled, with a *proviſo*, that if ſuch act be done, the bargain and ſale ſhall be void; and after the bargainor take a wife, and then the condition be broken; and before entry the bargainor die; his wife ſhall not have dower; for though the eſtate of the bargainee veſted by 27 *H.* 8. *c.* 10. of uſes; yet becauſe the huſband did not re-enter, the eſtate of inheritance in the bargainee was not deveſted, nor had the huſband any ſeiſin during the coverture. 6 Co. 34. Fitzwilliam's caſe; but if the words had been, that after the condition broken, the bargain and ſale ſhould be to the uſe of the bargainor in fee, &c. becauſe then the ſtatute reveſts the poſſeſſion in him again according to the uſe.

In ſome caſes, though the huſband be ſeiſed in fact, yet his wife ſhall not have dower; as, of an inſtantaneous ſeiſin (*a*); and therefore, if two jointenants are, and one of them makes a feoffment of his part, and dies, his wife ſhall not be endowed, becauſe he was ſole ſeiſed but for an inſtant when he made the livery: ſo, if *ceſtui que uſe* (*b*) after the ſtatute 1 *R.* 3. *c.* 5. and before 27 *H.* 8. *c.* 10. had made a feoffment in fee, and died, his wife ſhould not be endowed, becauſe her huſband was ſeiſed but for an inſtant. Co. Lit. 31. F. N. B. 150. Roll. Abr. 676. Moor, 56. [(*a*) The propoſition, that in the caſe of an inſtantaneous ſeiſin, the wife ſhall not be endowed, though here laid down broadly, is by no means general. When, indeed, the ſame act which gives the huſband the eſtate, conveys it out of him again, when he is the mere inſtrument of paſſing the eſtate, the tranſitory ſeiſin gained by ſuch an inſtrumentality does not in general ſeem ſufficient to entitle the wife to dower. But when the land in the language of Sir Wm. Blackſtone, 2 Comm. 132. *abides* in the huſband for a ſingle moment, that is, as a later writer explains it, Preſton on Eſtates, tit *Dower*, when he has a ſeiſin for an inſtant *beneficially for his own uſe*, the title to dower ſhall ariſe in favour of the wife. Thus, in the caſe put above, where lands deſcend on a man who is married, and a ſtranger enters by abatement immediately, after the death of the anceſtor—there the wife of the heir ſhall have

have her dower, and yet the huſband has merely a ſeiſin in law, and that for an inſtant only, for the abatement deveſted it from him. So, in the caſe above of the father and ſon jointenants, who were hanged out of one cart, where the queſtion depended on the priority of their death. And, where a huſband *tortiouſly* gains an inſtantaneous ſeiſin, as againſt the perſon benefited by, and deriving an eſtate in virtue of, ſuch tortious act, the wife is entitled to her dower. Thus, in Matthew Taylor's caſe in C. B. 34 El. cited in Sir W. Jon. 317. where tenant at will, or for years, makes a feoffment in fee, and dies, and his wife brings dower, the feoffee cannot plead that the huſband was never ſeiſed; for as the court there ſay, in an inſtant he gained a ſeiſin, or as it is better explained *ſupra* tit. *Diſſeiſin* (A), ſince the feoffee received his eſtate from him, he is eſtopped to ſay that the huſband was never ſeiſed: beſides, in reſpect of the feoffee the feoffor had an eſtate, though in regard to the diſſeiſee he is to be conſidered as a wrong-doer. (*b*) It may be queſtioned whether either of theſe inſtances will ſupport the doctrine here advanced, *viz.* that there cannot be dower in the caſe of an inſtantaneous ſeiſin. In the firſt, the huſband is never *ſolely* ſeized during the coverture: for when he makes the feoffment he is ſeiſed *jointly* with his companion: the tenancy is not ſevered *until* the huſband has made the conveyance, and departed with all his right and eſtate; and conſequently, during all the time he hath ſeiſin of the eſtate, he hath it *jointly* with ſome other, and not *ſolely* by himſelf. In the other inſtance, *viz.* of the *ceſtui que uſe*, the huſband hath not ſeiſin of the land *at any period:* he had merely the *uſe* with the *power* in virtue of the ſtatute of 1 R. 3. of transferring that quantity of eſtate in the *land* which he had in the *uſe*. Preſton on Eſtates, *ubi ſupra*.]

Roll. Abr. 676. Brook, 30. Cro. Jac. 615.

If leſſee for life makes a feoffment in fee, or a leaſe *pur auter vie*, and dies, his wife ſhall not have dower, becauſe he gained the fee but for an inſtant, and parted with it again, and this was no diſſeiſin.

[*Secùs*, of ſuch a feoffment or leaſe by a tenant at will, or for years, for thereby he gains a freehold. Sir W. Jon. 317. Br. tit. Diſſeiſor, &c. pl. 67. 12 E. 4. 12.]

Cro. Jac. 615. Amcotts v. Catherick, Roll. Abr. 676. S. C.

If tenant in ſpecial tail marries a ſecond wife, who is not dowable of the tail, and after makes a feoffment in fee, and dies, his wife ſhall not have dower, becauſe he gained the fee but for an inſtant.

Co. Lit. 31. Vaugh. 41. Cro. Car. 191. 3 Leon. 11.

So, if conuſee of a fine grant and render the land by the ſame fine to the conuſor, and die, his wife ſhall not be endowed, becauſe he had ſeiſin but for an inſtant.

Sneyd v. Sneyd, 1 Atk. 442.

[So, if a huſband become entitled to eſtates by virtue of ſurrenders from tenants by copy of court roll, and grant them out again by copy of court roll, this inſtantaneous ſeiſin of the freehold will not entitle the wife to dower.]

3. Of the Death of the Huſband.

F. N. B. 150. Roll. Abr. 678. Perk. 307. Co. Lit. 33. b.

As to the death of the huſband, this is either a natural or a civil death; but upon a civil death the wife ſhall not be endowed; as, if the huſband enter into religion, and be profeſſed, his wife ſhall not have dower till he be naturally dead; for though upon ſuch profeſſion his heir may enter, and a writ of *mortdanceſtor* lies; yet becauſe he could not enter into religion without the aſſent of his wife, and if ſhe had diſſented, his profeſſion would be void; therefore if ſhe does aſſent, ſhe in a manner vows chaſtity as well as her huſband, and ſhall have no dower during his natural life.

Bendl. pl. 31. Thorn v. Rolf, Dyer, 185. S. C.

In dower of the lands of *A.* her late huſband, the tenant pleads in bar that *A.* the huſband was in full life at ſuch a place, *et hoc paratus eſt verificare qualitercunq; curia, &c.* the demandant replies that her huſband *obiit* at ſuch a place, *&c. et eſt in eccleſiâ ibidem*

ibidem ſepultus, et hoc parata eſt verificare qualitercunq; curia, &c. Ideo conſiderat. eſt quod prædict. M. (demandant) *doceat de morte*, and *dictus* R. (tenant) *de vita viri, et ſuper hoc dies datus eſt, &c.* at which day the demandant examined two witneſſes who did not ſpeak directly to his death, but only of their great intimacy with him, and his being gone beyond ſea for his religion, and that they had not heard of him in ſeven years, and concluded that in their conſciences they rather think him dead, and the tenant examining no witneſſes to prove him living, the demandant had judgment.

Moor, pl. 55. S. C. And in Dyer a caſe is cited, where the death of the demandant's huſband was proved by four witneſſes, who agreed in all points, and

at the day of the eſſoign of the tenant he produced twelve witneſſes *de vita viri*, who alſo agreed in all points; and this was held the ſtronger proof, and the demandant was barred; for in theſe caſes the rule is *qui melius probet melius habet.*

(D) Of the Aſſignment of Dower.

1. By what Perſons.

IF a diſſeiſor, abator, or intruder aſſign dower, this is good, and ſhall not be avoided, unleſs they be in of ſuch eſtates by fraud and covin of the woman, to the intent ſhe may be endowed by them, or recover dower againſt them, and then this ſhall be avoided by the entry of him who hath right, though the aſſignment be indifferently made by the ſheriff after judgment of an equal third part.

Perk. 394, 395. 398. Co. Lit. 35. a. 2 Co. 67. 3 Co. 78. 5 Co. 30. 6 Co. 58. Plow. 54. b. Brook, 15.

59. The reaſon why ſuch aſſignment ſhall bind is, becauſe ſhe had a right to be endowed thereof, and might have compelled them as tertenants to aſſign her dower thereof, and ought not to expect till the heir will re-enter or ſue for recovery of his right: but if there were covin in her, and yet notwithſtanding this ſhould bind the heir, it would encourage ſuch violence and wrong to the heir as would put him to great trouble and expence to recover his right, without any default in him. But an aſſignment of a rent out of ſuch lands by them ſhall not bind, becauſe *de jure* not dowable of ſuch rent, *vide poſtea.*

If there be two or more jointenants of land, whereof a woman is dowable, and one of them aſſign her dower thereout, this is good, and ſhall bind the others, becauſe they were compellable to aſſign it in ſuch manner: but if one of them had aſſigned her a rent thereout in lieu of dower, this ſhould not bind the reſt, becauſe they could not be compelled to it by ſuit.

Perk. 397. Co. Lit. 35. 2 Co. 67. [This caſe of aſſignment of dower by one of two

or more jointenants muſt be underſtood to be where the huſband has been ſolely ſeiſed during the coverture, and afterwards conveys or deviſes the lands to two or more jointly and dies; for the wife of a jointenant is not dowable. *Vide ſupra.*]

If the huſband makes ſeveral feoffments of his land to ſeveral perſons, and one of them endows the wife of the feoffor of his part in ſatisfaction of all that ſhe ought to have of the other feoffees, and ſhe accepts it, this is good: but yet the others cannot take benefit of it, becauſe ſtrangers thereto, and cannot plead it, nor have any means to bring the other into court to plead it: but if the heir aſſigns her dower in ſatisfaction of dower out of his own lands, and the lands of the feoffees, then if a writ of dower be brought againſt the feoffees, they may vouch the heir, who may (*a*) plead this for his own ſafety, leſt they recover in value againſt him.

Co. Lit. 35. 9 Co. 18. Perk. 400. 402. (*a*) *Per* Moor, 26. the alienee himſelf may plead this aſſignment by the heir. *Vide* Co. Ent. 172. and Cro. Eliz. 842.

Perk. 399. Brook, 23. Roll. Abr. 681.

If the husband seised of lands in right of his wife, or jointly with his wife, of lands whereof a woman is dowable, assigns the third part of the same lands to the woman for her dower; this is good, and shall bind the wife, although she survives him, because they might be compelled to it by suit.

Perk. 403. 404. Co. Lit. 35. Brook, 63. 94. Roll. Abr. 681.

None can assign dower but those who have a freehold, or against whom a writ of dower lies; therefore a (*a*) guardian in socage, tenant by statute merchant, statute staple, or *elegit*, or lessee for years, cannot assign dower, for none of these have an estate large enough to answer the plaintiff's demand.

6 Co. 57. Co. Lit. 38. b. 39. a. 9 Co. 16, 17. F. N. B. 148. (*a*) But a guardian in chivalry, though he have but a chattel, may after his entry into the land assign dower; for which *vide* Plow. 141. Roll. Abr. 682. Co. Lit. 35. 38. Brook, 20. 9 Co. 17. 2 Inst. 262.

2. Of the Manner; and herein of assigning it by Metes and Bounds.

Roll. Abr. 683. Moor, pl. 47. 66. Which last book says that assignment by the sheriff in such manner is good, if it be equal in quantity.

If a woman be dowable of land, meadow, pasture, wood, &c. and any one of these be assigned in lieu of dower of all the rest, it is good, though it be against common right, which gives her but the third part of each; for the heir's enjoyment of the residue sufficiently accounts for her title to what she has.

Roll. Abr. 683. But to a writ of *habere facias seisinam* the sheriff cannot return that he delivered the demandant one of the manors in recompence of her dower.

If a woman be dowable in three manors, and accept of the heir one of those manors in lieu of dower in all the rest, this is good, though against common right, which gives her but the third part of each manor.

Perk. 407. Co. Lit. 34. 4 Co. 1. Co. Lit. 169. Brook, 3. But if the rent be granted by indenture, then it works by way of *estoppel*; so, if by deed poll, or by parol, and she agrees to it, and accepts the rent, she is concluded; *vide* Perk. 410. Dyer, 91. pl. 12. In dower, the tenant pleads in bar assignment to her of a rent out of the same land for her life, *virtute cujus* she was *in dominico suo ut de libero tenemento*, &c. But for not alleging that he was seised of the land at the time of the assignment, so that he might grant such rent, it was ruled against him. Dyer, 361. pl. 11. Beamond v. Dean, 2 Leon. 10. S. C. [(*b*) But see 2 H. 5. 12. The heir assigns dower of lands of which the husband was seised, but the wife not dowable, she is tenant in dower. 30 E. 1. Briefe. 884. If wife be endowed, and afterwards exchange with the heir for other lands which were the inheritance of the husband, she shall be said to be tenant in dower of the lands so taken in exchange, and her entry shall be said to be by the husband. *Per omnes justiciarios.* Hal. MSS. Co. Lit. 34. b. n. 9. 13th edit.]

If lands whereof a woman has no right to be endowed, or a rent out of such lands, be assigned in lieu of her dower, yet this is no bar to her to demand her dower; for she having no manner of title to those lands, cannot without livery and seisin be any more than tenant at will, which is no sufficient recompence for an estate for life, which her dower was to be (*b*).

Moor, pl. 167. Dyer, 91. in margine.

In dower the tenant pleads that he hath assigned to her, in recompence of her dower, 20 bushels of wheat yearly out of the same land for her life; and held a good bar, and in the nature of a rent: but sheep, horses, &c. assigned in recompence of dower are no bar, because they neither issue out of land, nor are of the nature of land.

A woman

A woman recovers dower, and hath a writ to the ſheriff, who returns that he hath delivered 84 acres to the demandant of the land mentioned in the writ; and afterwards a *ſcire facias* is brought, ſuggeſting that 60 acres of the 84 aſſigned to her by the ſheriff are a ſtranger's, not mentioned in the record, and therefore ſhe ought to have a new diviſion; the tenant ſays that the other 24 acres were parcel of the land recovered, and that ſhe had entered and accepted the 24 acres; and upon demurrer it was adjudged, that ſhe was barred by her acceptance and entry into the 24 acres. Moor, pl. 928.

A woman entitled to dower cannot enter till it be aſſigned to her, and ſet out either by the heir, tertenant, or ſheriff, in certainty. Roll. Abr. 681. Dyer, 343. Plow. 529.

Brook, 16. Co. Lit. 34. b. 37. a. b. And the reaſon ſeems to be from the partiality every one is preſumed to have for themſelves and their own intereſt; and therefore the law will not allow her in ſuch caſe to be her own carver: another reaſon may be for the better direction of ſtrangers, that they may more certainly know againſt whom to bring their *præcipe*, which they cannot be ſo well appriſed of, if ſhe might enter privately, and take what part ſhe pleaſed. But ſhe need not ſtay for the return of the writ of *habere facias ſeiſinam*, nor for the ſecond judgment. Palm. 265, 266. Howard v. Cavendiſh. And though ſhe once refuſes to accept the part aſſigned to her by the ſheriff, yet may ſhe afterwards enter into it. Dyer, 278.

The aſſignment of dower muſt be abſolute, and not ſubject to be defeated by any condition, nor leſſened by any exception or reſervation; for ſhe comes to her dower in the *per* by her huſband, and is in, in continuance of his eſtate, which the heir or tertenant are but miniſters or officers of the law to carve out to her; and therefore ſuch conditions or reſervations are either totally void, and her eſtate abſolutely diſcharged from them, or elſe the eſtate aſſigned with ſuch condition or reſervation is no bar to her recovery of dower, in an action brought for that purpoſe; as if the trees are excepted in an aſſignment of lands whereof ſhe is dowable, the exception is void. Roll. Abr. 682. 7 Co. 37. Plow. 25. b. 2 Inſt. 153. Hob. 153. Co. Lit. 34. b. 241. a. [The dowreſs holds of the heir; but by the inſtitution of law ſhe is in of the eſtate of her huſband; ſo that after the heir's aſſignment, ſhe holds by an infeudation from the immediate death of her huſband. Hence it is, that dower defeats deſcent, becauſe the lands cannot be ſaid to deſcend as demeſne which are in tenure; and the aſſignment of dower being in the nature of infeudation, and taking place immediately from the death of the huſband, there are only two-thirds which deſcended as demeſne. Gilb. on Dower, 395.]

In dower the tenant pleads that he by indenture granted a rent out of the ſaid land to the demandant in recompence of her dower, which ſhe accepted; the demandant confeſſes the grant of the rent, and her acceptance, but ſays that in the ſame indenture was a condition, that if the rent was not paid within ſuch a time after it became due, the rent ſhould ceaſe, and the indenture be void, and ſhews a breach; and upon demurrer it was adjudged for the demandant, becauſe it was pleaded as a grant; and alſo becauſe it was upon condition; for rent aſſigned in recompence of dower, and which comes in lieu of the land, ought to be as abſolute as the aſſignment of the land itſelf; and therefore the condition annexed is void; or if it ſhould be good, yet it is only annexed to it as a grant, and upon breach thereof ſhe is reſtored to her writ of dower. Cro. Eliz. 451. Wentworth's caſe. Roll. Abr. 684. Co. Lit. 34. b.

It is a rule, that when the wife brings a writ of dower, and recovers, the ſheriff ought to aſſign it by metes and bounds, if the Perk. 414. Roll. Abr. 682.

Co. Lit. 34. Bendl. 87. But an aſſignment, though in a different manner, by the conſent of the demandant may be good. *Vide* Roll. Abr. 683. [Sty. 276. According to the latter reporter, a ſpecial verdict found, that the tenant ſaid to the widow thus, viz. *I do endow you of a third part of all the lands my couſin* J. S. *your huſband died ſeiſed of.* Roll, C. J. to which Nicholas and Aſk, juſtices, agreed, held, that it may be aſſigned generally of the third part in ſome caſes, and the parties may agree againſt common right, and that here both parties agreed to take dower in this manner; but Jermain *e contra.* But *per* Roll, C. J. if the ſheriff aſſigns dower, and does it not *per metas et bundas*, it is error, if it might have been ſo aſſigned; and where a feme cannot be endowed *per metas et bundas*, ſhe may enter without aſſignment.] (*a*) For this *vide* Roll. Abr. 683. Perk. 332. Brook, 72. Co. Ent. 171.

thing recovered may be ſevered; and if the ſheriff does not return ſeiſin by metes and bounds, it is ill, (*a*) unleſs cloſes certain are aſſigned by name, or a manor which is known, and certain, in lieu of dower of other manors.

Palmer 265. *Vide* Keb. 743. The ſheriff committed for refuſing to make an equal allotment of dower, and taking 60*l.* to execute his writ of execution, and an information ordered againſt him; and Vern. 218, 219. 2 Chan. Ca. 160. That equity will relieve againſt a partial and fraudulent aſſignment of dower by the ſheriff.

Upon recovery of dower, and ſeiſin awarded, the ſheriff returns, that he had aſſigned to the demandant for her dower of a houſe the third part of each chamber, and had chalked it out to her; and this was held an idle and malicious aſſignment; and he was committed for it, for he ought to have aſſigned her certain chambers or rooms thereout, *&c.*

Perk. 411. F.N.B. 149. Co. Lit. 32. 34. 37. and *vide* Brownl. 127. and 3 Lev. 84. Sutton v. Rolf, in which it was adjudged that a writ of dower will lie againſt the heir of a tenant in common, before partition made; for otherwiſe they might perhaps make no partition at all, and ſo defeat the wife of dower.

The wife of a tenant in common ſhall not be endowed by metes and bounds, for ſhe being in *pro tanto* of her huſband's eſtate, cannot have it in other manner than he himſelf had.

3. By what Court.

Cro. Eliz. 364. Stainfield *&* *Uxor* v. Viſcount Bindon.

An aſſignment of dower by commiſſion *de dote aſſignandâ* out of the Court of Wards was held no bar of dower at common law, but it ought to have been by writ *de dote aſſignandâ* out of Chancery, the juriſdiction of which court is not given to the Court of Wards in ſuch caſe by 32 *H.* 8. *c.* 46.

Dyer, 363. Lady Arundell's caſe, *vide* Co. Ent. 173. *Le Record de cet caſe*, and 2 Mod. 18. S. C. cited.

Sir *Thomas Arundell* being attainted of felony, and his wife's dower ſaved by act of parliament, ſhe brought her writ of dower againſt the Earl of *Pembroke*, and he making default after appearance, a termor prays to be received, and ſhews his leaſe after the coverture, *&c.* and the attainder, *&c.* and that *E.* 6. granted a commiſſion under the ſeal of the court of augmentations, to aſſign the third part of the land of the ſaid Sir *Thomas Arundell* to his wife in dower; and ſhews further that, by virtue of the commiſſion, the third part of the rent reſerved on the ſaid leaſe was aſſigned to her, and this aſſignment confirmed by letters patent under the great ſeal, and ſhews her agreement and acceptance thereof, and ſaid that this ſuit was by colluſion to defraud him of his term. In this caſe it was held, 1*ſt*, That the court of augmentations had no power to aſſign dower to the demandant, or any other woman, but it muſt be in Chancery. 2*dly*, That the aſſignment of the rent was not warranted by the commiſſion, and

and then the confirmation could not make that good which was merely void; and it was adjudged for the demandant.

As to endowments in Chancery, it appears by our books, that in former times the widows of tenants who held of the king *in capite*, whoſe heir was in ward to the king, were to ſue in Chancery by petition for their dower; and after office found that ſhe was the tenant's widow, then ſhe was to make oath in Chancery that ſhe would not marry again without the king's licence; and upon that there went a writ out of the Chancery *de dote aſſignandâ* to the eſcheator, to aſſign to her dower of the third part of all the lands whereof her huſband was ſeiſed, *&c.* but if the heir were of full age at the time of the tenant's death, and the king had the lands only for his primier ſeiſin, then could ſhe not ſue in Chancery, becauſe the king was not then guardian, but had the lands only to ſuch ſpecial purpoſe; and therefore to remedy this, was the ſtatute *de prerogativa regis*, *c.* 4. made, which gives power to the king to aſſign dower to them, though the heir were of full age at the time of the tenant's death: but this power was not ſo abſolutely lodged in the king as to exclude them from ſuing at common law for their dower, by reaſon of the words *ſi viduæ illæ voluerint*, which left them at liberty in ſuch caſe, either to ſue to the king in Chancery, or if they thought fit to ſue the heir in the Common Pleas. But if the king had committed the wardſhip to another *durante minore ætate* of the ward, then alſo at common law the widow had election to ſue either to the king in Chancery, becauſe notwithſtanding ſuch commitment he ſtill continued guardian; or ſhe might ſue the committee at common law, and recover againſt him, without making the king a party by *ayde prier*, or otherwiſe, which was ordained by the ſtatute of *bigamis*, *c.* 3. for avoiding delays in ſuch caſes: and when ſhe recovered againſt the committee, ſhe took no ſuch oath as when ſhe ſued to the king in Chancery: yet nevertheleſs ſhe could not marry without the king's licence, it being againſt the policy of thoſe times to permit ſuch widows to marry whom they pleaſed, ſince then they might have brought in enemies or foreigners into the king's feud: and in the king's caſe the fines for alienation ſtill continued.

Stanf. Prer. 16. F.N.B. 163. Brook, 66. 76. 2 Inſt. 18. Keilw. 133. Brownl. 126. Co. Lit. 38. b. 9 Co. 16, 17. 7 Mod. 43.

Another prerogative the king had in thoſe times, that if the heir of his tenant *in capite* entered before livery ſued, this was looked upon as an intruſion, and his wife loſt her dower by it, by the expreſs proviſion of *prerog. regis*, *c.* 13. but this was meant only of intruſion after office found, which gave the king a title; for if he entered before office found, and died, his wife ſhould be endowed.

Stanf. Prer. 41. Brook, 66. Co. Lit. 30. b. F.N.B. 149.

(E) Where the Wife ſhall have her Election to be endowed of one Thing or another, and where of both: And herein of Endowment *de novo*, and the *Dos de Dote*.

Perk. 318, 319. F.N.B. 149. Co. Lit. 31. b.

IF the huſband ſeiſed of lands in fee exchange the ſame lands with a ſtranger for other lands, and die, the wife hath election to be endowed either of the lands given or taken in exchange, becauſe her huſband was ſeiſed of both during the coverture: but ſhe ſhall not have dower of both; for that would be unreaſonable.

Leon. 285.

Huſband ſeiſed of lands in right of his wife, they both join in exchange of thoſe lands with a ſtranger for other lands, which exchange is executed; then the huſband and wife alien the lands taken in exchange by fine: two judges held, the wife after the huſband's death might well enter into her own lands, notwithſtanding the fine which was of the other lands; and reſembled it to the caſe in *Dyer*, 385. where the huſband after marriage made a jointure to his wife, and then they both levied a fine *come ceo*, &c. thereof a ſtranger and his heirs; and this was adjudged no bar of her dower, becauſe the election to claim jointure, or dower, is not till after the huſband's death: and in the principal caſe judgment was given for the wife.

Perk. 320. (*a*) But if the tenancy eſcheat by the act of God, as by the death of a tenant, ſhe ſhall have dower of the tenancy only. Perk. 321.*

If lord and tenant are by fealty, and 12*d.* rent, and the lord takes a wife, and after purchaſes the tenancy in fee, and dies, his wife hath election to be endowed, either of the ſeignory or the tenancy, becauſe her huſband was ſeiſed of both during the coverture: ſo, for the ſame reaſon, if the huſband ſeiſed of a rent-charge in fee purchaſe the land whereout the rent is iſſuing, and die, his wife at her election may be endowed either of the land, or of the rent, and the huſband being ſeiſed of both, during the coverture, cannot by his own (*a*) act alter the wife's dower.

——* The reaſon is, becauſe the ſeignory is determined, during the coverture by act of law, and it is not any diſadvantage to the wife to be endowed of the tenancy, for if ſhe be put out of poſſeſſion of part or all, by more ancient title, the ſeigniory ſhall be revived in part or in all, &c. *Vide* Perkins.

Perk. 324.

If the huſband ſeiſed of lands in fee makes a feoffment thereof to a ſtranger in fee, rendering to him and his heirs 3*s.* rent, with clauſe of diſtreſs, and dies, and the feoffee endows the wife of the feoffor of the third part of the land for her dower, ſhe ſhall hold it diſcharged of any rent, and the whole rent ſhall iſſue out of the reſidue of the land, becauſe the wife ſhall be endowed of the beſt poſſeſſion of her huſband during the coverture; and the huſband had the land diſcharged of the rent after the coverture; and yet becauſe he had alſo an eſtate in the rent during the coverture, it ſeems ſhe may be endowed of that, if ſhe think fit, and waive her dower of the land; but the rent reſerved on the feoffment is no more a bar to her to demand dower of the land, than if none at all had been reſerved, if ſhe chooſes the land.

In

In ſome caſes, a woman ſhall be endowed a-new; as where the lands, &c. aſſigned to her for dower, are lawfully evicted by elder title; and therefore, if one be ſeiſed of two acres by good title, and another by diſſeiſin, and marry, and die, and his wife be endowed of the acre had by diſſeiſin, and after the diſſeiſee enter into the ſaid acre, now ſhe ſhall be endowed of the third part of the two remaining acres: ſo, if the diſſeiſee in ſuch caſe had recovered the acre againſt the wife, ſhe ſhould have been endowed of what remained, and the entry or recovery being by title paramount to her title of dower, it is as if her huſband had never been ſeiſed thereof; and therefore ſhe ſhall only recover the third part of what is left, and not a full recompence for the acre loſt. Perk. 419. F.N.B.149. Roll. Abr. 684. 4 Co. 122.

If one ſeiſed of two acres in one county marries, and enfeoffs a ſtranger of one acre with warranty, and hath iſſue, and dies, and the iſſue enters into the other acre, and the wife brings dower againſt the feoffee, who vouches the iſſue as heir, and he loſes by default; and thereupon the wife hath a conditional judgment, *viz.* againſt the vouchee if, &c. and the demandant ſues execution againſt the heir, and after is evicted by elder title; ſhe ſhall have a *ſcire facias* upon the firſt recovery againſt the tenant, to be endowed of the two parts left: alſo upon ſuch eviction ſhe may be endowed *de novo* againſt the heir; and the ſame law, if the endowment was in Chancery. Perk. 321. Roll. Abr. 684. Brook, 65. 9 Co. 17.

As to the *dos de dote*, if there be grandfather, father, and ſon, and the father, or, after his death, the ſon endow the grandmother, the mother ſhall not be endowed of the grandmother's thirds after her deceaſe, becauſe the grandmother's dower defeats the deſcent to the father, and by conſequence, the father was ſeiſed of no more than two thirds of that land; and therefore, the wife of the father was entitled to a third of theſe two thirds only, and no more: but if the grandfather had enfeoffed the father of the whole land, and died, and the grandmother had been endowed, either by recovery or aſſignment, there, the mother ſhould be endowed of the grandmother's third after her deceaſe, becauſe by the feoffment the father was ſeiſed of the whole eſtate, which gave a title to his wife to be endowed of that whole eſtate: and though the grandmother recovered one third out of that eſtate during her life, yet ſuch recovery doth not defeat the operation of the livery, ſince by that conveyance the reverſion of that third is claimed; and, by conſequence, the mother ſhall be endowed of that third when it falls in poſſeſſion, ſince the father was actually ſeiſed of it during the coverture, by virtue of ſuch livery. If there be grandfather, father, and ſon, and the two firſt die, and the mother be endowed by the ſon of a third part of the whole, either by aſſignment *en pais*, or upon a recovery in a writ of dower, and the grandmother bring a writ of dower againſt the mother, and recover, ſhe leaves the reverſion in her; for the dower was veſted in the mother by the aſſignment or recovery, and is only defeated during the life of the grandmother, whoſe eſtate as to the mother is leſs than her own eſtate; and, Perk. 315. 516. 4 Co. 122. Buſtard's caſe. F.N.B.149. Roll. Abr. 677. Co. Lit. 31. 42. a.

therefore, the reverſion is in the mother, and ſhe, after the grandmother's death, may enter into that third recovered from her; and by conſequence, the heir may re-enter into the ſecond dower aſſigned to the mother, upon ſuch recovery againſt her by the grandmother; for ſhe cannot have both.

Roll. Abr. 677. *A.* ſeiſed of land marries *B.*, and aliens to *C.*, who marries *D.*, and then aliens to *E.* and dies, and after *D.* is endowed, and then *B.* hath dower aſſigned to her of the third part of all the lands, and brings a *præcipe* thereof againſt *D.*, who vouches to warranty *E.*, who counterpleads upon the matter, and ſays that *D.* ought not to be endowed, *quia non poteſt habere dotem de dote*; and adjudged accordingly.

Hilchins v. Hilchins, 2 Vern. 403. [Lands, ſubject to a title of dower, were deviſed to a perſon in fee who died leaving a widow; this widow ſued for her dower, and recovered a third part of the whole without any regard to the title of dower in the widow of the teſtator, who did not put her claim in ſuit: it was holden by the court, that the teſtator's widow not having recovered her dower, it was to be laid out of the caſe, and the dower of the deviſee's widow was not *therefore* to be looked upon as *dos de dote*.]

(F) What ſhall be a Bar of Dower, and what not: And herein of Acts done or ſuffered by the Huſband ſolely, or by the Huſband and Wife jointly, or by the Wife ſolely, either during the Coverture, or after: And herein of Elopement, and Detinue of Charters, or Heir.

I ſee tit. Fine & Feoffment.

2 Inſt. 349. Perk. 376. IF a recovery be had againſt the huſband by colluſion, this ſhall not bar the wife of dower; as, if the recovery be by confeſſion or reddition, which are always underſtood to be by colluſion, the huſband always acting and concurring in obtaining them: but it ſeems to have been a very great doubt whether a recovery by default ſhould not be a bar; and the better opinion being that ſuch recovery was a bar at common law; therefore the ſtatute of *W.* 2. *c.* 4. was made, which ordains that notwithſtanding ſuch recovery by default, *&c.* pleaded, the tenant ſhall moreover in bar of the dower ſhew his right to the tenements recovered; and if it be found that he had no right, then ſhall the demandant recover her dower, notwithſtanding ſuch recovery by default againſt her huſband.

Perk. 379. 380. Rol. Abr. 681. So, if the huſband make a feoffment in fee, and diſ- By the ſtatute *W.* 2. *c.* 4. it appears, that if the recoverer had right, then the wife is barred; therefore, if the heir of the diſſeiſor be in by deſcent, and the diſſeiſee enter upon him, and marry, and the heir of the diſſeiſor recover by default or reddition in a writ of entry, in nature of an aſſiſe, and the huſband die, his wife ſhall not have dower, becauſe he, who recovered, had right to the poſſeſſion by the deſcent: *aliter*, if this diſſeiſin, deſcent, *&c.*

&c. were after marriage, becauſe the huſband was ſeiſed before of a rightful eſtate during the coverture, whereof his wife had title of dower, which cannot be defeated by the diſſeiſin, deſcent, and recovery, which all happened during the coverture.

feiſe the feoffee, who recovers in aſſiſe againſt him, the wife ſhall

not falſify this recovery directly, but ſhe may ſay, that long time before her huſband was ſeiſed, *que lui dower poit*, &c. Brook, 22. 38.

If a recovery be againſt the huſband by verdict, the wife ſhall not falſify in the point tried; but ſhe may ſay, that he might have pleaded a better plea, *viz.* a releaſe of all actions, or of all the right of the demandant; or ſhe may confeſs and avoid the recovery, but cannot falſify in the point tried againſt her huſband.

2 Inſt. 349. Perk. 382. Brook, 24. *vide* Perk. 383. which ſeems *cont.*

If in a *præcipe*, brought againſt the huſband, he loſes upon a dilatory plea, as upon non tenure, jointenancy, miſnomer of the town, &c. the wife may falſify upon a writ of dower brought, by ſhewing that the demandant had no right; but if he had right, ſhe cannot falſify the recovery, by ſhewing that her huſband might have pleaded jointenancy, miſnomer, &c. for theſe would have been only in abatement of the writ, and make nothing to the right: but if ſhe ſhews that her huſband was tenant of the land recovered, and that the demandant had no right or cauſe of action, but jointly with a ſtranger, which ſtranger by deed *in cur. prolat.* releaſed all his right to the huſband before the action brought; this is a good falſification of the recovery for one moiety of the land recovered.

Brook, 26. Perk. 381. 385, 386. A recovery in a *ceſſavit* ſhall bar the wife, Perk. 389. If the huſband aliens in mortmain; and the lord enters, *q.* whether this be a good bar? Perk. 390.

If the huſband levy a fine with proclamations of his lands, and die, his wife is bound to make her claim within five years after his death; otherwiſe ſhe ſhall be debarred of her dower; for though her title of dower was not conſummate at the time of the fine levied; yet it being initiate by the marriage and ſeiſin of the huſband, the fine begins to work upon it preſently after the huſband's death; and if ſhe does not claim it within five years after, ſhe ſhall be barred.

2 Co. 93. 10 Co. 49. 99. 3 Inſt. 216. Hob. 265. Moor, pl. 154. 879. Dyer, 224. 13 Co. 20. 2 Roll. Rep. 69. 409.

all againſt Plow. 373. *Vide* 3 Leon. 50. By which it appears that though ſhe brought her writ of dower within five years; yet becauſe ſhe did not purſue it till after ſix years were paſt, it was adjudged that ſhe could not by a new writ revive her ancient claim, which was barred by the five years lapſed after the huſband's death; and it was held, that aſſignment of dower in the court of wards was no ſufficient claim of dower, becauſe ſhe could not have a writ of dower there.

If the huſband and wife join in levying a fine, or ſuffering a common recovery, this ſhall bar her of her dower totally, becauſe in both caſes ſhe is examined upon record by the judges, as to her conſent; and ſhe having nothing in the lands in her own right, her joining in ſuch acts can be to no other purpoſe but to bar her dower: but if the huſband be ſeiſed in fee, and a ſtranger levy a fine to him and his wife *ſur conuſance de droit come ceo*, &c. of theſe lands, and the huſband and wife grant and render the ſame land to the ſtranger and his heirs; it ſeems the wife ſhall not be barred of her dower, becauſe ſhe is not examined in this caſe, as ſhe is in the other; and therefore, if this fine *ſur grant & render* be

Plow. 515. Eare v. Snow, 10 Co. 49. Cro. Eliz. 29. Brook, 77.

be pleaded in bar, ſhe may ſay that ſhe had nothing in the land at the time of the fine levied.

Bulſt. 173. Leon. 285. Dyer, 358.

If a jointure be made to the wife during the coverture, and after the huſband and wife levy a fine thereof; yet this is no bar to her dower of any other lands of her huſband's, becauſe the jointure being made after the marriage, ſhe had election after the death of the huſband to refuſe it, and claim dower, and not before; and then the fine, levied of the jointure before her time for election of dower was come, can be no bar to her electing of dower when it is come.

Perk. 350. F.N.B. 149. Moor, pl. 103. If leſſor marries the leſſee for years, and dies, it is

If a woman takes a leaſe for life of her huſband's lands after his death, ſhe ſhall have no dower, becauſe ſhe cannot demand it againſt herſelf; and if ſhe takes a leaſe for years only, yet ſhe ſhall not ſue to have dower during theſe years, becauſe it was her own act to ſuſpend the fruit and effect of her dower during that time.

ſaid ſhe ſhall have dower during the term; but it ſhould ſeem ſhe can have no fruit thereof till the term ended, ſhe having the whole already for years, unleſs upon recovery of dower the term be merged for the third part ſo recovered in dower.

Perk. 352, 353. 3 Co. 27. Though by this contrivance all women may be defeated of their dower as to eſtates purchaſed after the marriage.

If lands are given to the huſband and wife, and to the heirs of the huſband, who dies, the wife may diſagree to this eſtate made during the coverture, and then it will be an eſtate to the huſband and his heirs *ab initio*, and ſo ſhe ſhall have her dower thereof: but if the eſtate be made to the huſband and the wife for the life of the huſband, remainder to the right heirs of the huſband, it ſhould ſeem ſhe cannot in this caſe diſagree, becauſe the eſtate upon the huſband's death is determined and gone.

4 Co. 1. Vernon's caſe. Dyer, 91. Co. Lit. 34. 36. Brook, 97. 2 Brownl. 132. *Vide plus*, title *Jointure*.

By the common law, a woman could not be barred of her dower by any aſſignment or aſſurance to her of other lands, or of a rent iſſuing out of other lands, whereof ſhe was not dowable (except in the caſe of dower *ad oſtium eccleſiæ*, or *ex aſſenſu patris*), for whether ſuch aſſignment or aſſurance were made by the huſband before marriage or after, or by the heir after his death; and they were expreſsly ſaid to be in full bar and recompence of her dower; yet might ſhe recover her dower notwithſtanding; for ſhe having a right to be endowed of the third part of all her huſband's lands veſted and fixed in her immediately upon the marriage, and the huſband's ſeiſin thereof, this right like all others could not be transferred or extinguiſhed, but by a releaſe thereof; and if no ſuch releaſe were made, it continued ſtill in being, for want of the proper means to deſtroy it; and if it ſtill exiſted, her remedy was open to recover and reduce it into poſſeſſion.

Moor, pl. 103. Co. Lit. 36. b. [(*a*) A better reaſon than this is, that the whole of a will concerning lands muſt be in writing, and no averment ought to be taken out of the words of the will.

One deviſes lands to his wife during her widowhood, and dies, ſhe marries again, and brings dower; and this deviſe was pleaded in bar; and it was held no bar. 1*ſt*, Becauſe a will imports a conſideration in itſelf, and cannot be averred to be in bar of dower, without it be ſo expreſſed (*a*). 2*dly*, Dower cannot be of leſs eſtate than for life (*b*). And a third reaſon may be, becauſe her right cannot be barred by collateral recompence.

will. 4 Co. 4. a. (*b*) Moore, in the caſe referred to, expreſsly ſtates that this ſecond reaſon was diſallowed, and ſuch a deviſe holden a bar of dower by two judges, Weſton and Bowles againſt Dyer, J.]

In ejectment the caſe was, that a man deviſed his land to his wife till his daughter *M.* ſhould arrive at the age of 19 years, and after to *M.* in tail, remainder over in fee, and deviſes farther that *M.* ſhould pay, after her age of 19 years, to his wife 12 *l. per annum* in recompence of her dower; and if ſhe failed in payment, that then his wife ſhould have the land for her life: the wife, before the daughter came to the age of 19, brought a writ of dower, and recovered a third part, and after the daughter came to 19, and for non-payment of the 12 *l.* the mother entered; and the queſtion was, whether her entry was lawful? It was argued that it was, and that by bringing her writ of dower ſhe had not waived the benefit to have the lands by the deviſe, becauſe then ſhe had no title to it, but her title accrued after for non-payment of the 12 *l.* But it was adjudged, that ſhe having recovered a third part in dower, ſhe ſhould not have the rent by the will; for it is againſt the intention of the will that ſhe ſhould have both, and the acceptance of one is a waiver of the other. Cro. Eliz. 128. Goſling v. Warburton.

One ſeiſed of lands in fee held in ſocage, and of other lands in tail held *in capite*, deviſes by will in writing the third part of all his lands to his wife in recompence of her dower, and dies; ſhe enters into the third part of the fee-ſimple lands without bringing her writ of dower; and held, that ſhe was barred from claiming any more. Dyer, 220. 4 Co. 4.

A man marries an orphan of *London*, who had a great portion in the orphan's court there; the huſband dies before taking it out, but makes his will, and deviſes this money to his wife, provided that ſhe ſhould not claim her dower; and yet after his death ſhe brought her writ of dower; and thereupon a bill was brought in Chancery to compel her to releaſe her dower, or renounce the deviſe, and for an injunction in the mean time; but to no effect, the money belonging to her in her own right, by the cuſtom, for want of the huſband's altering the property thereof; and though he had, yet it was admitted it would have been no bar of dower, being totally collateral thereto, though it ſhould ſeem ſhe would in ſuch caſe have (*a*) forfeited the money by ſuing for dower. 2 Vent. 340. Phaeſant's caſe. Chan. Ca. 181. S. C.

(*a*) If lands, money, goods, &c. are deviſed to a woman, without ſaying in lieu or ſatisfaction of dower, &c. yet the wife ſhall have both, becauſe a deviſe implies a conſideration; but if it be ſaid in lieu or recompence of dower, there the wife cannot have both, but may waive which ſhe pleaſes; and this has been often adjudged in Chancery. 2 Chan. Ca. 24. 2 Vern. 365. Abr. Ca. in Eq. 218, 219. [See *acc.* Lawrence v. Lawrence, 2 Vern. 365. 1 Eq. Ca. Abr. 218. 2 Freem. Rep. 234. 1 Br. P. C. 591. Lemon v. Lemon, Vin. Abr. tit. Deviſe, (T. c.) pl. 45. Hitchin v. Hitchin, Pr. Ch. 133. Galton v. Hancock, 2 Atk. 427. Tinney v. Tinney, 3 Atk. 8. Incledon v. Northcote, *id.* 436. Ayres v. Willis, 1 Vez. 230. Charles v. Andrews, 9 Mod. 152. Broughton v. Errington, 7 Br. P. C. 12. Pitt v. Snowden, 1 Br. Ch. Rep. 292. Pearſon v. Pearſon, *id. ibid.* However, notwithſtanding theſe caſes, deviſes have been frequently deemed a ſatisfaction of dower, where the will has been ſilent, on account of ſtrong and ſpecial circumſtances; as, where allowing the wife to take a double proviſion would be inconſiſtent with the diſpoſitions of the will. Arnold v. Kempſtead, Ambl. 466. and 1 Br. Ch. Rep. 292. Villa Real v. Lord Galway, Ambl. 682. and 1 Br. Ch. Rep. *ubi ſupr.* Jones v. Collier, Ambl. 730. Wake v. Wake, 3 Br. Ch. Rep. 255. Boynton v. Boynton, 1 Br. Ch. Rep. 445. In ſuch caſe the widow muſt make her election. But ſhe ſhall not be put to this election, unleſs there be a declaration plain, or a clear incontrovertible reſult from the will that the teſtator meant that ſhe ſhould not take both. Foſter v. Cook, 3 Br. Ch. Rep. 347. French v. Davies, 2 Vez. jun. 572. Nor ſhall ſhe in any caſe be obliged to make her election till the account be taken, and it appear out of what eſtates ſhe is dowable, Boynton v. Boynton,

a Much of the language here is from note b. in Co. Litt. 36. b. 13th ed.

v Boynton, *ubi ſupr.* nor will ſhe be precluded from making it by accepting an annuity for three years under the will, ſhe during that time claiming both her dower and the annuity. Wake v. Wake, *ubi ſupr.*]

Co. 112. Co. Lit. 265. 8 Co. 151. Edward Altham's caſe.

A woman had title to dower of lands, whereof one is tenant for life, remainder to another in fee; the woman releaſes to the remainder-man all her right of dower: this is a good bar in dower brought againſt the tenant for life, though ſhe had no preſent cauſe of action againſt him in the remainder, till after the death of the tenant for life: ſo, of a releaſe to tenant for life, he in the reverſion or remainder ſhall take advantage thereof, becauſe her dower accrues not only out of the eſtate for life, but alſo out of the reverſion or remainder, and both as to her make but one eſtate; ſo that if ſhe diſcharges either, ſhe diſcharges the whole.

Cro. Jac. 151.

In dower the tenant pleads a releaſe from the demandant to ſuch a one tenant *in poſſeſſione tenementor. prædict. exiſten.*, and becauſe not ſaid that he was *tenens liberi tenementi*, it was held no plea; and adjudged for the demandant; for a releaſe of dower to tenant for years, or at will, can be no bar of dower, becauſe ſhe cannot demand it againſt them.

2 Inſt. 436. But this caſe may admit of ſo

If a woman pretends herſelf *enſient* by her huſband, when in truth ſhe is not; by which the heir is diſturbed of his inheritance; ſhe ſhall loſe her dower if ſhe acknowledge it before the juſtices.

many diſtinctions, that it is hard to make law of it, as it is put, and harder yet, that it ſhould be a bar of her juſt right. And ſee the writ *de ventre inſpiciendo*.

Davies, 30. b. Brook, 53. tit. Cuſtoms.

By the cuſtom of ſome places the wife ſhall be barred of her dower, if ſhe receives part of the money for which her huſband ſold the land, whereof ſhe was otherwiſe dowable: ſo, by the cuſtom of ſome places, if a widow marries, ſhe ſhall have no dower of her ſecond huſband's lands.

2 Inſt. 435. Co. Lit. 32. F.N.B. 150. Roll. Abr. 680.

As to elopement, this was no bar of dower at the common law (*a*), though a divorce were ſued and obtained for the adultery: but now by the (*b*) ſtatute of *W.* 2. *c.* 34. it is expreſsly provided that in ſuch caſe the wife ſhall loſe her dower; and though ſhe does not go away *ſponte*, but is taken againſt her will, yet if after ſhe conſents and remains with the adulterer, ſhe ſhall loſe her dower; for the remaining with him without reconciliation is the bar of dower, not the manner of going away.

[(*a*) Nor is a jointure now forfeitable by elopement or adultery. Sidney v. Sidney, 3 P. Wms. 268. Neither will the circumſtance of a wife's living ſeparate from her huſband in adultery prevent a court of equity from decreeing a ſpecifick execution of articles in her favour. Blount v. Winter, in Canc. July 19, 1781.] (*b*) The words of the ſtatute are *ſi uxor ſponte relinqueret virum ſuum, et abierit et moretur cum adultero ſuo, amittat in perpetuum actionem petendi dotem ſuam, quæ ei competere poſſet de tenementis viri ſui, ſi ſuper hoc convincatur, niſi vir ſuus ſponte et abſq; coertione eccleſiæ eam reconciliet, et ſecum cohabitare permittat, in quo caſu reſtituatur ei actio. Vide* Dyer, 107. a precedent of ſuch elopement pleaded, and iſſue taken upon the reconciliation of the huſband, and there held, that the defendant cannot give in evidence any other elopement but that pleaded.

Perk. 354. Brook, 12. *cont.* Roll. Abr. 680. 2 Inſt. 136. Co. Lit. 32. 13 Co. 23.

If a woman be raviſhed, and remain with the raviſher againſt her will, ſhe ſhall not loſe her dower; but if after ſuch raviſhment ſhe conſent to remain with him, ſhe ſhall loſe it: ſo, if ſhe voluntarily go away from her huſband, though ſhe remain all her life-time with the adulterer againſt her will, or if ſhe remain not with him, but he turn her away, yet ſhall ſhe loſe her dower: but if

ſhe

ſhe be reconciled as the ſtatute ordains, then ſhe ſhall be endowed, though the huſband aliened * the land in the mean time.

If ſhe elope, and live in adultery on

any other the manors or lands of her huſband, ſhe ſhall loſe her dower. 2 Inſt. 436. But *vide* Perk. 355. F. N. B. 150. Roll. Abr. 680 *cont.* For the huſband is to take care that none ſuch live there. If the huſband be reconciled by church cenſures, yet ſhe ſhall loſe her dower, but cohabitation is ſufficient evidence of a reconciliation. Roll. Abr. 680.——* Co. Lit. does not warrant this part of the poſition.

If a man grants his wife with her goods to another, and ſhe lives with the grantee all the lifetime of the huſband, yet ſhe ſhall loſe her dower, by reaſon of living with him in adultery. And where ſuch a grant was pleaded, it was holden, 1*ſt*, That the grant was void. 2*dly*, That it did not amount to a licence; or if it did, that it was void. 3*dly*, That after the elopement there ſhall be no averment admitted *quod non fuit adulterium*, though the grantee and the woman married after the huſband's death. And though in this caſe they brought ſentence of purgation of the adultery from the ſpiritual court, yet it was not allowed againſt ſuch preſumption.

2 Inſt. 435. Roll. Abr. 680. Dyer, 106. in margine.

If the huſband's relations keep him from his wife, ſo that ſhe does not know what is become of him, and give out that he is dead, and thereupon procure her to releaſe all marriages and intereſt which ſhe can have in him as her huſband, and alſo perſuade her to marry again, which ſhe does with one who has notice that her firſt huſband is alive, but ſhe herſelf has no notice of it; though ſhe lives in adultery with this man, and though her huſband be not out of the realm, nor beyond the ſeas, ſo that ſhe ought to have taken notice of his being alive, yet becauſe *non reliquit virum ſponte*, as the ſtatute ſays, but by perſuaſion of his friends, not knowing herſelf but that he was dead, this is no ſuch elopement as will bar her of her dower.

Roll. Abr. 680. Green v. Harvey.

It is a good plea in bar of dower, that the demandant detains from the heir ſuch charters, ſhewing them in certainty, unleſs they are in a bag ſealed, or box locked; and then it is ſufficient to ſay that ſhe detains from him ſuch bag or box of charters. But if the bag or box be open, then the defendant muſt ſhew the charter in certain, and after ſuch plea he muſt add, that if ſhe will deliver them to him, he is, and always hath been ready to render her dower. Upon this if ſhe delivers them to him, ſhe ſhall have judgment for her dower preſently; but if ſhe denies ſuch detainer, and it be found againſt her, ſhe ſhall be barred for ever. And it is to be obſerved, 1*ſt*, That theſe charters ought to concern the land, or the reverſion of the land whereof dower is demanded. 2*dly*, That ſuch detainer is no bar of dower for more lands than the charters concern. 3*dly*, That none can plead this plea but the heir, and not a ſtranger, who is tenant of the land, though he hath the charters conveyed to him.

9 Co. 17, 18. Plow. 85. Perk. 356. 360. 5 Co. 75. Roll. Abr. 679. Brook, 1. 4. 39. 41. 47. 48. 53. 57. 67. Hob. 39. 113. 199. Bendl. pl. 215. Dyer, 37. pl. 42. 230. pl. 52.

The reaſon why ſuch detinue of charters is a

good plea for the heir ſeems to be, becauſe the inheritance by law is caſt upon him immediately after his anceſtor's death, without any act of his concurring; and therefore he cannot provide againſt the injury done him by any precaution or covenant whatſoever: but a ſtranger, who comes to the land by conveyance, and his own act, ought to take care to have all the deeds and writings, neceſſary for the defence of his title, delivered to him at the ſame time, or to ſecure himſelf by proper covenants; and if he has not ſo done, it is his own folly; and he ſhall take no advantage thereof by pleading it in bar of the demandant's right, but muſt purſue his remedy by an action of detinue, &c. In what caſes the heir

heir himſelf ſhall be conſidered as a ſtranger, and cannot plead detinue of charters, *vide* 9 Co. 18. Perk. 258. Dyer, 230. pl. 52.

Perk. 359. If two coparceners are of land, and after partition made between them the mother brings dower againſt one of them, ſhe [the daughter] may well plead detinue of charters, becauſe the charters concern her inheritance, though they do alſo concern her ſiſter, who both make but one heir.

Perk. 360. Roll. Abr. 679. Brook, 8. If the daughter enter into the land after her father's death, who left his wife *enſient*, and the wife bring dower againſt the daughter as heir, ſhe cannot plead detinue of charters, becauſe it may be that the wife is *enſient* with a ſon, who will be heir, and therefore may juſtly detain the charters for him.

Perk 360. Roll. Abr. 679. *cont.* Detinue of a tranſcript of a fine is not a ſufficient cauſe to detain dower, becauſe another tranſcript may be had in the treaſury.

Saik. 252. pl. 2. Burdon v. Burdon. Comb. 183. Detinue of charters is no good plea after imparlance: reſolved upon a demurrer to ſuch plea in the court of *Durham*, and confirmed on a writ of error in *B. R.* S. C.

Dyer, 230. pl. 52. Perk. 360. 363. Roll. Abr. 679. Brook, 47. 67. 9 Co. 18, 19. 10 Co. 94. Co. Lit. 39. a. The guardian in chivalry may plead detinue of the heir, becauſe the wardſhip of the heir belongs to him: but he cannot plead detinue of charters, becauſe they belong to the heir for defence of his inheritance. And the reaſon why he is allowed to plead detinue of the heir in bar of dower ſeems, becauſe the writ of dower lies only againſt him during the minority of the heir; and ſince the demandant does wrong in detaining from him the wardſhip, it is but reaſonable ſhe ſhould be delayed of her right againſt him, till ſhe reſtores it; and therefore he concludes his plea, that if ſhe will deliver to him the ward, he hath been and ſtill is ready to render her dower: ſo, if the wife takes away the ward, and delivers him to another, ſo that the guardian cannot have him, this is a good cauſe to bar her of her dower: ſo, if the guardian comes in by voucher, he may plead the ſame plea: and this is a good plea in bar of dower *ad oſtium eccleſiæ*, or *ex aſſenſu patris;* if the wife does not enter, but brings her writ, claiming it as dower, whereof ſhe was *nominatim dotata* by her huſband; and in theſe caſes if ſhe cannot render the ward unmarried ſhe ſhall loſe her dower, becauſe ſhe hath thereby deprived the guardian of what was moſt valuable, *viz.* the marriage of his ward.

Perk. 362. If a woman, as mother to the heir, brings him up, and one claims the wardſhip of him as guardian in chivalry, and takes him from her; this is no cauſe for the rightful guardian to detain her dower, becauſe ſhe was not in fault.

Perk. 363. If the mother takes the heir out of the poſſeſſion of thoſe who had the education of him, and they retake him, ſo that ſhe cannot deliver him to the guardian, this is a good cauſe to detain her dower for the wrong done in the eſloignment at firſt, when the wardſhip did not belong to her.

(G) Where the Wife ſhall hold her Dower, ſubject to the Charges of her Huſband, and where not: And herein of the Privileges of Tenant in Dower, and the Nature of her Eſtate as to Alienations made, or Actions brought by or againſt her.

THE wife ſhall hold her dower diſcharged of judgments, recognizances, ſtatutes, mortgages *, or any other incumbrances made by the huſband after marriage, becauſe after his death her title, which is now conſummate, has relation to the marriage and ſeiſin of her huſband, which were before the incumbrances: but if ſhe joins in a grant of a rent by fine out of ſuch land, or makes a leaſe for years, rendering rent by fine to the huſband and his heirs, ſhe ſhall hold her dower ſubject to ſuch rent or term, becauſe ſhe was examined upon the fine, and by ſuch means might bind her own inheritance. 4 Co. 64. 66. * The widow of a mortgagor not barred of her dower, if ſhe did not join in the mortgage. 4 W. & M. c. 16. § 5. 10 Co. 49.

If the huſband die indebted to the crown, yet his wife's dower is by law privileged from any diſtreſs; and if ſhe be diſtrained, ſhe may have a writ to the ſheriff, commanding him not to diſtrain her, or to re-deliver the diſtreſs, if any be taken, unleſs ſuch debts were contracted before her title of dower accrued, for then it will be liable thereto. And the reaſon ſhe ſhall not be diſtrained for debts to the crown, contracted after the marriage, ſeems to be, her prior title by relation. Co. Lit. 31. a. F.N.B. 150. *per tout.*

If the huſband ſeiſed of three manors grant a rent-charge out of all, and die, and the wife have one manor aſſigned to her by the heir in lieu of dower of all the three manors, ſhe ſhall hold it charged for a third part of the rent, becauſe this endowment was againſt common right, by which ſhe ought to have had the third part of each manor: but if ſhe had recovered her dower, and ſuch aſſignment had been made by the ſheriff, ſhe ſhould have held it diſcharged, becauſe ſhe purſued the proper means to obtain it clear, and then it is not reaſonable the ſheriff's act in miſexecuting the judgment of the court ſhould prejudice her, eſpecially when the heir is not more hurt by the whole charge falling upon the two manors, than he would if it had fallen upon two parts of all the three manors. Perk. 330. 332. Roll. Abr. 683. 684.

A wife may demand dower of a rent-charge granted to her huſband and his heirs, without ſhewing the deed, becauſe the deed belongs not to her, but her eſtate is created by the law. Plow. 41. a. 81. b.

Tenant in dower is allowed by the ſtatute of *Merton*, *c.* 2. to deviſe the corn growing upon the land at the time of her death, of which before that ſtatute it was doubted if ſhe might; and the word *blada* there extends likewiſe to hemp, flax, and other things, which grow by the induſtry of man, but not to graſs, trees, &c. which come *ſuapte natura*. 2 Inſt. 81. Keilw. 125.

In dower againſt an infant who makes default upon the *grand cape* returned; it was held *per tot. cur.* that judgment ſhall be given Cro. Jac. 111. 392. Cro. Eliz.

309. 331. 557. 567. Moor, pl. 465. 1148, 1149. 2 Brownl. 118. Cro. Eliz. 638. 2 Leon. 59. 189.

given upon the default: for the infant ſhall not have his age in dower, which being but for life the widow may be totally defeated of it by his frequent defaults: though ſome of the books ſay, that if judgment be given upon the *grand cape* before appearance, this is error: *ſecùs*, if he appears by guardian, and after loſeth by default; for then if any default be in the guardian, he ſhall recover againſt him in a writ of *diſceit:* and other books doubt if the infant ſhall not be allowed his age in dower; but the contrary ſeems the more reaſonable opinion.

Cro. Jac. 392. Moor, pl. 1148. S C. between Herbert and Binion.

In error to reverſe a fine levied by the plaintiff and her huſband, the heir is ſummoned as tertenant, and appears, and pleads that he is within age, and prays that the parol may demur; plaintiff counterpleads the age, ſhewing that he was entitled to have dower before the fine levied, and now is barred of her dower by this fine, which is erroneous, and ſets forth the errors, and ſeeks to be reſtored to her writ of dower; but upon demurrer and ſolemn argument it was held in this caſe, that the parol ſhould demur.

(H) To whom the Tenant in Dower ſhall be attendant, and by what Services.

Perk. 424, 425. 9 Co. 135. But though in moſt caſes ſhe ſhall be attendant to

AND here the rule is, that the dowreſs is to be attendant to the reverſion dependant upon her eſtate, for the ſervices which were paid during the life of her huſband, unleſs the original feudal contract increaſe ſuch feudal ſervices, and then ſhe ſhall be an attendant for the ſervices increaſed.

him in the reverſion by the third part of the ſervices, by which he holds over, yet may ſhe be attendant to others, and by other ſervices; and therefore if lord, meſne and tenant are by knights ſervice, and 3*s.* rent, and the tenant marries, and dies, his iſſue within age, and the meſne ſeiſe the ward of the body and land of the heir, and endows the wife, ſhe ſhall be attendant to the meſne by 1*s.* rent; and if he die during the minority of the heir, then ſhe ſhall be attendant to his executors in the ſame manner till the full age of the heir, becauſe till then the profits belong to the guardian and his executors in their own right; but for this *vide* Keilw. 124. 129. Roll. Abr. 685. Brook, 64.

Perk. 427.

If he in reverſion grant it over to another, and the tenant in dower attorn, ſhe ſhall be attendant to the grantee by her own agreement.

Co. Lit. 46. a. 241. a. Brook, 64. Perk. 431.

If one makes a giſt in tail, rendering 20*s.* rent, and dies, and the donee marries and dies without iſſue, and his wife is endowed by the heir of the donor, ſhe ſhall be attendant to him for a third part of the rent, though the eſtate-tail and the rent are both determined; for her eſtate being a continuance of her huſband's, and the donor thereby kept out of poſſeſſion for a third part during her life; it is but reaſonable ſhe ſhould pay her proportion of the rent reſerved: ſo, though the lord had releaſed to the tenant donor all his ſeignory, yet the wife of the donee ſhould be attendant in the ſame manner, by reaſon of the expreſs reſervation; and ſhe is a ſtranger to the releaſe.

Perk. 434.

If tenant holds by fealty, and a horſe of 40*s.* price, his wife being endowed, ſhall be attendant to the heir by the third part of the 40*s.* only; but if it was of a horſe to be rendered yearly, ſhe ſhould render to the heir a horſe every third year.

(I) Of the Proceedings and Damages in Dower *unde nihil habet.*

BEFORE the ſtatute of *Marlb. c.* 12. in dower *unde nihil habet*, there were days of common return, as in other real actions, which was miſchievous to the wife, by reaſon of the long delay, ſhe claiming but an eſtate for life; but this is now remedied by that act, and four days of return in the year are given at leaſt, and that act extends likewiſe to the vouchee, but not to a writ of right of dower, nor to dower *ad oſtium eccleſiæ*, nor *ex aſſenſu patris*; but 32 *H.* 8. *c.* 21. extends to, and gives the ſame return in every writ of dower. 2 Inſt. 124.

In dower the tenant at the day of taking the inqueſt, after the jury had appeared, and before they were ſworn, made default, and a *petit cape* was awarded, and the tenant at the day *in banco* informed the court that he was but tenant for life, and the reverſion in one *A.* who at the day in bank ought to be received, and the court appointed him to plead his plea at the return of the *petit cape*, before which time his appearance ſeems idle. Brownl 126.

In dower of lands in *L.*, *M.*, and *N.*, the ſheriff returns *plegii de proſeq. A.*, *B.*, *C.*, *D.* and the names of the ſummoners *E.*, *F.*, *G.*, *H.*, and that after the ſummons made, and 14 days and more before the return of it, at the moſt uſual church door of *L.* where part of the lands lay, ſuch a *Sunday* after ſermon ended, he publickly proclaimed all and ſingular the things contained in the writ, to be proclaimed according to the form of the ſtatute in that caſe made, and indorſes his name to the return; and exception was taken to this return, becauſe proclamation was not made at all the church doors: but *per cur.*, proclamation at any of the church doors is ſufficient: but the return was held ill, becauſe he ſays he had proclaimed all and ſingular the things in that writ contained, without ſaying what. Hob. 133. Allen v. Walter. The proclamation by the 31 Eliz. c. 3. ought to be at the pariſh-church door, though it be in another county than where the land lies. Cro. Eliz. 472. Error of a judgment in dower, in that the proclamation is ſaid to be at *H.* in the ſpring, and it doth not appear that it is within the pariſh of *W. H.*, where the demand is; but by Weſton for the defendant, this is cauſe why no grand cape ſhould iſſue, by 31 Eliz. c. 3., but it is no cauſe of error; and the judgment was affirmed *niſi*. Keb. 529. Upon a writ of ſummons in dower it was returned *ad oſtium eccleſiæ proclamari feci juxta formam ſtatut. ſecundum exigen. brevis*, and held good by two juſtices againſt one, though what the error was does not appear. Keb 680. On a motion for a ſuperſedeas, to ſtay proceedings on a grand cape in dower, *quia erroniæ emanavit*. 1ſt, Becauſe the return of the ſummons was not according to the ſtatute of 31 Eliz. c. 3. for the ſtatute is after ſummons. 2dly, The land lies in a vill called Heroick, and the return is of a proclamation of ſummons at the pariſh church of Halifax, and it does not appear that the lands lie within the pariſh. 3dly, The return is *proclamari feci ſecundum formam ſtatuti*, and it is not returned to have been made upon the land; for all which cauſes it was held erroneous, and the grand cape was ſuperſeded. Mod. 197. Furnis v. Waterhouſe.

Error to reverſe a judgment in dower at the grand ſeſſions in *Wales*: it appeared by the record that the tenant appeared at the return of the ſummons, and day was given over, *& adtunc venit per attornat. & nihil dicit in barram*; whereupon *conſiderat. eſt quod tertia pars terrar. & tenement. capiatur in manus d'ni regis*; and upon day given *ad audiend. judicium*, judgment was given *quod recuperet*, and error aſſigned that they ought not to have awarded a Vent. 60. Williams v. Gwinn. 2 Saund. 46. S. C. 2 Keb. 450. 551. 69 S. C.

petit cape, becauſe the defendant appeared, and then they ought to have given judgment upon the *nihil dicit*; for the *petit cape* is always upon default after appearance, and is only to anſwer the default, as the *grand cape* is before appearance to anſwer the default, and demand: but it was held no error, being only an awarding of more proceſs than needs be, and it was an advantage to the tenant by delaying the demandant; and *per Twiſden*, if erroneous, they might now give judgment upon the *nihil dicit* in this court.

Vent. 267. Lomax v. Armeror. 2 Lev. 98. 123. S. C. 3 Keb. 277. 326. 421. S. C.

Error of a judgment in dower in *Newcaſtle-court*; becauſe the proceeding was by plaint, and no ſpecial cuſtom certified to maintain it; and it was held error, becauſe pleas of frank tenement cannot be held without original writ, unleſs there be a ſpecial cuſtom for it.

Brook, 96.

In dower, if tenant makes default, by which *grand cape* iſſues, the demandant ſhall make her demand, for no certainty appears before the demand made.

Leon. 92. Michell v. Hyde.

In dower, one appears upon the *grand cape*, who in truth was but leſſee for years, and ſo might plead non-tenure; and if now he might wage his law of non-ſummons, and the writ be abated, was the queſtion? becauſe it was ſaid that by wager of his law he affirms himſelf to be tenant: but two juſtices only in court held, that he would be at no miſchief, for being but leſſee for years, if judgment and execution were againſt him, he might, notwithſtanding, enter upon the demandant. Another matter was, that where the writ of dower was, *de tertiâ parte rectoriæ de D.*, and the *grand cape* made upon it accordingly; yet the ſheriff by colour thereof took the tithes ſevered from the two parts, and carried them away; and *per cur.*, this is not ſuch a ſeiſure as is by the writ intended, for he ought only to have ſeiſed generally, but not to carry them away; and the court had a mind to have committed him for a miſdemeſnour.

3 Lev. 169. Whelpdale's caſe.

In dower, tenant demands the view, demandant counterpleads the view, becauſe her huſband died ſeiſed, *& hoc parat. eſt verificare & petit judicium & dotem ſuam de tenement. prædict. ſibi abjudicari*; tenant *proteſtando*, that the huſband did not die ſeiſed, demurs and ſhews for cauſe that the counterplea *male concludit*, for it ought to have been *& petit judicium & quod tenens de viſu excludatur*, and the counterplea is but dilatory, and ought not to conclude peremptorily for final judgment; and of this opinion was *Levinz*, but two other juſtices held it not ill: alſo, the demand was of three meſſuages, *&c.* where it ought to have been only of the third part of them; and if this might be amended was doubted.

3 Lev. 220. Barnes & *Ux.* v. Rich.

In dower, *unde nihil*, *&c.* tenant demands the view, demandant counterpleads it, becauſe the huſband *alienavit tenement. prædict.* to the tenant *& hoc*, *&c.* and it was demurred, becauſe *alienavit* does not ſhew what eſtate he aliened, for it may be a leaſe for years: but *per cur.*, alienation implies all the eſtate which he had, and the ſtatute *W.* 2. 48. ouſts the view, where the huſband aliens to the tenant, or any of his anceſtors; and this is in the very words of the ſtatute; and a *reſpondeas ouſter* awarded, but no

Note: In dower the view is ouſted by W. 2. c. 48. in theſe words, *In*

notice

notice taken whether the view was allowable in dower *unde nihil habet.*

brevi de dote cum petatur dos quale tenem.

de tenemento quod vir uxoris alienavit tenenti aut ejus anteceſſori, cum ignorare non debet tenens vir uxoris alienavit ſibi vel anteceſſori ſuo, licet vir non obiit ſeiſitus, nihilominus tenenti de cætero non erit viſus concedendus; and my lord Coke in his expoſition thereof ſays it extends not to a writ of dower *unde nihil habet*, for thereon no view lay at the common law, becauſe the demandant ſhould not be delayed, having nothing to live on; but it extended to other writs of dower, whether for dower at common law, *ad oſtium eccleſiæ, ex aſſenſu patris*, or by the cuſtom; and where the view has been granted, it is to be intended in thoſe caſes, for which *vide* 2 Lev. 117. 3 Keb. 360. Dyer, 179. pl. 41. 2 Roll. Abr. 725. 2 Inſt. 481.

At the common law, before the ſtatute of *W.* 1. *c.* 49. if a woman had accepted any part of her dower, though never ſo ſmall, of any one tenant in any one county or town, ſhe had no other remedy for the reſidue, but by a writ of right of dower; for if ſhe brought a writ of dower *unde nihil habet*, it was a good plea in abatement, that ſhe had accepted ſuch a part of ſuch a tenant, in ſuch a town or county. This being a great miſchief to the woman is remedied by that ſtatute, which provides that it ſhall be no plea in abatement, to ſay that ſhe hath received part of her dower of any other perſon before the writ purchaſed; and this extends as well to guardian in chivalry as to the tenant of the land, becauſe ſuch guardian is to render her dower. 2 Inſt. 261.

In dower the tenant pleads, that after marriage the huſband had ſettled other lands on the demandant for life, for her jointure, and that ſhe after his death agreed thereto, and entered accordingly; the demandant replies, that it was a voluntary ſettlement of her huſband, and traverſes that it was for her jointure; and iſſue thereupon; and at the *niſi prius* the tenant made default, and a *petit cape* awarded, and returned, and judgment, that the demandant have ſeiſin; and the demandant ſuggeſts that her huſband died ſeiſed, and prays a writ to inquire of the damages, returnable ſuch a day; the ſheriff returns that he hath delivered ſeiſin of the lands particularly, and alſo an inquiſition which finds that the lands are worth 114*l.* 11*s. per annum*, and that her huſband had been dead ſix years and three quarters, and that ſhe had ſuſtained damages *occaſione detentionis dotis ultra valorem præd. & ultra miſas & cuſtag. ſua* 195*l.* *& pro miſis & cuſtag.* 20*s.* and upon this the demandant *gratis* releaſes the 195*l.* and demands judgment only for the 20*s.* and judgment is given that the demandant recover *tam valorem tertiæ partis prædict.* from the death of her huſband, which came to 257*l. quam* the 20*s.* and 11*l. de incremento, in toto* 269*l.* and the tenant brings error, for that the damages being releaſed by the demandant, there ought to have been no judgment againſt him for the value of the land. But the whole court reſolved, that the releaſe was only of the damages ſuſtained *occaſione detentionis dotis*, and not of the meſne profits of the lands, for they are two diſtinct things, as appears by *Co. Lit.* 33. *a. Raſt. Entr.* 237. where the writ is to inquire not only of the value of the land, but alſo of the damages *ratione detentionis*; and the judgment is always entered accordingly, and a *fieri facias* lies for the damages; and therefore the judgment was affirmed. Raym. 166. Harvey v. Harvey.

Note: The meſne values and damages are to be recovered againſt the tenant in a writ of dower, and ſo it appears in the judgment of this caſe, and in Co. Lit. 33. a. and Bendl. 155.

Co. Lit. 32. Dyer, 284. pl. 33. Yelv. 112. Dr. and Stud. lib. 2. c. 13. f. 166. 2 Inſt. 80. The words of this ſtatute are, *Quod viduæ quæ poſt mortem virorum ſuorum expelluntur de dotibus ſuis, & dotes ſuas vel quarentenam ſuam habere non poſſunt ſine placito, quod quicunque deforciaverit eis dotes ſuas vel quarentenam ſuam de tenementis de quibus viri jui obierint ſeiſiti, & ipſæ viduæ poſtea per placitum recuperaverint, ſi ipſi deforc. de injuſto deforciamento convicti fuerint, reddant eiſdem viduis damna ſua, ſcilicit valorem totius dotis eis contingentis a tempore mortis virorum ſuorum uſque ad diem quo ipſæ viduæ per judicium curiæ ſeiſinam ſuam inde recuperaverint.*

As to damages in dower, they are given by the ſtatute of *Merton*, *c.* 1. but that ſtatute extends only to the poſſeſſory action of dower *unde nihil habet*, and not to the writ of right of dower; becauſe they are intended to be given for the detention of the poſſeſſion; and on writs of right, where the right itſelf is queſtionable, no damages are given, becauſe no wrong done till the right be determined: alſo, that ſtatute extends only to lands, whereof the huſband died ſeiſed; and therefore judgment for the damages was reverſed, becauſe the jury did not find that the huſband died ſeiſed; for otherwiſe ſhe ſhall have no damages: as, if the huſband aliens and takes back an eſtate for life, the wife ſhall recover dower, but no damages; becauſe this dying ſeiſed was only of an eſtate of freehold; but if he makes a leaſe for years only, rendering rent, ſhe ſhall recover a third part of the reverſion with a third part of the rent and damages, becauſe there he died ſeiſed as the ſtatute ſpeaks.

Co. Lit. 32. [(*a*) But the ſtatute is expreſs that the widow ſhall have her damages, viz. *valorem totius dotis ei contingentis a tempore mortis viri ſui*, and in a modern caſe, which underwent a great deal of diſcuſſion, damages were awarded her from the death of her huſband, though ſhe had delayed bringing her writ of dower for above two years. Dobſon v. Dobſon, Ca. temp. Hardw. 19. 2 Barnard, K. B. 180. 207. 443. S. C. In that caſe, however, it is to be obſerved, the tenant did not plead *tout temps priſt*. And though he plead ſuch plea, yet the widow ſhall recover damages from the teſte of the original to the execution of the writ of entry. *Vide* caſes *ſupr.* and Bull. Ni. Pr. 117.] Note; the ſtatute of Merton extends to copyholds, whereof the wife is dowable by cuſtom. 4 Co. 30. Co. Lit. 33.

Damages muſt be after demand of dower (*a*), for the heir is not bound to aſſign this proviſion till demanded, becauſe the law caſts the freehold of the whole upon him, which cannot divide without the concurrence of the wife; but a demand *in pais* before good teſtimony is ſufficient; and if the heir appear the firſt day on ſummons, and plead that he hath been always ready, and ſtill is, to render her dower; ſhe may plead ſuch requeſt; and iſſue may be taken upon it: but the feoffee of the heir cannot plead *tout temp priſt*, becauſe he had not the land all the time ſince the death of the anceſtor, and therefore ſhe ſhall recover the meſne profits, and damages againſt him, and if he hath not provided his indemnity and recompence againſt the heir, it is his own folly.

Co. Lit. 33. a.

If the heir or feoffee aſſign dower, and the wife accept thereof, ſhe loſeth her damages, becauſe having the dower, which is the principal, ſhe cannot ſue for the damages, which are but conſequential or acceſſory.

Co. Lit. 33. a. Felfield v. Rous. Moor, pl. 213. S. C. Kendl. pl. 215. S. C.

In dower the tenant, as to part, pleads non-tenure, and to the reſidue, detinue of charters, and iſſue taken upon both pleas, and both found againſt the tenant; and it was found further, that the huſband died ſeiſed ſuch a day and year, leaving iſſue a ſon, which ſon, together with the demandant, as his mother and guardian, took the profits for ſix years after the huſband's death, and that ſuch a time the ſon died without iſſue, and the land deſcended to the tenant as uncle and heir to him, and that he entered

tered and took the profits till the purchaſe of the original writ; and the yearly value of the land was found, and damages were aſſeſſed for the detaining dower and coſts; and the plaintiff had judgment for the damages from the death of the huſband without any defalcation. In this caſe my Lord *Coke* ſays there are many things obſervable, but the moſt material ſeems to be the recovery of damages from the huſband's death, though there was no demand of dower, and though the demandant herſelf took the profits for ſix years, which ſeems to be the conſequence of the tenant's pleading non-tenure, which being found againſt him, the other matter found was ſuperfluous, except as to the damages, for which he then remains deforceor.

In dower upon default, a *grand cape* was awarded, and on ſuggeſting that her huſband died ſeiſed, a writ of inquiry of the value of the lands was awarded likewiſe, and inquiſition taken and returned, and 60*l.* damages for the value of the land; and it was moved to ſtay the filing of the writ of inquiry, becauſe no notice was given to the tenant thereof, nor of the execution of it; and though it was anſwered that in real actions no perſonal notice is to be given, but the tenant ought to take notice, becauſe the ſummons is always executed on the land, and not elſewhere; yet *per curiam*, the *grand cape* is a judgment, and by that the ſuit is determined at common law, and the damages for the value of the land are added by the ſtatute of *Merton*, and perſonal notice ought to be given of the writ, and of the execution of it, as in other caſes of writs of inquiry; and therefore for want of notice they diſcharged the inquiſition, and awarded reſtitution of the damages. But *Levinz* makes a *quære* of it, and ſays the practiſers informed him that it is not uſual to give notice of the executing of the writ of inquiry in caſe of dower.

3 Lev. 409. Perkins v. Lamb. Upon a trial at bar the iſſue was, whether there was a demand of dower, and refuſal, to entitle the plaintiff to damages? the plaintiff proved an actual demand of the heir, being of the age of 14 years, then in her cuſtody, though by his father's will committed to another; the infant ſaid his guardian would not let him aſſign dower; reſolved *per tot. cur.* upon debate; 1ſt, That it was demandable of the heir, though he had been under age. 2dly, That his guardian was but in nature of a guardian in ſocage, and that the dower was not demandable of him, but of the heir, though not in the cuſtody of the guardian; and that if the heir had entered upon the land to aſſign dower, he had been no treſpaſſor upon the guardian, though the cuſtody of the land during ſuch nonage was committed to ſuch guardian. 3dly, That his not aſſigning dower upon demand, though he did not refuſe to do it, was a refuſal in law, to entitle the plaintiff to her damages. Hil. 29 & 30 Car. 2. in C. B. between Corſellis and Corſellis. Bull. Ni. Pri. 117.

In dower, the tenant to part pleads non-tenure, and to other parts detinue of charters; and judgment for the demandant; but it was reverſed in error, becauſe the tenant, being within age, appeared by attorney, where it ought to be by guardian. Then a new writ of dower was brought, and the tenant pleads *tout temp priſt*; the demandant pleads the firſt record to eſtop him; tenant rejoins *nul tiel record*, becauſe it is reverſed; which the court agreed; but they held that the demandant might take iſſue that he had not been *tout temp priſt*, and give in evidence the firſt record to prove it.

Daliſon, 100. Rich's caſe. 3 Leon. 52. S. C. Note: The caſe in truth was, that after her huſband's death ſhe entered and abated without aſſignment of dower, and occupied for five years, and then the tenant re-entered, and ſhe brought dower; and agreed that in ſuch caſe the tenant need not ſay *tout temp priſt* generally, but ſhew the abatement and re-entry, for the time of her occupying ſhall be conſidered and recouped in damages.

In

Leon. 56. Walker v. Nevil.

In dower, judgment was given upon *nihil dicit*, and becauſe the huſband died ſeiſed, a writ of inquiry of damages was awarded; by which it was found that the third part of the value of the land was 8*l. per ann.* and that eight years had elapſed *a die mortis viri ſui proxime ante inquiſition. & aſſident damna* to 80*l.* and upon the record it appeared that after the judgment in the writ of dower the demandant had execution by *habere fa. ſeiſinam*, and that damages were aſſeſſed for eight years; whereas it appeared upon all the records, that the demandant had been ſeiſed for part of the eight years; and therefore error was brought and aſſigned, 1*ſt*, That damages are aſſigned till the time of the inquiſition taken, where they ought to be but to the time of the judgment; but this was diſallowed. 2*dly*, That the value being found but 8*l. per annum*, the damages for eight years are but 64*l.*; but *per cur.*, it may be that by the long detaining of dower demandant had ſuſtained more damages than the bare value; but becauſe it appeared that damages were aſſeſſed for the whole eight years, where the demandant herſelf was ſeiſed for part of them, by force of the judgment and execution, it was held erroneous.

Penrice v. Penrice, Barnes, 234. (*a*) The opinion of the court in this latter point is contrary to the preceding caſe, and to the expreſs words of the ſtatute of Merton, c. 1., and alſo to the caſes of Spiller v. Andrews, 8 Mod 25. Dobſon v. Dobſon, Ca. temp. Hardw. 19. 2 Barnard. K. B. 180. 207. 443. and Kent v. Kent, 2 Barnard. 357.

[Upon the execution of a writ of inquiry in an action of dower *unde nihil habet*, the jury aſſeſſed damages to the amount of the third part of the value of the land, from the death of the huſband to the day of the inquiſition, without making any deduction for land-tax, repairs, or chief rents. The inquiſition was ſet aſide, the court being of opinion, that as there are in a writ of dower *unde nihil habet* the words *ultra repriſas*, a deduction ought to have been made for land-tax, repairs, and chief rents; and that the jury (*a*) ought only to have aſſeſſed damages to the day of awarding the writ of inquiry.]

Brook, 49. 73. 78. 93.

In dower if demandant recovers by confeſſion, or otherwiſe, yet ſhe may after, upon ſuggeſtion and averment, that her huſband died ſeiſed, have a writ to inquire of the value and damages.

Brown v. Smith, Hil. 25 & 26 Car. 2. Bull. Ni. Pri. 117.

[If the heir ſell to *J. S.* and the widow recover her dower againſt him, he muſt pay the whole meſne profits from the death of the huſband, though he have not himſelf been half the time in poſſeſſion: ſhe is entitled by the ſtatute, and can recover only againſt the tenant.]

Lev. 38. Aleworth v. Roberts. Sid. 188. S. C. Keb. 85. S. C. 646. 711. Brownl. 127. *cont.*

In dower *unde nihil habet*, the demandant had judgment, and a writ of ſeiſin executed, and the tenant brought error, and the judgment affirmed; but pending this, the tenant aliens the land, and dies; and now the demandant brings *ſcire facias* againſt the heir of the heir, and againſt the alienee, to have her damages, ſuggeſting that her huſband died ſeiſed; the tenants ſeverally plead the matters aforeſaid; and judgment againſt the demandant; but therein agreed that the judgment is complete at common law without the damages, and error lies of it before the damages given, and that it is time enough to ſuggeſt the dying ſeiſed of the huſband, in order to recover damages after the judgment given for

for the dower; but the ſtatute of *Merton* gives damages *contra deforciatores*, which here neither the heir of the heir, nor the alienee are; and therefore they are loſt by the death of the heir, and are not a lien upon the land to paſs with it; for if they ſhould be recovered, from what time muſt this recovery be? not from the huſband's death, becauſe none of the preſent tenants had the land from that time; nor from the death of the heir, againſt whom the judgment was, for none of the now tenants are deforceors; and therefore they are like damages in treſpaſs, which die with the party; and when the tenant dies before judgment for the damages, the judgment for the dower remains as at common law.

A widow brought a writ of dower, and recovered, and this judgment was affirmed in a writ of error, after which ſhe took out a writ of inquiry of damages, but died before the ſame was executed; the damages are loſt, being no duty till they are aſſeſſed; and therefore a *ſcire facias* by her adminiſtrator in this caſe was held not maintainable. 1 Show. 97. S. C. 3 Lev. 275. S. C. 3 Mod. 281. Mordant v. Thorold. Salk. 252. pl. 1. S. C. Carth. 133. S. C.

[If the defendant plead *ne unque ſeiſe que dower*, the demandant may give in evidence a releaſe to her huſband, or a ſurrender to him by one who was ſeiſed as jointenant with him. So, if the demand be of an advowſon or rent-charge, ſhe may give a grant of the advowſon or rent-charge in evidence, and that her huſband died the day before payment or preſentation. 2 Roll. Abr. 676. pl. 10. Bull. Ni. Pri. 118. But *qu.* as to the ſurrender in this caſe?

for one jointenant cannot ſurrender to another, by reaſon of the unity of poſſeſſion. Perk. § 586, 7. See 40 E. 3. pl. 21. 41. b. *contr.* See alſo Watk. on Deſcents, 33. note.

If the tenant plead *ne unques accouple in loyal matrimonie*, it ſhall not be tried by a jury, but a writ ſhall iſſue to the biſhop to certify it. To a demand of dower as the widow of *J. R.*, the defendants pleaded *ne unques accouple;* the plaintiff replied a ſentence of the eccleſiaſtical court in a cauſe of divorce brought by Sir *W. W.* againſt her, charging that ſhe was his wife, and had committed adultery with *J. R.;* to which ſhe pleaded, that ſhe was the lawful wife of *J. R.*, and not of the ſaid Sir *W. W.;* and that afterwards *J. R.* died, and the cauſe coming on to be heard, the judge declared, that the plaintiff had been the wife, and was then the widow of *J. R.;* and ſhe prayed judgment whether the defendants were not eſtopped to plead *ne unques accouple.* The court held it no eſtoppel, as the biſhop's certificate in an action between the plaintiff and other defendants would have been. Robins v. Crutchley, 2 Wilſ. 118. 127.

In dower, the defendant pleaded, that *T. D.* was ſeiſed in fee, and made a leaſe to *J. C.*, but did not ſhew when ſeiſed in fee, or that the term was aſſigned to him; ſo it might be after coverture. After judgment for demandant, the ſaid *J. C.* claiming by leaſe for years from *T. D.*, father of the demandant, prayed to be received, but the court would not admit him. Green v. Roe, Com. Rep. 581. A recovery in dower will eſtop the tenant, and all

claiming under him, from giving a prior term in evidence on an ejectment afterwards brought by the widow under the judgment. Booth v. Marquis of Lindſey, 2 Ld. Raym. 1293.

By 16 and 17 *Car.* 2. *c.* 8. § 3, 4. execution ſhall not be ſtayed by writ of error upon any judgment after verdict, unleſs the plaintiff in error become bound to pay damages and coſts, in caſe

the judgment be affirmed, or the plaintiff diſcontinue, or be non-ſuited; and the court wherein execution ought to be granted upon ſuch affirmation, diſcontinuance, or nonſuit, ſhall iſſue a writ to inquire as well of the meſne profits, as of the damages by any waſte committed after the firſt judgment; and upon the return thereof, judgment ſhall be given, and execution awarded for ſuch meſne profits and damages, and alſo for coſts of ſuit.

Kent v. Kent, 2 Str. 971. 2 Barnard. 357. 386. 441. Ca. temp. Hardw. 50.

Where there are two tenants in dower, and one dies after judgment for damages, and his heir and the other bring error, the whole of the original damages ſhall be recovered againſt the ſurvivor. But the value from the time of the judgment to the affirmance cannot be recovered againſt the ſurviving plaintiff only; nor can the court compute ſuch damages after the rate of the damages found by the firſt jury, but they muſt award a writ of inquiry.

Doe v. Roach, Andr. 153. Ca. temp. Hardw. 373.

If the judgment be affirmed in *dom. proc.* and coſts given, the defendant in error may bring an action upon the recognizance for ſuch coſts, without ſuing out a writ of inquiry.

The writ of dower is now little in practice, and will probably in a ſhort time fall quite into deſuetude. The court of Chancery ſeems at length to be in poſſeſſion of a concurrent juriſdiction with the common law courts in all caſes of aſſignment of dower. That the court of Chancery had juriſdiction in matters of dower, for the purpoſe of aſſiſting the widow to a diſcovery of the lands or title-deeds, or of removing any impediments to her rendering her legal title available at law, ſeems indeed never to have been doubted. But (*a*) it has been queſtioned, whether it could give relief in thoſe caſes, in which there appeared to be no obſtacle to her legal remedy? However, the language of that court now is (*b*), "that "the widow labours under ſo many diſadvantages at law, from "the embaraſſments of truſt terms, *&c.* that ſhe is fully entitled "to every aſſiſtance that a court of equity can give her, not only "in paving the way for her to eſtabliſh her right at law, but alſo "by giving complete relief when the right is aſcertained." And in the exerciſe of this juriſdiction it will enforce a diſcovery (*c*), even againſt a purchaſer, for a valuable conſideration without notice. And though (*d*) the widow ſhould die before ſhe had eſtabliſhed her right at law, it will, in favour of her perſonal repreſentative, decree an account of the rents and profits of the lands, of which ſhe afterwards appeared dowable. But courts of equity conſider themſelves as ſo far proceeding merely on a right which may be aſſerted at common law, that, as in a court of common law no coſts can be given on a writ of dower, ſo no coſts are given in a court of equity on a bill brought for the ſame purpoſe (*e*).]

(*a*) Wallis v. Everard, 3 Ch. Rep. 87.
(*b*) Curtis v. Curtis, 2 Br. Ch. Rep. 634. Mundy v. Mundy, 4 Br. Ch. Rep. 294. and 2 Vez. jun. 122. Mitf. Eq. Tr. 109.
(*c*) Williams v. Lamb, 3 Br. Ch. Rep. 264.
(*d*) Wakefield v. Childs, 8th July 1791, cited in Fonbl. Eq. Tr. 20.
(*e*) Mitf. Eq. Tr. 111.

(K) Of the Admeaſurement of Dower.

F.N.B. 148. Co Lit. 39. a. 2 Inſt. 367.

IF the heir within age aſſign to the wife more land in dower than ſhe ought to have, he himſelf ſhall have a writ of admeaſurement of dower at full age by the common law; ſo, if too much be

be aſſigned in dower by the heir within age, or his guardian in chivalry, and the heir die, his heir ſhall have ſuch writ to rectify the aſſignment: but the heir, in whoſe time the aſſignment of too much was by the guardian, cannot have ſuch writ till his full age, becauſe till then the intereſt of the guardian continues; and if any wrong be done, it is to the guardian himſelf, and not to the heir. If a diſſeiſor aſſigns too much, the heir of the diſſeiſee ſhall have admeaſurement by the common law.

If the heir within age, before the guardian enters, aſſigns too much in dower, the guardian ſhall have a writ of admeaſurement of dower, by the ſtatute of *W.* 2. *c.* 7. before which ſtatute the guardian had no remedy, becauſe the writ of admeaſurement, being a real action, lay not for the guardian, who had but a chattel: alſo, by the ſame ſtatute it is provided, that if the guardian purſue ſuch writ faintly, or by colluſion with the wife, the heir at full age ſhall have a writ of admeaſurement, and may allege the faint pleading or colluſion generally. 2 Inſt. 367.

If the wife after aſſignment of dower improves the lands, ſo as thereby they become of greater value than the other two parts, no writ of admeaſurement lies: ſo if they be of greater value, by reaſon of mines open at the time of the aſſignment, no writ of admeaſurement lies, becauſe the land in quantity was no more than ſhe ought to have; and then it is lawful to work the mines, which were open at the time of ſuch aſſignment. F.N.B.149. 2 Inſt. 368. 5 Co. 12. Saunder's caſe.

If the ſheriff aſſigns too much in dower, by one book it ſeems that the heir ſhall have a writ of admeaſurement; but *q.* whether he ſhall have that or a *ſcire facias* upon the recovery, which was of no more than the third part? pl. 13. Fitzh. Execution, 165. 2 Ld. Raym. 1294-5. Palm. 266. [Br. tit. Dower, pl. 83. Extent,

Theſe writs of admeaſurement of dower are vicontiel, and not returnable; and the parties may plead before the ſheriff in the county, if they think fit: but if they are removed in *C. B.*, by a *pone*, as the plaintiff may, without ſhewing any cauſe, and the defendant, upon ſhewing cauſe; and thereupon proceſs goes out, *viz.* ſummons, attachment, and *diſtringas*; then the ſheriff cannot make admeaſurement, but ought to extend all the lands particularly, and return it in *C. B.*, and upon that admeaſurement ſhall be made. F.N.B.148.

Dower by the Cuſtom.

This kind of dower varies according to the cuſtom and uſage of the place, and is to be governed accordingly; and where ſuch cuſtom prevails, the wife cannot waive the proviſion thereby made for her, and claim her thirds at common law, becauſe all cuſtoms are equally ancient with the common law itſelf. Co. Lit. 33. b. Cro. Eliz. 825. Leon. 62. 133.

By the cuſtom of gavelkind in *Kent*, the wife ſhall have the moiety ſo long as ſhe keeps herſelf chaſte and unmarried. The reaſon of this proviſion for the wife ſeems to be founded on the equal diſtribution, which is obſerved in this kind of inheritance in the ſame family for their equal ſupport; and therefore when ſhe proves unchaſte, or marries again, and thereby contracts a new Co. Lit. 33. b. 111. a. F.N.B.150. Stanf. Prær. 44. b. Roll. Abr. 558. Brook, tit.

Dower, 70. Brook, tit. Cuſtom, 67. 69. 72. 2 Jon. 6. Sid 136.

alliance, this proviſion as to her ceaſes, and returns again into the family. But the preſumption of her chaſtity is to continue till it be proved ſhe was delivered of a child, begotten during her widowhood, which may be in any action brought by or againſt her.

Lambart's perambulation, 555. [But authorities are not wanting to ſhew, that not only child-bearing, a caſual conſequence of fornication, and the detection of it in this publick manner, but the commiſſion of the act of fornication itſelf is a forfeiture of her eſtate. Rob. Gavelk. 165. and the authorities there cited.]

Hunt & *Uxor* v. Gilburn, Leon. 62. Cro. Eliz. 121. S. C. adjudged. Moor, 260. pl. 408. S.C. adjudged. Cro. Eliz. 825. S. P. and S. C. cited.

Dower, and demands the third part of the lands of *A.* her late huſband lying in *Kent*, *&c.*, defendant pleads that the cuſtom there is, that wives ſhall have the moiety of their huſbands' lands in dower, ſo long as they live chaſte and unmarried, and *non aliter*, or *non ſecundum curſum communis legis*, and that the demandant after the death of her firſt huſband had married the other demandant, *&c.; et per cur.*, the cuſtom is good, and is the law in *Kent;* and therefore ſhe can claim no other dower, nor in any other manner, and the rather, by reaſon of the negative concluſion.

Co. Lit. 33.b. 110.b. F.N.B. 150. Cro. Eliz. 415.

By the cuſtom of borough-engliſh, the widow ſhall have the whole of her huſband's lands in dower, which is called her free-bench.

Moor, pl. 566. The reaſon of which ſeems to be, that in theſe boroughs the eldeſt ſon was introduced into the trade of his father, and therefore the youngeſt ſon inherited the land, and conſequently the wife that was intruſted with the younger children of her huſband had the whole during her life.

Cro. Jac. 126. Laſhmer v. Avery.

Upon a ſpecial verdict, the caſe was this: a cuſtom of a manor was found to be, that if a copyholder in fee died ſeiſed, his wife ſhould hold it during her life as *frank bank;* the lord enfeoffs the copyholder, who died ſeiſed; and adjudged that her cuſtomary eſtate was gone, becauſe by the acceſſion of the freehold the copyhold eſtate was extinguiſhed, and ſo her huſband did not die ſeiſed thereof; *ſecùs*, if the lord had enfeoffed a ſtranger, for then the copyhold remained ſo ſtill, and the cuſtom with it.

Hob. 181. Howard v. Bartlett. Cro. Jac. 573. S. C.

Cuſtom of a manor was, that the wives of copyholders for life ſhould enjoy their huſbands' eſtates during widowhood; and the caſe was, that *A.*, a copyholder for life, purchaſed the freehold and inheritance of his copyhold, but took the conveyance to *B.*, and his heirs during the life of *A.*, remainder to *A.* in fee, and then *A.* dies: adjudged that his wife ſhould have her cuſtomary eſtate, becauſe the cuſtomary eſtate of *A.* her huſband continued during his life, and was not extinct, nor altered by the purchaſe of the freehold, which during his life was in *B.*, and then all cuſtomary incidents to ſuch cuſtomary eſtate remain, whereof this is one, and grows out of it as an excreſcence or fruit, and ſhe may enter without admittance.

3 Lev. 385. Benſon v. Scot. 4 Mod. 251. S. C. Salk. 185. pl. 3. S. C. Carth. 275. S. C.

Cuſtom of a manor was, that the copyholders' wives ſhould have their free-bench of all copyholds whereof their huſbands died ſeiſed; and a copyholder, being married, ſurrenders to *A.* in fee by way of mortgage, for ſecuring 70*l.* and this ſurrender was preſented to be enrolled; but before admittance the ſurrenderer dies, and after his death *A.* is admitted; and if the wife ſhould have

have her free-bench, was the queſtion? For the wife it was ſaid, that till admittance the copyhold remained in the huſband, and then he died ſeiſed, and ſo his wife within the cuſtom; and though the admittance after his death has relation to the time of the ſurrender, yet that is only by fiction of law between the parties, but ſhall not prejudice the wife who is a ſtranger: alſo, the admittance hath relation to the marriage, which was before, and is perfected by, the death of the huſband, and ſo her title was begun and perfected too, before the title of the ſurrenderee. But the court denied that the wife had any initiate title by the marriage in this caſe as women have to their dower at common law; but ſhe hath only a conditional inception of a title ſubject to the huſband's power of preventing it by alienation, as here he might have done; for ſhe is not to have her free-bench but where the huſband died ſeiſed; and this by the relation of the ſurrender he did not; and adjudged accordingly. Skin. 406. pl. 1. 12 Mod. 49.

[The cuſtom of a manor was to grant copyholds for three lives: the firſt life had a power of ſurrendering the whole eſtate, and the widow of a tenant, who died ſeiſed, was entitled to her free-bench. *F.*, a copyholder for three lives, ſurrendered to *H.*, the deceaſed huſband of the defendant; who afterwards by licence from the lord, demiſed to *J. S.* for ninety-nine years by way of mortgage: then *H.* died, and *J. S.* aſſigned to the plaintiff. At the trial, only one inſtance of a leaſe by licence was given in evidence; whereupon it was inſiſted for the defendant, the widow, that there being no ſpecial cuſtom to let by leaſe, the only way of transferring the copyhold was by ſurrender. And therefore in this caſe, if the eſtate of *H.* the huſband was not determined according to the cuſtom of the manor, he muſt be deemed to have died ſeiſed of the copyhold, and the widow ſtill entitled to her free-bench. But the court ſaid, that here, the right of the huſband was confined to ſuch eſtate as he ſhould *die ſeiſed of*: conſequently, as between lord and tenant, they might defeat the wife's eſtate when they pleaſed.] Saliſbury v. Hurd, Cowp. 481. Farcley's caſe, Cro. Ja. 36. S.P. Anon. Freem. 516. S. P.

The cuſtom of a manor was, that the wife of a copyholder dying ſeiſed ſhould have her widow's eſtate; a commiſſion of bankruptcy is taken out againſt the copyholder, and his eſtate ſold by the commiſſioners, but before the vendee was admitted the copyholder dies; and yet adjudged that the widow's eſtate was gone, becauſe her huſband did not die ſeiſed, his eſtate and right being bound by the ſale, to which the admittance after has relation, and deveſts the widow's eſtate. Cro. Car. 569. Parker v. Edith.

If the cuſtom of a manor be, that if any of the tenants marry a widow ſhe ſhall have no dower; this is good; but cuſtom, that the wife of tenant in fee ſhall not be endowed, is not good. Roll. Abr. 562. Dav. 30. b.

If there be a cuſtom, that where the huſband ſells his lands and his wife receives part of the money, or if it be expended in the family, that his wife ſhall be barred of her dower, this may be good. Roll. Abr. 562. Brook, tit. Cuſtom, 53. 78.

Ancient rent, or common in borough-engliſh, gavelkind, *&c.* is of the nature of the land there, and women ſhall have dower accordingly; Brook, tit. Cuſtom, 4. 58. 65 69.

accordingly; and ſo it ſeems to be of rent, common, &c. newly granted, though ſome have held the contrary; and in all theſe caſes, whether it be of land or rent, the cuſtom muſt be ſhewn ſpecially.

Perk. 435, 436. 2 Sid. 139.

If the cuſtom be, that the wife ſhall have for her dower the moiety of the lands and tenements of her huſband, &c. ſhe ſhall not be endowed of a fair or bailiwick, becauſe the cuſtom ſhall be taken ſtrictly, and theſe are no tenements: *ſecùs*, if they were appendant to a manor, whereof ſhe is dowable, for then ſhe ſhall have a moiety of the profits as appendant to a moiety of the manor.

Dower *ad Oſtium Eccleſiæ.*

Lit. § 39. Co. Lit. 34. a. 36. b. 37. a.

Dower *ad oſtium eccleſiæ* is where a man of full (*a*) age, ſeiſed of lands in fee, after marriage endows his wife at the (*b*) church-door of (*c*) a moiety, a third or other part of his lands, declaring them in certainty; in which caſe, after her huſband's death, ſhe may enter into ſuch (*d*) lands without any other aſſignment, becauſe the (*e*) ſolemn aſſignment at the church-door is equivalent to the aſſignment *in pais* by metes and bonds: but this aſſignment cannot be made before marriage, becauſe before, ſhe is not entitled to dower.

(*a*) Cannot be made by one under age. Perk. 438.

(*b*) *Dowment ad oſtium cameræ caſtri vel meſſuagii* is not good. F. N. B. 150. Co. Lit. 34. (*c*) It was formerly held that it could not be of more than a third part of the huſband's eſtate. F. N. B. 150. Co. Lit. 34. b. 36. a. (*d*) This dower cannot be of the capital barony held of the king *in capite*, or of the capital meſſuage held by knight's ſervice. (*e*) This dower, before the ſtatute of frauds and perjuries, was held to be good without deed, or without livery and ſeiſin. Perk. 437. Brook, 7. 80. Dyer, 18. pl. 108. Co. Lit. 34. a. 35. a.

Co. Lit. 32. a.

If this dower be aſſigned, with a clauſe, that, notwithſtanding any divorce that ſhall happen, the wife ſhall hold it for her life, this is good, becauſe *modus & conventio vincunt legem.*

Co. Lit. 38.

If tenant in tail aſſigns ſuch dower, this ſhall not bind his iſſue againſt the ſtatute *de donis*, nor him in the reverſion after the eſtate ended.

Dower *ex Aſſenſu Patris.*

Lit. § 40. Co. Lit. 35, 36. Perk. 444. Brook, 7. 80. Plow. 304. b. Cro. Jac. 169. Dower *ex aſſenſu matris* is as good. Perk. 441. Co. Lit. 35. This endowment of a reverſion expectant on an eſtate for life is not good, nor of lands held by the father in jointenancy, becauſe not dowable of them. Co. Lit. 35. a. Perk. 445. F. N. B. 150. (*f*) Can be only by the heir apparent. Perk. 442. F. N. B. 150. 3 Co. 38. 6 Co. 22. Co. Lit. 35. But it is good, though the heir apparent be within age, for the eſtate does not move from him. Co. Lit. 35. b. 38. a. Brook, 80.

Dower *ex aſſenſu patris* is where the father is ſeiſed of lands in fee, and his ſon and heir (*f*) apparent after marriage endows his wife by the father's aſſent, *ad oſtium eccleſiæ*, of a certain quantity of them; in which caſe, after the death of the ſon, his wife may enter into ſuch parcel, without any other aſſignment, though the father be living: but this aſſent of the father muſt be by deed, becauſe his eſtate is to be charged *in futuro*, and this may likewiſe be of more than a third part.

4 Co. 1. Co. Lit. 36. Brook, 97.

Theſe dowers, *ad oſtium eccleſiæ*, or *ex aſſenſu patris*, if the wife enters and aſſents to them, are a good bar of her dower at com-

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mon law; but ſhe may, if ſhe will, waive them, and claim her dower at common law, becauſe being made after the marriage ſhe is not bound by them. 3 Leon. 272.

Theſe dowers enſue the nature of dower at common law, and the wife may have a writ of dower for them, though they are certain, as well as for her dower at common law, and as well againſt the guardian as the tertenant. Co. Lit. 35. F. N. B. 150.

Theſe dowers are good, though the wife be under the age of nine years at the time of her huſband's death, being made by conſent. Co. Lit. 30. a. 37. a.

But they are forfeited for high or petit treaſon in the huſband; and ſo they were anciently, if he were attainted of felony or murder; though now in theſe laſt caſes thay are ſaved by the ſtatutes 1 *E.* 6. *c.* 2. and 5 *Edw.* 6. *c.* 11., but remain forfeitable by his attainder of high or petit treaſon. Co. Lit. 37. a. 41. Stanf. 195. a.

Dower *de la pluis Beale.*

Dower *de la pluis beale* is where there is a guardian in chivalry, and the wife occupies lands of the heir as guardian in ſocage, if the wife brings a writ of dower againſt ſuch guardian in chivalry, he may ſhew this matter, and pray that the wife may be endowed *de la pluis beale* of the tenements in ſocage; and it will be adjudged accordingly. And the reaſon of this endowment was to prevent the diſmembring of the lands holden in chivalry, which are *pro bono publico*, and for the defence of the realm. Lit. § 48. Co. Lit. 38, 39. a. b.

After judgment given, the wife may take her neighbours, and in their preſence endow herſelf of the faireſt part of the tenements, which ſhe hath in ſocage, for her life. Lit. § 49.

If the lands, which the wife hath as guardian in ſocage, are not of value ſufficient for her dower, or if a rent-charge be iſſuing out of them, upon her ſhewing thereof, ſhe ſhall recover of the guardian in chivalry to make it up. Lit. § 49.

If all the lands which the huſband had were holden in ſocage, and his wife hath them as guardian in ſocage, ſhe ſhall be allowed the third part of the profits upon her account in allowance of dower. But ſhe cannot endow herſelf of the third part thereof, becauſe that would be to make herſelf judge in her own cauſe; neither can the heir, in a writ of dower brought againſt him, plead that ſhe is guardian in ſocage, and may endow herſelf. Perk. 451.

Guardian by tort in ſocage cannot endow herſelf *de la pluis beale*, becauſe the law will not encourage ſuch wrong and violence. 5 Co. 30.

Dureſs.

EVERY legal contract muſt be the act of the underſtanding, which they are incapable of uſing, who are under reſtraints and terrors; and therefore the law requires the free aſſent of the parties as eſſential to every contract, and that they be not under any force or violence. But for the better underſtanding hereof I ſhall conſider:—

(A) For what Dureſs or Degree of Reſtraint or Terror, a Man ſhall avoid his Deed or Contract.

(B) On whom and by whom the Dureſs muſt be committed.

(C) What Contracts or Securities may be thus avoided.

(D) The Manner of avoiding them.

(A) For what Dureſs or Degree of Reſtraint or Terror, a Man ſhall avoid his Deed or Contract.

Co. Lit. 253. Jenk. 166. (a) For every reſtraint of the liberty of a freeman is an impriſonment. 2 Inſt. 482.

IT ſeems clearly agreed, that where a perſon is illegally reſtrained of his liberty by being confined in a common gaol, or (a) elſewhere, and during ſuch reſtraint enters into a bond, or other ſecurity, to the perſon who cauſes the reſtraint, that he may avoid the ſame for dureſs of impriſonment.

2 Inſt. 481. (b) That dureſs of impriſonment is intended only where the party is wrongfully impriſoned till he makes a bond, and not where a man is lawfully impriſoned for another cauſe, and for his delivery makes a bond. 3 Leon. 239. *per cur.* (c) If a man be lawfully in priſon, yet if he makes an obligation againſt his agreement and will, he may avoid it by dureſs. 43 E. 3. 10. b. Roll. Abr. 687.— Where after judgment the defendant, having no good cauſe of action, cauſed the plaintiff to be arreſted and detained in priſon, threatening him that if he would not ſeal a releaſe to him, he ſhould lie there

But if a man be impriſoned by order of law, the plaintiff may take a feoffment of him, or a bond for his ſatisfaction, and for the deliverance of the defendant, notwithſtanding that impriſonment: for this is not by dureſs of impriſonment, becauſe he was in priſon by (b) courſe of law; for it is not accounted in law dureſs of impriſonment, but where either the impriſonment, or the dureſs that is offered (c) in priſon, or at large, is tortious and unlawful; for *executio juris non habet injuriam.*

there and rot; and thereupon he ſealed one, and was diſcharged; it was ruled at Guildhall by Bridgman, C. J. that this releaſe could not be avoided by dureſs, becauſe he was in cuſtody in the courſe of law by the king's writ when he ſealed, but he offered it ſhould be found ſpecially if Baldwin would pray it, which he did not; and therefore the releaſe was held good. Lev. 69.

My Lord *Coke* ſays, that for menaces, in four inſtances, a man may avoid his own act. 1*ſt*, For fear of loſs of life. 2*dly*, (*a*) Of loſs of member. 3*dly*, Of mayhem. 4*thly*, Of impriſonment. 2 Inſt. 483. (*a*) 2 Roll. Abr. 124. S. P.

But menacing to commit a battery, or to burn his houſes, or ſpoil his goods, is not ſufficient to avoid the act; for if he ſhould ſuffer what he is threatened, he may ſue and recover damages in proportion to the injury done him. 2 Inſt. 483.

If a man is taken by virtue of a proceſs iſſuing out of a court that hath no power to grant ſuch proceſs, and for his enlargement gives bond to appear in the ſaid court, this may be avoided, becauſe taken by dureſs: adjudged in an action upon ſuch bond, given by one who was taken upon an attachment under the privy ſeal of the court of requeſt; for that court had (*b*) no power to grant ſuch proceſs, and therefore it was no warrant to the ſheriff to take his body. Cro. Eliz. 646. Stepney and Lloyd. 4 Inſt. 97. S. C. Cro. Car. 596. (*b*) So, where the arreſt was by the purſuivant of the high commiſſion by their command, until he entered into a bond to appear, &c. it was held void. Roll. Abr. 687.

If *A.* falſely charges *B.* with felony for ſtealing his horſe, and procures a warrant from a juſtice of peace to a conſtable, whereby he is taken, and being in cuſtody, upon *A.*'s promiſe to diſcharge him, ſeals a bond for 10 *l.* to *A.*, and is thereupon immediately diſcharged; this bond may be avoided by dureſs; and ſo ruled, it appearing that the horſe was *B.*'s own horſe, and that theſe proceedings were only to cover the deceit. Allen, 92. Ruled by Roll accordingly upon the trial of an iſſue on the dureſs.

Alſo in equity, if a man by compulſion enters into a bond, though the terror and force are not ſufficient to make it dureſs at common law, yet it may be relieved againſt. 2 Vern. 497. *per Cur.*

But in this every caſe muſt depend on its own circumſtances; for where *A.* being taken by the huſband going to bed to his wife, gave ſecurities for payment of 500 *l.* and a bill was brought to be relieved againſt the ſecurities, ſuggeſting a plot to catch him; and that the defendant with an axe threatened to cut him in pieces; there being no proof of a plot, and it appearing that the ſecurities were entered into at three ſeveral times, and when the plaintiff was in cool blood, and that he joined in concealing the conſideration thereof, the court refuſed to relieve. Preced. Chan. 266. Woodman and Skute.

Alſo, by a rule of the court of Common Pleas, 14 & 15 *Car.* 2. 1662. all warrants for confeſſing judgments, taken by any ſheriff or bailiff from any perſon in his or their (*c*) cuſtody by arreſt, if not executed in the (*d*) preſence of ſome ſworn attorney of (*e*) either court, and his name ſet or ſubſcribed thereto as a witneſs, ſhall not be (*f*) good, or of any force; and upon oath made that this was not done, the ſame ſhall be ſet aſide, and the ſheriff or officer may be puniſhed for ſo doing; and if judgment be entered thereon, the ſame on motion will be vacated and ſet aſide; and if [The ſame rule obtains in B. R. See tit. Attorney, vol. 1. 298.] (*c*) So, if a man under arreſt be ſeemingly diſcharged by the bai-

liffs with a deſign that he ſhould

the execution thereon be executed, the party will have reſtitution awarded him.

give a warrant of attorney to confeſs a judgment, but if he did not, to be retaken; this is within the rule. 6 Mod. 85. So, if he be really diſcharged; yet if he has probable reaſon to believe himſelf not to be diſcharged, and under ſuch apprehenſions, he gives a warrant for confeſſing of judgment, it will be ſet aſide. 6 Mod. 85. agreed *per cur.* (*d*) Though an attorney be preſent, yet if there be practice in obtaining it, it will be ſet aſide. 6 Mod. 85.——So, where an adminiſtratrix owed money to *A.*, in right of her inteſtate only, and was arreſted by *A.* without naming her adminiſtratrix, and gave a warrant of attorney to confeſs judgment, whilſt under an arreſt; though judgment was entered, and her goods taken in execution, and although an attorney was preſent, yet the court ſet aſide the judgment for irregularity, and awarded reſtitution. 6 Mod. 163. (*e*) If one under an arreſt confeſſes judgment in *B. R.* in the preſence of a ſworn attorney of *C. B.* it is well. Wilmot v. Barry, Barnes, 44. Str. 530. and ſo *vice verſa*. 6 Mod. 85. 1 Salk. 402. Comb. 224. If one under an arreſt by proceſs of an inferior court gives warrant for confeſſing a judgment in that court, it will not be ſet aſide in *B. R.* though no attorney be preſent. 6 Mod 85.—But if being in cuſtody by proceſs of an inferior court he gives a warrant of attorney to confeſs judgment in *B. R.* if an attorney be not preſent, it will be ſet aſide. 6 Mod. 85. (*f*) But if the defendant is arreſted, and in execution, and one becomes bound for him to the plaintiff, and the defendant gives him judgment for his counter-ſecurity, it is good, though no attorney were preſent. 5 Mod. 144. One in execution may confeſs a new judgment, without the preſence of an attorney. 2 Stra. 1245. [But even in that caſe, if the party had been prevailed upon to confeſs a judgment for more than was really due, the court would relieve. Cowp. 281.]

(B) On whom and by whom the Dureſs muſt be committed.

Roll. Abr. 687. Montal and Woolington, Brownl. 66. S. C. adjudged.

THE dureſs that will avoid a deed muſt be done to the party himſelf; therefore if *A.* and *B.* enter into an obligation, by reaſon of dureſs done to *A.* *B.* (*a*) ſhall not avoid this obligation, though *A.* may, becauſe he ſhall not avoid it by dureſs (*b*) to a ſtranger.

[Wayne v. Sands, Freem. 351. *acc.*] (*a*) Cro. Jac. 187. S. P. adjudged, and that the bond may ſtand good as to one, and be avoided as to the other *. (*b*) Dureſs by a ſtranger, by procurement of the party that ſhall have the benefit, is a good cauſe to avoid, &c. 43 E. 3. 6. Roll. Abr. 688. S. C. —But dureſs by a ſtranger, without making the obligee party thereto, is no cauſe to avoid, &c. Keilw. 154. a.——* But ſuppoſe ſuch bond joint, and not ſeveral, will not the dureſs of one obligor avoid it, as to the other?

(*c*) Roll. Abr. 687. (*d*) 2 Brow. 276.

But (*c*) a ſon ſhall avoid his deed by dureſs to his father; ſo (*d*) ſhall the father his deed, by reaſon of dureſs to his ſon.

[But *per* Twiſden, J. a man ſhall in no caſe avoid his deed by a dureſs to another, let him be related how he will. Freem. 351.]

Roll. Abr. 687. 2 Brownl. 267. S. P.

Alſo the huſband ſhall avoid a deed made by dureſs to his wife.

For the huſband and wife are but one perſon. Sid. 123. cited to be adjudged.—For dureſs of impriſonment of the plaintiff's commoign. Keilw. 154.

Roll. Abr. 687. 2 Brownl. 276.

But a ſervant ſhall not avoid a deed made by dureſs to his maſter, nor *vice verſâ*.

(C) What Contracts or Securities may be thus avoided.

IF a man makes a (*a*) leaſe by dureſs, and the leſſee enters, the leſſor ſhall have an aſſiſe againſt him as a diſſeiſor; for the free conſent of parties being eſſential to all contracts, where either of the parties is under force and violence, his free aſſent cannot be ſuppoſed, and therefore ſuch contract is void, and the perſon who enters by virtue of it is a wrong-doer. Bro. tit. Diſſeiſin, 68.

(*a*) So, if a man under dureſs makes a letter of attorney to give livery, he ſhall have an aſſiſe. Bro. tit. Diſſeiſin, 63.

But if a man by dureſs make a feoffment and livery in perſon, he ſhall have no aſſiſe againſt the feoffee, becauſe ſuch dureſs ſhall not be preſumed, for then the power of the *pais*, preſent at the ſolemnity, would have been ſuppoſed to have come in to his reſcue. Bro. tit. Diſſeiſin, 63. *Vide* 2 Inſt. 483., where it is ſaid that a feoffment made by dureſs is not void, but voidable only.

So, if a man acknowledges and enrolls a deed, he cannot afterwards plead dureſs. Moor, 42. Cro. Eliz. 88. S. C.

And the court inclined accordingly. Roll. Abr. 862. S. P. And that no averment ſhall be taken, that a deed enrolled was made by dureſs.

But a ſtatute merchant may be avoided by *audita querela*, becauſe it was made by dureſs of impriſonment. Roll. Abr. 687. Owen, 142. S. C. *Vide* Vidian Ent. 107.

In debt, for the arrears of an account, the defendant may ſhew that the plaintiff of his own wrong impriſoned the defendant, and aſſigned auditors to him, being in priſon, and that ſo the account was by dureſs. Leon. 13. The Earl of Northumberland's caſe adjudged by all the judges.

A will ſhall be (*b*) avoided by dureſs or menace of impriſonment. Dyer, 143. b.

(*b*) So, if a man makes a will in his ſickneſs by the over importunity of his wife, to the end he may be quiet, this ſhall be ſaid to be a will made by reſtraint, and ſhall not be good. Styl. 427.

If a man takes *A. S.* to wife by dureſs, though the marriage be ſolemnized *in facie eccleſiæ*, yet it is merely void, and they are not huſband and wife, for without a free conſent (*c*) there can be no marriage. Keilw. 52. b. 1 N. Dyer, 13. in margin. Sid. 65.

(*c*) Though *de jure* it cannot, yet *de facto* it may, and ſo within the ſtatute 3 H. 7. c. 2. Cro. Car. 488.

(D) The Manner of avoiding them.

IF a man executes a deed by dureſs, he cannot plead *non eſt factum*, for it is his deed, though he may avoid it by ſpecial pleading judgment *ſi actio*. 5 Co. 119. Reſolved *per Cur.* 2 Inſt. 483.

S. P. *Vide* Keb. 516. That in pleading the ſpecial manner of the dureſs, *viz.* whether it was *per minas vitæ, minas impriſonam.*, &c. muſt be ſet forth; and note, ſo are all the entries.

Ejectment.

(A) Of the Nature of the Action, and Antient Manner of Proceeding in Ejectment.

(B) Of the Modern Manner of Commencing and Proceeding in Ejectment: And herein,

1. Of ſerving the Declaration, Notice to the Tenant in Poſſeſſion, and entering into the common Rule.
2. Of adding proper Parties.
3. Of the Coſts.

(C) In what Caſe the Antient Form is ſtill to be adhered to.

(D) Of the Declaration in Ejectment: And herein,

1. Of what Things an Ejectment will lie.
2. What ſhall be a ſufficient Deſcription thereof.
3. Of the Deviſe and Right of Entry in the Leſſor of the Plaintiff, and of the Ouſter.

(E) Of the Plea and General Iſſue in Ejectment.

(F) Of the Verdict and Judgment in Ejectment.

(G) Of the Writ of Execution: And herein,

1. Of the Time when the Writ is to be ſued.
2. How the Writ is to be executed.
3. How the Plaintiff is to be quieted, and what Relief he has where his Poſſeſſion is diſturbed.

(H) Of the Meſne Profits, and how to be recovered.

(I) Of bringing a new or ſecond Ejectment.

(A) Of the Nature of the Action, and Antient Manner of Proceeding in Ejectment.

AN ejectment is a mixed (*a*) action, in which a leſſee for years, when ouſted, ſhall recover his term, as alſo his damages. 5 Co. 105. 9 Co. 77. (*a*) For it is *real* in reſpect of the *lands*, and *perſonal* in reſpect of the *damages* and *coſts*. Comb. 250.

[It is alſo a *poſſeſſory* action, grounded on a *right* to the poſſeſſion of the premiſes in queſtion between the parties. It is always neceſſary therefore for the plaintiff to ſhew that his leſſor had a right to enter, by proving a poſſeſſion within twenty years, or accounting for the want of it under ſome of the exceptions allowed by the ſtatute.] 10 Mod. 177. 1 Burr. 119. 21 Ja. 1. c. 16.

This remedy was contrived to ſupply ſeveral defects which attended the bringing of real actions; for in theſe the party could not recover any damages, neither could he regularly bring a ſecond action if he was barred in the firſt. 6 Co. 7. Ferrar's caſe.

But the concluding the demandant by one action being oftentimes found to have been very prejudicial to his right; to ſupply this and ſeveral other inconveniencies which attended the bringing of real actions, the manner of forming a term for years, and the leſſee's bringing an ejectment to recover the term, thereby to aſſert the title of the leſſor of the plaintiff, was found out, and was (*b*) firſt introduced in the 14 *H.* 7. (*c*), before which time it ſeems that leaſes for years were but of very ſhort duration, and were generally defeated or determined before any intricate title could be decided, and were ſuch precarious poſſeſſions with reſpect to the power which the owner of the freehold and inheritance had over them, that every ſuch leſſee was looked upon only as his bailiff; and if ouſted, could only have recovered damages for the loſs of his poſſeſſion; and if ouſted by his leſſor, he could only ſeek a remedy from his covenants. (*b*) F. N. B. 220. [(*c*) This method appears to have been ſettled as early as the reign of Edw. 4. In 7 E. 4. 6. *per* Fairfax, *ſi home port ejectione firmæ, le plaintiff recovera ſon terme qui eſt arrere ſi bien come en quare ejecit infra terminum*; *et, ſi nul ſoit arrere, donques tout in damages.* Bro. Abr. 1. *Quare ejecit infra terminum*, p. 6.]

It ſeems alſo, that ſome time before the above-mentioned period, long terms had their beginning, which to ſecure to themſelves, the leſſees uſed, when moleſted, to go into equity againſt the leſſors for a ſpecifick performance, and againſt ſtrangers, to have perpetual injunctions to quiet their poſſeſſions. This drawing the buſineſs into the courts of equity, was probably one reaſon which obliged the courts of law to come to a reſolution, that they ſhould recover the land itſelf in an *habere facias poſſeſſionem*. Hence this action became, and ſtill continues, the common method of controverting the title to lands and tenements.

As this reſolution brought on a new method of trial unknown before to the common law, it became uſual for a man that had a right of entry into any lands to ſeal leaſes of ejectment on the lands, and then any perſon that next entered on the freehold was an ejector (*d*). But as this was a means of turning any man out of [(*d*) The practice of ſetting up a caſual ejector is ſaid by Keeling to have been

introduced about the time of the troubles, 1 Keb. 705. but in truth it is of much earlier date. 3 Burr. 1297.]

of poſſeſſion, becauſe the leſſee would recover his term without any notice to the tenant in poſſeſſion, the courts of juſtice would not ſuffer that men ſhould loſe their poſſeſſions without any opportunity to defend them; they therefore made it a ſtanding rule, that no plaintiff ſhould proceed in ejectment to recover his lands againſt ſuch a feigned ejector, without delivering the tenant in poſſeſſion a declaration, and making him an ejector and proper defendant if he pleaſed.

F. N. B. 489.

This was a proper rule; for otherwiſe the court would be made inſtrumental in doing an injury to a third perſon, becauſe a declaration might be delivered to a ſtranger, a feint defence be made, and a verdict, judgment, and execution obtained without the tenant's having any notice of it. For, though it is not to be doubted, but that ſuch actions were brought at firſt againſt the real ejectors that reſided in the poſſeſſions; yet becauſe any perſon that came into the land *animo poſſidendi*, was equally an ejector with him that reſided, and the action in ſtrictneſs of law might be brought againſt him, which might turn to the injury of the reſiding poſſeſſor; therefore the courts declared that they would not give judgment unleſs the tenant in poſſeſſion had notice of it, and an affidavit was made that he was ſerved with a copy of the declaration.

Style, 468. T. Raym. 93. Keb. 705. 740.

Upon ſuch notice to the tenant in poſſeſſion, and affidavit as aforeſaid, the tenant in poſſeſſion uſed to move the court, that as the title of the land belonged to him, he might defend in the caſual ejector's name, which motion the court, upon an affidavit of that matter, would grant, and direct that the ſuit ſhould be carried on in the caſual ejector's name, the tenant in poſſeſſion ſaving him harmleſs. But the caſual ejector was not permitted to releaſe errors in prejudice of the tenant in poſſeſſion, though the ſuit was carried on in his name by rule of court, and the proceſs for coſts was taken out againſt him; and he was obliged to put the bond of the tenant in poſſeſſion in ſuit, who undertook to ſave him harmleſs.

Alſo, by the ancient practice, ſuch leaſes were actually to be ſealed and delivered, becauſe otherwiſe the plaintiff could maintain no title to the term: they were to be ſealed too on the land itſelf, becauſe it was maintenance to convey out of poſſeſſion.

(B) Of the Modern Manner of Commencing and Proceeding in Ejectment: And herein,

1. Of ſerving the Declaration, Notice to the Tenant in Poſſeſſion, and entering into the common Rule.

[(*a*) Which is the firſt proceſs. Roe v. Doe, Barnes, 173.]

ACcording to the modern practice there is regularly no neceſſity of ſealing and delivering leaſes on the lands; but the party who claims a title feigns a leaſe, and in the name of the feigned leſſee delivers a (*a*) declaration to the tenant in poſſeſſion

in

in the name of the caſual ejector, who is alſo now ſome feigned perſon; on which declaration there is (*a*) notice to the tenant in poſſeſſion in the caſual ejector's name.

(*a*) Which notice is, that as the caſual ejector does not claim title, unleſs the tenant appears and defends his title, the caſual ejector will ſuffer judgment to paſs by default, whereby the tenant will be turned out of poſſeſſion. [It muſt be ſigned by the caſual ejector. Barnard. K. B. 43. or by the nominal plaintiff. 3 Term Rep. 351.]

It hath been holden, that the ſervice of the declaration ought to be on the tenant himſelf, or his wife, and that the ſervice on any of his children or (*b*) ſervants is not good; and now by the 4 *Geo.* 2. *c.* 28. it is enacted, "That in all caſes between "landlord and tenant, as often as it ſhall happen that one half "year's rent ſhall be in arrear, and the landlord or leſſor, to "whom the ſame is due, hath right by law to enter for the non-"payment thereof, ſuch landlord or leſſor ſhall and may, with-"out any formal demand or re-entry, ſerve a declaration in "ejectment for the recovery of the demiſed premiſes; or in "caſe the ſame cannot be legally ſerved, or no tenant be in actual "poſſeſſion of the premiſes, then to affix the ſame upon the door "of any demiſed meſſuage; or in caſe ſuch ejectment ſhall not "be for the recovery of any meſſuage, then upon ſome notori-"ous place of the lands, tenements, or hereditaments compriſed "in ſuch declaration in ejectment; and ſuch affixing ſhall be "deemed legal ſervice thereof; which ſervice or affixing ſuch "declaration in ejectment ſhall ſtand in the place or ſtead of a "demand and re-entry," *&c.*

Salk. 255. pl. 5.

[(*b*) But by the modern practice, ſervice on the child or ſervant of the tenant is deemed good ſervice, provided it be made on the premiſes, and be afterwards acknowledged by the tenant or his wife. Barnes, 175. 176. 180. 188. 190. 192. 2 Wilſ. 263. and that, though it ſhould not clrealy appear that the declaration came to the hands of the tenant before the eſſoign day of the term. 1 H. Bl. 644. Barnes, 183. The ſervice, if made perſonally on the tenant himſelf, need not be on the premiſes. 2 Str. 1064. But if the tenant abſcond, or keep out of the way, to avoid being ſerved, it is uſual to ſerve a declaration on ſome perſon reſiding at his houſe, or if that cannot be done, to affix the ſame upon the door; and then, on an affidavit of the circumſtances, to move the court for a rule upon the tenant, to ſhew cauſe why ſuch ſervice ſhould not be deemed ſufficient: the court will preſcribe the mode of ſerving the rule, which is generally made abſolute on an affidavit of its ſervice. Sprightly v. Dunch, 2 Burr. 1116. Goodright v. Noright, 1 Bl. Rep. 290. Fenn v. Denn, 2 Burr. 1181. Gulliver v. Wagſtaff, 1 Bl. Rep. 317.]

After the declaration delivered, the plaintiff's attorney (except as is above excepted by the ſtatute) is obliged to make oath that he delivered to *J. D.* tenant in poſſeſſion of the premiſes in queſtion, a true copy of the annexed declaration, with the before-mentioned ſubſcription, which ſubſcription the deponent did then read to the ſaid *J. D.* and acquaint him with the contents thereof.

This affidavit is to be poſitive, that *J. D.* was tenant in poſſeſſion, or that the defendant acknowledged himſelf to be ſo, becauſe no man ſhould be turned out of poſſeſſion without a poſitive affidavit, on which he may charge the defendant with perjury.

Barnard. K. B. 330. 429.

[Affidavit of ſervice on *A. B.* tenant, or *C.* his wife; or the wives of *A.* and *B.* who or one of them are tenants: neither ſufficient. Barnes, 173, 174.——The affidavit required, where the declaration is ſerved in purſuance of 4 Geo. 2. c. 28. is, in ſubſtance, as follows: "That the declaration was fixed on ſuch a place, being the moſt "notorious part of the premiſes in queſtion (there being no perſon in poſſeſſion, on whom the de-"claration could be legally ſerved): that half a year's rent was then due from the tenant: that no "ſufficient diſtreſs was to be found on the premiſes to anſwer the arrears then due: that the late tenant "held ſuch premiſes by virtue of a leaſe from the leſſor of the plaintiff; and that therein is contained "a clauſe of re-entry for non-payment of that rent." Caſ. Pr. C. P. 68.]

Upon

(a) Salk. 259. pl. 14.

Upon this affidavit the plaintiff moves for judgment againſt the caſual ejector, which is always granted, unleſs the defendant in due time enters into the common rule of confeſſing leaſe, entry, and ouſter. This rule being made by aſſent of parties, an attachment lies for non-performance of it, as for all other rules of court that are diſobeyed; and this is all (*a*) the remedy which the parties on both ſides have for their coſts.

If there be ſeveral perſons that claim title, the rule may be drawn generally or particularly: generally, as that *J. H.* who claims title to the premiſes in queſtion in his poſſeſſion ſhould be admitted defendant for ſuch meſſuages; and this puts a neceſſity on the plaintiff at the aſſiſes to diſtinguiſh by proof what tenements are in each defendant's poſſeſſion, becauſe by the rule he is to confeſs leaſe, entry, and ouſter, only for the lands in his poſſeſſion; and if the plaintiff cannot diſtinguiſh by proof what tenements are in each defendant's poſſeſſion, he can have no verdict againſt him, and conſequently no judgment.

Or the rule may be drawn ſpecially, that *J. H.* who claims title to ſuch lands, expreſſing them particularly, ſhould be admitted defendant, and that ſuperſedes the neceſſity of proof, that the lands are in his poſſeſſion; and if the defendant's attorney will not give a note of the particulars of the land for which he was admitted defendant, the plaintiff may ſummon him before a judge, who will order the rule thus ſpecially to be drawn up, in caſe the party in poſſeſſion will admit himſelf to be defendant.

Runnington's Eject. 165.

[In the King's Bench, if the premiſes are ſituate in *London* or *Middleſex*, and the notice requires the tenant to appear on the firſt day, or within the firſt four days of the next term, the plaintiff ſhould regularly move for judgment againſt the caſual ejector, in the beginning of the term; and then the tenant muſt appear within four days incluſive after the motion, or the plaintiff will be entitled to judgment. If, however, the motion be deferred till the latter end of the term, the court will order the tenant to appear in two or three days, and ſometimes immediately, that the plaintiff may proceed to trial at the ſittings after term; though if the motion be not made before the laſt four days of the term, the tenant need not appear until two days before the eſſoign day of the ſubſequent term. And ſhould the notice in ſuch caſe require the tenant to appear in the next term generally, the tenant has the whole of that term to appear in.

Reg. Tr. 32. Car. 2. C. B.

In the Common Pleas, if the premiſes are ſituate in *London* or *Middleſex*, and the tenant has notice to appear in the beginning of the term, the plaintiff cannot take any thing by his motion for judgment againſt the caſual ejector, for default of appearance, unleſs ſuch motion be made within *one week* next after the firſt day of every *Michaelmas* and *Eaſter* terms, and within four days next after the firſt of every *Hilary* and *Trinity* terms. But it has been holden, that this rule does not extend to the caſe of a vacant poſſeſſion under 4 *Geo.* 2. *c.* 28.

Barnes, 172.

In country cauſes, though the declaration be delivered before the eſſoign day of *Eaſter* or *Michaelmas* term, yet the tenant, in both

both courts, is allowed till four days after the next iſſuable (that is, *Hilary* or *Trinity*) term to appear, and if the cauſe ariſe in *Cumberland*, or in any oeher county where the aſſiſes are holden only once a year, the tenant is not compellable to appear till four days after the term preceding the aſſiſes. But in the King's Bench, the plaintiff muſt move for judgment the ſame term in which the tenant has notice to appear; though the practice is different in the Common Pleas, for there he may move for judgment at any time during the next iſſuable term. By a late rule of the court of King's Bench, the clerk of the rules is, for the future, to keep a book, in which are to be entered all the rules which ſhall be delivered out in ejectments, inſtead of that formerly kept, which contained a liſt of the ejectments moved. The entry is to ſpecify the number of the entry; the county in which the premiſes lie; the name of the nominal plaintiff; the *firſt* leſſor of the plaintiff, with the words "*and others*," if more than one; and alſo the name of the caſual ejector. And unleſs the rule for judgment be drawn up, and taken away from the office of the clerk of the rules within two days after the end of the term in which the ejectment ſhall be moved, no rule is to be drawn up, or entered, nor any proceeding had in ſuch ejectment.]

1 Salk. 257.

M. 31 Geo. 4. 4 Term Rep. 1.

If on the trial the defendant will not appear and confeſs leaſe, entry, and ouſter, the courſe is to call the defendant and his attorney, if he be within the rule, and then to call the plaintiff himſelf and nonſuit him, and then, upon the (*a*) return of the *poſtea*, (*b*) judgment will be given againſt the caſual ejector.

(*a*) But the judgment againſt the caſual ejector cannot be entered till the *poſtea* be returned, on which is indorſed, that the nonſuit was for want of confeſſing leaſe, entry, and ouſter,; for it does not appear that the defendant has not complied with the rule till after the aſſiſes at which the cauſe was to have been tried, and therefore the judgment cannot be entered till the next term after ſuch aſſiſes. [And ſuch is the practice of the court of King's Bench. Doc. on the dem. of Lord Palmerſton v. Copeland, 2 Term Rep. 779. But in the court of Common Pleas, the plaintiff may, in this caſe, enter up judgment againſt the caſual ejector, and take out execution, *immediately* after trial. Throgmorton on the dem. of Fairfax v. Bentley, C. P. Hil. 27 Geo. 3. *Ibid.*] (*b*) Of which judgment the defendant cannot bring a writ of error, for he was no party thereto; and if he brings ſuch writ in the name of the caſual ejector, the caſual ejector being a friend to the plaintiff's leſſor, may either releaſe the errors, or upon a motion for a *non pros.* the court will order it to be entered.——But if an infant be tenant in poſſeſſion, and the plaintiff obtain judgment againſt the caſual ejector for want of confeſſion of leaſe, entry, and ouſter, and the infant bring a writ of error in the caſual ejector's name; and the defendant in error ſet up a releaſe from a caſual ejector; upon making this out to be the caſe of the infant, on motion on the writ of error, the court will not ſuffer ſuch a releaſe to be pleaded in bar to ſuch writ of error, becauſe no laches can be imputed to the infant for want of confeſſion of leaſe, entry, and ouſter. See *infra* n.

If the plaintiff in ejectment, who is but a nominal perſon, dies, yet the action ſhall not abate; for if there be any other perſon of the ſame name, the court will intend him to be the perſon mentioned in the declaration, becauſe he is only nominal, and therefore while there is any perſon of the name living, the leſſor of the plaintiff, who is only concerned in the intereſt, may proceed in the ſuit.

3 Keb. Rep. 372.

Alſo if plaintiff, who is only a truſtee for the leſſor, releaſes the action, he may be committed for the contempt *.

Salk. 260. pl. 15.

* The conſtant mode now is, to declare in a fictitious name, ſuch as *John Doe*, &c. for the leſſor of the plaintiff is the real party.

The

Carth. 288. The rule in the Common Pleas is, that the tenant in poſſeſſion ſhall forthwith appear and receive a declaration; and this ſuperſedes the neceſſity of an original writ, becauſe the tenant is to appear and receive a declaration, and therefore cannot take any advantage for want of an original, unleſs a writ of error; but when a writ of error is brought, they muſt file an original, unleſs it be after a verdict, when it is helped by the ſtatute 18 *Eliz. c.* 14.

2 Show. Rep. 249. pl. 253. Boucher and Friend. 5 Mod. 333. Alſo in the King's Bench, where a perſon may proceed as well by original as by bill, there is no need of an original nor of a *latitat*, or bill of ejectment; but before there be any proceedings, common bail muſt be filed for the caſual ejector. But in caſe of a writ of error, the party muſt file a bill of ejectment, beſides the plea-roll, before the errors are aſſigned.

Sid. 24. pl. 5. (*a*) In Carth. 3. Comb. 13. 50. it is ſaid, that the court will enlarge the term; but in Carth. 401, 402. 6 Mod. 130. Comb. 110. Salk. 257. pl. 8. it is ſaid, that it cannot be done without conſent of parties, although the plaintiff is hung up by an injunction in Chancery, or delayed by a writ of error brought in the Exchequer-chamber, for that this would be altering records; and it was the party's fault in not delivering a declaration of a term long enough to get judgment. [However, in a ſubſequent caſe, the term was enlarged without conſent, from five to ten years. Oates v. Shepherd, 2 Str. 1272. And as the demiſe is now conſidered to be mere matter of form, the courts feel no difficulty in altering it, where the juſtice of the caſe requires it. Doe v. Pilkington, 4 Burr. 2447. Small v. Cole, 2 Burr. 1159. Goodright v. Strother, 2 Bl. Rep. 706. Roe v. Ellis, *Id.* 940. Vicars v. Haydon, Cowp. 841.] The court hath charged the plaintiff in ejectment after the declaration delivered, and hath (*a*) enlarged the term where the cauſe hath been long in agitation, and judgment entered againſt the plaintiff after he is dead.

2. Of adding proper Parties.

By Holt, C. J. Comb. 209. (*b*) To make the landlord a defendant in ejectment, is of right; for otherwiſe he might be prejudiced in his inheritance, by combination between the plaintiff and tenant in poſſeſſion. Salk. 257. pl. 10. So the landlord, though a peer. Comb. 339. or a member of parliament, muſt be joined, if he applies for it; for every perſon, who has any privilege, has it by law, which the courts cannot compel him to waive. Salk. 256. pl. 6.——[Such, it ſeems, was the right of the landlord at common law: yet, by ſtat. 11 Geo. 2. c. 19. § 13. it is enacted, "that the landlord may, by leave of the court, make "himſelf defendant with the tenant in poſſeſſion, in caſe he appear; and in caſe ſuch tenant ſhall refuſe or neglect to appear, judgment ſhall be ſigned againſt the caſual ejector. But if the landlord "ſhall deſire to appear by himſelf, and conſent to enter into the like rule as the tenant, in caſe he "had appeared, ought to have done, the court ſhall permit him" (as the court often did permit before the paſſing of this ſtatute, ſee the authorities collected in 3 Burr. 1290.) "ſo to do, and order a "ſtay of execution upon ſuch judgment until further orders." And by the ſame ſtatute, § 12. "the "tenant being ſerved with a declaration in ejectment muſt give notice thereof to the landlord, under "the penalty of three years improved rent." This penalty, however, does not attach on the tenant of a mortgagor who omits to give notice of an ejectment brought by the mortgagee in order to enforce his

No perſon is admitted to defend in ejectment unleſs he be tenant, and is or hath been in poſſeſſion, or (*b*) receives the rent, becauſe it is an act of champerty for any perſon to interpoſe to cover the poſſeſſion with his title. To make any perſon defendant with another, who was not concerned in the poſſeſſion of the tenements, was a miſchief at common law, becauſe if the plaintiff recovered againſt one of the defendants, the ſtranger, who was acquitted, had no remedy for his coſts. But that is remedied by 8 & 9 *W.* 3. *c.* 11. whereby coſts are given to the perſons "ſo acquitted," unleſs the judge certifies immediately on the trial, that the plaintiff had a probable cauſe for making him a defendant.

an attornment. Buckley v. Buckley, 1 Term Rep. 647. A lord, claiming by eſcheat, or it ſeems, a mortgagee, who is out of poſſeſſion, (though as to the latter it hath been holden otherwiſe formerly, Jones v. Williams, Barnes, 194.) may be admitted to defend. Fairclaim v. Shamtitle, 3 Burr. 1299. So, the immediate heir of the perſon laſt ſeiſed, or remainder-man claiming under the ſame title with the original landlord. Heblethwaite v. Roe, 3 Term Rep. 783. n.; or, a deviſee in truſt, Lovelock v. Doncaſter, 4 Term Rep. 122.; though they have never been in poſſeſſion. But if the perſon who wiſhes to defend, be neither tenant, nor *actual* landlord, but have ſome intereſt to ſuſtain, he muſt move the court, on an affidavit of the fact, to be made defendant inſtead of, or with the caſual ejector, which may now be done without the conſent of the tenant. Sty. 368. 3 Burr. 1290. And ſuch *new* defendant may give a rule to reply, and *non pros.* the plaintiff, but cannot have coſts. Ward v. Badtitle, 2 Rep. 760. And in no event will it be permitted to a leſſee to defend *alone* againſt his landlord, or thoſe who claim under him on a ſuppoſed defect of title. Driver v. Lawrence, 2 Bl. Rep. 1259.]———But a landlord may refuſe to be made defendant. Salk. 256. pl. 6.——Where it was moved, that the wife of the leſſor of the plaintiff might be made defendant, the plaintiff's title being by a pretended marriage, which was controverted, and the court inclined accordingly; but perceiving it to be a trick to gain time, and ſo to put off the trial, it was refuſed. Salk. 257.—One who is only a truſtee need not be joined. Comb. 332.———If a material witneſs is alſo made a defendant, the right way is for him to let judgment go by default; but if he pleads, and by that means admits himſelf tenant in poſſeſſion, the court will not afterwards upon motion ſtrike out his name. Dormer v. Forteſcue, Mich. 9 Geo. 2.

In ejectment, where there are two defendants for the ſame premiſes, and one appears and confeſſes leaſe, entry, and ouſter, and the other does not, the plaintiff cannot proceed againſt the other, but he muſt be nonſuited, becauſe both the defendants not admitting the demiſe, and the plaintiff not proving an actual entry and demiſe, he cannot maintain his declaration (*a*). But if there appeared any covin between ſuch perſon not appearing, and the leſſor of the plaintiff, the court will ſtop the judgment againſt the caſual ejector, for the part of him who appeared, and oblige him who did not, to releaſe the coſts, becauſe a declaration was delivered to each of them for their reſpective parts; and therefore, where one does not pay obedience to the rule, the plaintiff has judgment againſt the ejector for his part only.

Vent. 255. 2 Vent. 195. [(*a*) The practice in this caſe is now to proceed againſt the one who does appear, and to enter a verdict againſt the other, indorſing on the *poſtea* the cauſe of ſuch verdict, which as to that defendant entitles the plaintiff to judgment againſt the caſual ejector. Claxmore v. Searl, 1 Ld. Raym. 729. Thruſtout v. Foot, Barnes, 149. Ellis v. Knowles, *Id.* 174.

And where there are ſeveral defendants, to whom the plaintiff delivers declarations, that are ſeverally concerned in intereſt, and the plaintiff moves to join them all in one declaration, yet the court will not do it; but the plaintiff muſt deliver ſeveral declarations to each of them; becauſe each defendant muſt have a remedy for his coſts, which he could not have if they were joined in a declaration, and the plaintiff prevailed only againſt one of them. And by this means the plaintiff might have a tenant of his own, defendant with others, in order to ſave the coſts.

2 Keb. 514.

[But where ſeveral ejectments are brought for the *ſame premiſes*, upon the *ſame demiſe*, the court on motion, or a judge at his chambers, will order them to be conſolidated.]

Grimſtone v. Burgers, Barnes, 176.

3. Of the Coſts.

The parties by entering into the common rule are under the power of the court, by virtue whereof the court awards coſts, which being taxed by the maſter, if demanded of the party, and he

Salk. 251. pl. 14. [If a verdict be given

for the defendant, or the plaintiff

he refuſes to pay them, the court on affidavit thereof will grant an attachment.

be nonſuited for any other cauſe than the want of confeſſion of leaſe, &c. the defendant muſt tax his coſts on the *poſtea*, as in other actions; and ſue out a *capias ad ſatisfaciendum* for the ſame againſt the plaintiff, which he muſt ſhew, under ſeal, to the plaintiff's leſſor, and at the ſame time ſerve him with a copy of the conſent-rule; and if the leſſor, being required, refuſe to pay the coſts, the court, on motion, will grant an attachment againſt him. Tilly v. Baily, M. 6 G. 2.—If the leſſor of the plaintiff die before the commiſſion-day of the aſſiſes, and the plaintiff be afterwards nonſuited, becauſe the defendant did not confeſs leaſe, &c. the executor of the leſſor of the plaintiff is not entitled to coſts. Thruſtout v. Badwell, 2 Wilſ. 7. But if he die after the trial of the cauſe, the executor ſhall have the coſts, which had been taxed on the conſent-rule. Goodright v. Holton, Barnes, 119.—If the tenant appear, confeſs leaſe, &c. and a verdict be given againſt him on the trial, the judgment thereupon is entered againſt the tenant, on which the plaintiff may take out execution, as in ordinary caſes; for this is not a caſe provided for by the rule. Runningt. 415.]

2 Lev. 66. 6 Mod. 309. 12 Mod. 318. Str. 402.

And although the plaintiff in ejectment be but a nominal perſon, yet if he be not to be found, or if he be not able to pay the coſts, the attorney or ſolicitor is liable, or may be committed until he pay the coſts, or produce a plaintiff that is able to pay them.

So, if a ſtranger carries on a ſuit in another's name, who has a title, and yet is ſo poor that he cannot pay coſts; in caſe he fails, upon affidavit of this matter, the court will order ſuch perſon, who carries on the ſuit, to pay coſts to the defendant.

Stra. 694. 2 Str. 932. 2 Barnard. K. B. 140. 2 Kel. 55. pl. 17. [Ca. temp. Hardw. 56. 1 Wilſ. 130.

If an infant delivers a declaration to the defendant, ſome friend or guardian muſt be ſet up as plaintiff to anſwer the defendant's coſts; but if ſuch perſon dies inſolvent, ſo that the defendant has no remedy, by this rule the infant himſelf muſt anſwer the coſts, becauſe the rule was entered into for the infant's benefit; and even infants muſt not diſturb the poſſeſſion of others by unlawful entries, without being puniſhed with coſts.

Previouſly, however, to any motion in court, inquiry ſhould be made, whether there be a real and ſubſtantial plaintiff or not? for on inquiry, the guardian may undertake to pay the coſts, in which caſe the court would probably decline to interpoſe. Cowp. 128.—It hath likewiſe been holden, that upon the death of the plaintiff's leſſor, proceedings may be ſtayed, till the plaintiff ſhall have given the defendant ſecurity for his coſts. Eaſt v. Nonelly, Barnes, 147. Thruſtout v. Grey, 2 Str. 1046. So, where an ejectment was brought on the demiſe of a perſon reſiding at Antigua, Cuſack v. Jones, H. 33 G. 3. B. R.; and in another caſe, where the leſſor of the plaintiff reſided in Ireland, the plaintiff was compelled to give the defendant a ſimilar ſecurity. Denn v. Fulford, 2 Burr. 1177. In the latter caſe, the ejectment was brought under the direction of the court of Chancery, where the bill was retained till after trial of the ejectment, and ſecurity had been there given to the amount of 40 *l.* But excepting ſuch inſtances, and that of a former ejectment, the court will not compel the leſſor of the plaintiff to give ſecurity for the coſts. Doe v. Alſton, 1 Term Rep. 491.]

1 Keb. Rep. 827. pl. 1.

If there be baron and feme leſſors in ejectment, and one dies after entering into the rule, the ſurviving perſon is liable to pay coſts.

If ejectment be brought to be tried at bar to bring a matter in queſtion, as the validity of a will, and a parcel of land be inſerted in the declaration, which is not concerned in the queſtion, but to which the plaintiff hath undoubted right, and the defendant confeſs leaſe, entry, and ouſter of the whole, not obſerving this part, the plaintiff ſhall not on this account be excuſed from the coſts; but the court will give the defendant leave to retract his confeſſion as to this parcel. The like was done in (*a*) a caſe where a parcel of copyhold land was inſerted in the declaration, which was not touched by the will, no ſurrender being made to the uſe of the will.

(*a*) Mich. 27 Car. 2. B. R. between Oddye and Preſton.

(C) In what Caſe the Ancient Form is ſtill to be adhered to.

WHERE the houſes or things for which the ejectment is brought are (*a*) empty, in ſuch caſe no declaration can be delivered, nor affidavit made thereof, by reaſon of which the court cannot proceed to give judgment againſt the caſual ejector; and therefore it is neceſſary to proceed the old way, by ſealing a leaſe on the land, and giving rules to plead, and when theſe rules for pleading are out, affidavit muſt be made of the whole matter; upon which the court grants judgment. But (*b*) there can be no judgment againſt the caſual ejector without moving the court for that purpoſe, though the rules for pleading are out, becauſe the court will not grant any judgment againſt the caſual ejector, who is only nominal, without ſuch proper affidavit, leſt otherwiſe a third perſon ſhould be tricked out of his poſſeſſion.

(*a*) But by 4 Geo. 2. c. 28. in all caſes between landlord and tenant, in caſe there be no perſon reſiding in the houſe, or in caſe the declaration cannot legally be ſerved, it is ſufficient to affix it to the door of the houſe or on ſome notorious place on the lands, in caſe the ejectment be for lands. [But a very little matter is ſufficient to retain the poſſeſſion; and there ore where the tenant had left ſome beer in the cellar, and the landlord proceeded as on a vacant poſſeſſion, the judgment was ſet aſide. Savage v. Dent, 2 Str. 1064.] (*b*) Salk. 255. pl. 3.

So, if the tenant in poſſeſſion kept his door ſhut, it was thought the beſt way to ſeal a leaſe on the land, and proceed in the old way: but in this caſe it ſeems, that if the practice and fraud of the tenant be made appear to the court by affidavit, the court will grant judgment againſt the caſual ejector *niſi*.

It has been held, that where a corporation is leſſee of the plaintiff, they muſt give a letter of attorney to ſome perſon to enter and ſeal a leaſe upon the land, for a corporation cannot make an attorney or bailiff but by deed, nor can they appear but by making a proper perſon their attorney by deed. They cannot therefore enter and demiſe upon the land in perſon as natural perſons can; nor can they ſubſtitute an attorney to enter into a rule for their coſts; nor will an attachment go againſt them for diſobedience to that rule, and, by conſequence, they are put to make an (*b*) actual leaſe upon the land, which leaſe muſt try their title, and then the attorney may proceed in the common method, which is not altered by the ſaid ſtatute.

(*b*) But in Carth. 390. Patrick v. Balls, in ejectment, where the plaintiff declared upon a demiſe made to him by the aldermen and burgeſſes—without ſetting forth that it was by deed, or under the ſeal of the corporation; on a writ of error, it was held well enough; and that this being a fictitious action to try the title, the demiſe need not now be ſet out to have been by deed. 1 Ld. Raym. 136. [And the law is the ſame before verdict; for in Farley on the demiſe of the Mayor, &c. of Canterbury v. Wood, Kent Summ. Aſſ. 1794., where the declaration ſtated the leaſe to have been made to the plaintiff under the common ſeal of the corporation; it was objected that the leaſe ought to be proved; but Lord Kenyon ſaid, that by the common rule and appearance the leaſe was admitted as ſtated. Runningt. 150. If a corporation be aggregate of many, they may ſet forth the demiſe in the declaration without mentioning the chriſtian names of thoſe who conſtitute the corporation; but if the corporation be ſole, the name of baptiſm muſt be inſerted; becauſe in the former caſe, the name wholly conſiſts in its character; in the latter, in the individual perſon; therefore, there cannot be a ſufficient ſpecification of that perſon without mentioning his name. Dy. 86.]

Another inſtance, where the old method is ſtill to be obſerved, is, where the ſeveral intereſts of the leſſors of the plaintiff are not

known: and there it is a good way to ſeal a leaſe upon the premiſes, leſt they ſhould fail in ſetting out in their declarations the ſeveral intereſts which each man paſſes (*a*).

[(*a*) But there ſeems to be no neceſſity for ſo doing, even in this caſe; inaſmuch as by the common rule, according to the modern practice, the leaſe would, of courſe, be admitted: and though there be ſeveral defendants, yet each appears and defends only for ſuch part of the premiſes as is in his poſſeſſion. Runningt. 151.]

So, where the proceedings are in an inferior court, there, they muſt proceed by actually ſealing a leaſe, becauſe they cannot make rules to confeſs leaſe, &c. in as much as ſuch courts have not an authority to impriſon for diſobedience to their rules. And the reaſon is, the inferior courts having but a limited authority cannot make any new rules to bind perſons that do not come in by proper proceſs of ſuch court; but the courts above, having an unlimited authority in every thing within their juriſdiction, ſhall bind any perſon that conſents to their rules: and therefore in ſuch inferior courts, the leaſe is ſealed on the land, and the defendant tries the title in the name of the caſual ejector, to ſave expence.

If an ejectment be brought in an inferior court, and a *habeas corpus* be brought to remove it, and the plaintiff in ejectment declare againſt the caſual ejector, there may be a rule to confeſs leaſe, &c. as if he had originally declared in the court above, and the court will not grant a *procedendo*.

2 Keb. 119. * *Sed. qu.* as to a *procedendo*, if the inferior court has not an excluſive juriſdiction?

If a *habeas corpus* be brought to remove a cauſe in ejectment out of an inferior court, and the lands lie within their juriſdiction, and the leſſor of the plaintiff ſeal a leaſe on the premiſes, the courts above will grant a *procedendo*, becauſe the title of the land is a local matter, properly within the juriſdiction of the court below, where, if they proceed regularly, they ſhall not be prohibited; but if the leſſor has not ſealed a leaſe on the premiſes, they will not *.

2 Keb. 69.

But if the lands lie partly within the *Cinque* Ports and partly without, the defendant cannot plead above the juriſdiction of the *Cinque* Ports; for though the land be local matter, yet the demiſe is tranſitory and triable any where; therefore, though the plaintiff may lay his action for that which lies within an inferior juriſdiction in the court below, if he takes proper meaſures for that purpoſe; yet if he will lay it above, ſince the demiſe is tranſitory, the defendant cannot ſtop his proceeding, becauſe the courts above for ſuch tranſitory matters have a proper juriſdiction.

Moor, 86. Keb. 785.

If the defendant in an inferior court enter into a rule to confeſs leaſe, &c. and the cauſe be removed by *habeas corpus*, and the judge of the inferior court grant an attachment againſt the defendant for diſobedience to the rule, the ſuperior court will grant an attachment againſt ſuch judge for compelling obedience to their rules, and thereby obſtructing the buſineſs of the ſuperior courts, ſince the defendant is not bound by the rule he entered into in the inferior court, ſuch rule being only the practice of the ſuperior courts.

(D) Of the Declaration in Ejectment: And herein,

1. Of what Things an Ejectment will lie.

AN ejectment does not lie for a rent or common appendant, or other things that lie merely in grant, becauſe theſe, being (*a*) incorporeal things, are in their nature inviſible, *quæ nequo tangi nec videri poſſunt*; and therefore not capable of being delivered in execution (*b*).

Cro. Car. 202. Cro. Jac. 146. (*a*) Co. Lit. 9. a. [(*b*) But for common appendant or appurtenant ejectment will lie, becauſe the ſheriff may give poſſeſſion of ſuch common, by giving poſſeſſion of the land to which it belongs. Newman v. Holdmyfaſt, Str. 54. Andr. 107. So, it will lie for ſo many acres of land with common of paſture, *cum pertinentiis*. Baker v. Roe, Ca. temp. Hardw. 127.]

So, an ejectment does not lie *de quodam rivulo, &c. aquæ curſu*, called *locar* in *L.*, for *rivulus ſive aquæ curſus* lies not in demand; for *non moratur*, but is always flowing; nor (*c*) can execution by *habere facias ſeiſinam* be made thereof, and therefore the action ought to be of ſo many acres of land *aqua coopert*: but if the land under the river does not belong to the plaintiff, but the river only, then upon a diſturbance the remedy is by action upon the caſe only.

Yelv. 143. Challener and Thomas, adjudged. Brownl. 142 S. C. Poph. 167. S. C. cited, & *vide* Godb. 157. which ſeems contrary. (*c*) For this reaſon an ejectment does not lie *de piſcariâ* in ſuch a river more than of a common apprendre or rent: adjudged upon a writ of error upon a judgment out of Ireland, and the judgment for this reaſon reverſed. Cro. Car. 492. 8 Mod. 277. But Jones ſaid, perhaps an aſſiſe would lie for it, becauſe it is *proficuum in certo loco capiend.* & *vide* Cro. Jac. 146. [And in the caſe of the King v. Old Alresford, 1 Term Rep. 364. Aſhhurſt, J. is reported to have ſaid, "there is no doubt "but that a fiſhery is a tenement. Treſpaſs will lie for an injury to it, and it may be recovered in "ejectment."] An ejectment lies *pro ſtagno*, becauſe in law the word *ſtagnum* comprehends both land and water. Yelv. 143. Co. Lit. 5. Regiſt. 227.——So, *de gurgite* is good for the ſame reaſon. Co. Lit. 5.

So, an ejectment does not lie *de pannagio*, becauſe this is only the maſts that fall from the trees which the ſwine feed on, and not part of the ſoil itſelf, as the herbage is.

Lev. 212. Pemble and Stern, adjudged. Sid. 416. S. C. adjudged.

But an ejectment lies of a boilary of ſalt; that is, where a man hath no inheritance in the ſoil in which there is a well of ſalt-water, but only a leaſe or grant of ſo many buckets of the water as will ariſe, (which are called the boilaries), and theſe are withheld from him, he may bring his ejectment for ſo many boilaries, as his grant was.

Cro. Jac. 150. ſaid to have been adjudged. Sid. 161. Lev. 114. S. P. admitted.

So, an ejectment lies for a coal-mine, becauſe it is not to be conſidered as a bare profit *apprender*; but a coal-mine comprehends the ground or ſoil itſelf, which may be delivered on the execution; and though a man may have a right to the mine without any title to the ſoil, yet the mine itſelf being fixed in a certain place, the ſheriff has a thing certain before him, to deliver in execution.

Cro. Jac. 150. Commyn and Kincto, adjudged. Noy, 121. S. C. Roll. Rep. 483. S. C. cited. Hard. 57.

S. C. cited to be adjudged, Carth. 277. 4 Mod. 143. Comb. 201. Show. Rep. 364. Salk. 255. pl. 2. 1 Burr. 627.

Cro. Car. 262. Ward and Petifer.

An ejectment lies *pro primâ tonſurâ*, that is, if a man hath the grant of the firſt graſs that grows on the land every year, he may recover it in ejectment of him that with-holds it from him; for the firſt graſs, or *primâ tonſurâ*, is the beſt profit and grant of the property; and therefore he that hath it ſhall be eſteemed the proprietor of the land itſelf till the contrary be proved; for the after-graſs or feeding is in the nature of commonage. As therefore he, that hath the firſt graſs or *tonſura*, has the moſt ſignal profit of the land, and may keep it longer or ſhorter on the land, according to the ſeaſonableneſs of the year, it is but reaſonable to give him this remedy againſt the perſon that ouſts him of it, eſpecially, when it is a fixed determinate thing, which the ſheriff may put him in poſſeſſion of; which diſtinguiſhes it from a right of common or other profit *apprender*: for the commoner cannot aſſign any one acre which he hath a right to ſeparate from the reſt of the commoners; whereas the grantee of the firſt graſs has in reality a right to the land itſelf till the crop be taken off; for no man can enter on the land till that be off, without being a treſpaſſer.

Hard. 303. 401.

So, an ejectment lies *pro herbagio*, becauſe the herbage is the moſt ſignal profit of the ſoil, and the grantee hath at all times a right to enter and take it.

Dal. 95. (*a*) In Hard. 58. a caſe is cited to have been adjudged, that ejectment lay not *de paſturâ*; [but ſee Rex v. Piddlerenthide, 3 Term Rep. 772. Rex v. Tolpuddle, 4 Term Rep. 671. Bunt v. Moore, 5 Term Rep. 329.]

So, an ejectment lies (*a*) *pro paſturâ centum ovium*, that is for ſo much land as will feed one hundred ſheep.

Cro. Car. 301. Jon. 321. 2 Ld. Raym. 789. 3 Wilſ. 30. (*b*) This remedy is given only to lay-impropriators, and therefore the act of parliament leaves ſpiritual perſons to purſue their old remedy in the ſpiritual court. Co. Lit. 159. Dyer, 116. pl. 71.——That an ejectment lies only for tithes in kind, but does not lie where the tithing conſiſts *in modo decimandi*; but for this, and of the manner of ſuing for and recovering tithes, *vide* head of Tithes.

Although tithes are eſteemed part of the incorporeal inheritance, and by the common law were only of eccleſiaſtical conuſance; yet being in the hands of lay proprietors they are now conſidered as a temporal eſtate: for by the 32 *H.* 8. *c.* 7. it is provided, that every (*b*) lay perſon having any eſtate of inheritance, freehold, right, term, or intereſt in tithes, and being thereof diſſeiſed, ouſted, wronged, or otherwiſe kept from the ſame, ſhall have his remedy in the courts of law for them in like manner as for lands; and hence it is that an ejectment lies for tithes.

Latch. 62.

An ejectment lies *pro rectoriâ*, becauſe a rectory conſiſts of a church, glebe-lands and tithes.

11 Co. 25. Style, 101. Doct. Pl'it. 191. Salk. 256. pl. 7. [In an ejectment for a chapel and lands in Hampſtead, the court refuſed to make the chaplain a defendant, *quod* his right of entry into the chapel to perform divine ſervice. Martin v. Davis, 2 Str. 914. 2 Barnard. K. B. 27.—In the caſe of *the King* v. *Biſhop of London*, it was ſaid (*in argument*), that an ejectment would lie for a prebendal ſtall, after collation or admittance; for then it becomes a freehold. 1 Wilſ. 14.]

It was formerly held, that an ejectment did not lie *pro capellâ*, becauſe it was *res ſacra*, which was not demiſable; but now ſince it is become a lay inheritance, it is recoverable in ejectment, as other lay eſtates; but it muſt be demanded by the name of a meſſuage, or it is not formal.

2. What ſhall be a ſufficient Deſcription of thoſe Things for which an Ejectment will lie.

In this action the law requires, that the thing demanded be ſo particularly ſpecified, that the ſheriff may certainly know what to give the poſſeſſion of, if the plaintiff ſhould recover (*a*); for the judgment is in order to execution, and the judgment would be vain, if execution could not be had of the thing ſpecifically demanded. But the judges did not confine themſelves to thoſe rules which govern the *præcipe*, but allowed ſome things to be recovered in this action, which could not be demanded in a *præcipe*; becauſe ſince the eſtabliſhment of that real action (*b*), many things have been added and improved by art, and acquired new appellations that are perfectly underſtood now by the law, which are not found in the ancient law-books; and as men begun to contract by new names which were not known in the old law, ſo it was reaſonable to ſuffer the remedy to follow the nature of ſuch contracts.

[(*a*) At this day, however, the practice is otherwiſe. The ſheriff, *now*, delivers poſſeſſion according to the direction of the plaintiff, who therein acts at his peril. The plaintiff himſelf muſt *now ſhew* the ſheriff that which under the writ he is to deliver poſſeſſion of; and is to take poſſeſſion, at his peril, *only* of what he has title to; for if he takes more than he has recovered, and proved title to, the court will, in a ſummary way, ſet it right. 1 Burr. 629. 5 Burr. 2673.] (*b*) Hence it is ſaid in Palm. 337. by Noy, *arguendo*, that an ejectment will lie of a hop-yard. [So, it will lie for *alder car*; a well-known term in Norfolk for land covered with alders. Barnes v. Peterſon, 2 Str. 1063. So, for a *beaſt-gate*, a provincial term in Suffolk, importing land and common for one beaſt. Bennington v. Goodtitle, *id.* 1083. Andr. 106. S. C. So, for a *cattle-gate*, a Yorkſhire term, ſaid to be ſynonymous with beaſt-gate. Metcalf v. Roe, Ca. temp. Hardw. 106. 1 Term Rep. 137.]

But the judges did not extend this action as far as they went in an (*c*) *aſſiſe*, becauſe the recognitors having the view of the thing demanded in the aſſiſe, muſt have more certain knowledge of the thing demanded than could be given in ejectment.

Dyer, 84. pl. 85. (*c*) And therefore it hath been held, that an ejectment will not lie *de croſto*, though an aſſiſe will. Style, 30. [But in Sty. 194. Roll, C. J. ſaid, that an ejectment would lie in this caſe: and according to poſitive law (4 & 5 Ann. c. 16. § 3. 3 Geo. 2. c. 25. § 14.) and modern practice a view may (on motion in the uſual manner) be had of the *locus in quo* in ejectment, as well as in the ancient aſſiſe, or any other action.]——But if an ejectment be brought for a *croft* and an acre of meadow, and the plaintiff have a verdict, he may have a ſpecial judgment for his acre of meadow, releaſing the damages for the reſt. Lev. 58.——Alſo, an ejectment will lie *de uno croſto vocat.* B. Lev. 58. *per* Twiſden.

An ejectment lies of an *orchard*, becauſe it is a word of a certain ſignification, though in a *præcipe* it muſt be demanded by the name of a garden; and it being well enough underſtood, the ſheriff may with certainty deliver it upon an execution.

Noy, 37. Wright and Wheatley, adjudged. Cro. Eliz. 854. S. C. adjudged, becauſe but a perſonal action, wherein damages are the principal. Roll. Rep. 55. S. C. Cro. Jac. 654. Palm. 337. S. P. adjudged. Hard. 55. S. P. by Baldwin, *arguendo*. Lev. 58. S. P. *per* Twiſden.

So, an ejectment lies of (*d*) a ſtable, becauſe it is a word of a determinate ſignification, and may be delivered by the writ of execution.

Lev. 58. Lady Dacres's caſe, adjudged upon view of ſeveral precedents of recoveries *de ſtabulo*. (*d*) So, an ejectment lies of a cottage. Cro. Eliz. 818. Cro. Car. 555. Hardr. 57.

An ejectment of an houſe is good, though in a *præcipe* it ought to be demanded by the name of a meſſuage; becauſe the ejectment

Cro. Jac. 654. Royſton and

Eccleſton, adjudged, Palm. 337. S. C. adjudged, & *vide* 3 Lev. 97. Hard. 76.

is an action of treſpaſs in its nature; and as a treſpaſs, *wherefore he broke into the houſe* has been allowed; ſo it has been allowed to be good in ejectment: and the import and certain ſignification of the word *domus* or houſe is well enough underſtood in the law; for in waſte the thing itſelf is recovered, beſides damages, and yet the action of waſte is given *de domibus*.

3 Leon. 210. Noy, 109. Hard. 57. S. P.

So, an ejectment of a chamber in the ſecond ſtory of ſuch a houſe was held good, there being certainty enough to direct the ſheriff in the execution.

[So, an ejectment for part of an houſe in *A.* hath been adjudged to be well enough. Sullivaine v. Seagrave, 2 Str. 795. Rawſon v. Maynard, Cro. Eliz. 286.]

Noy, 109. Ford and Lerk, adjudged.

But an ejectment *de coquinâ*, *Anglicè* a kitchen, is naught; for though the word is well enough underſtood, yet becauſe any chamber in the houſe is applicable to that uſe, the ſheriff hath not certainty enough to direct him in the execution, in regard the kitchen may be changed between the judgment and execution.

Godb. 53. 11 Co. 55. Roll. Rep 55 Bridg. 56. adjudged, being of an uncertain extent, and that the giving it a name did not help it; but *vide* Cro. Eliz. 235. 339. Cro. Jac. 654. which ſeems contrary.

An ejectment lies not of (*a*) a cloſe, becauſe it is of an uncertain extent; nor will it mend the declaration, though the cloſe be called by a particular name, becauſe that alſo leaves the extent of it uncertain, ſo that the ſheriff cannot tell what quantity of land to deliver in execution; and though the number of acres contained in the cloſe ſhould be mentioned in the declaration, and be ſet forth to belong to a meſſuage for which the ejectment was alſo brought; yet even that hath been (*b*) held too general, becauſe the nature and quality of the land is thereby left uncertain, ſo that the ſheriff is ſtill at a loſs what to deliver the poſſeſſion of, as whether meadow, paſture, &c.

(*a*) An ejectment of a piece of land called *D.*, without ſhewing the contents, Palmer's caſe, Owen, 18: the court was divided, but after adjudged that it was well enough, becauſe it was but an action of treſpaſs, and damages were the principal, though it would be otherwiſe in a *præcipe*; but upon a writ of error in the Exchequer-chamber, this judgment was reverſed. Hetl. 176. Moor, 422. pl. 587. (*b*) So, adjudged in Savil's caſe, 11 Co. 55. and the S. P. held and admitted to be law, in Style, 164. Lev. 212. Bridg. 56. Hard. 133. Palm. 102. 3 Lev. 97. Salk. 254. pl. 1. where Savil's caſe is affirmed to be law by Holt, Ch. Juſt.

Cro. Jac. 573. Palm. 102. 4 Mod. 98. [Cowp. 349.]

But an ejectment for a cloſe called *D.*, containing three acres of land, is good, becauſe the quality of the land is mentioned, the word *terra* ſignifying in law arable land.

Cro. Car. 435. Martin and Nicholi, adjudged, Cro. Car. 471. S. P. adjudged, Hard. 59. S. C. cited.

An ejectment does not lie for a meſſuage and forty acres of land, meadow and paſture thereto belonging, (*c*) without diſtinguiſhing how much of one ſort, and how much of the other.

(*c*) So, where an ejectment was brought for five cloſes called Furlong, containing ten acres of arable and paſture; it was held naught, becauſe not ſpecified how many acres of each there were, ſo that the ſheriff had no rule to govern himſelf by in the execution. Knight and Syms, adjudged, Salk. 254. pl. 1. Holt, 263. pl. 2. Show. 358. Carth. 204. 4 Mod. 97. Comb. 198. S. C.—But an ejectment of twenty acres *jamnorum & bruer.* is well enough, becauſe intended of lands of the ſame nature, viz. heath, on which *gorſe* and *furze* grow. Cro. Car. 179. Mod. 90. [So, in modern times, it hath been holden, that it will lie for fifty acres of furze and heath, and fifty acres of moor and marſh. Connor v. Weſt, 5 Burr. 2672.]

Cro. Eliz. 186. Wood and Pain,

An ejectment *de uno meſſuagio ſive tenemento* is naught for the (*d*) uncertainty of the word *tenement*; for being of a more extenſive ſignification

ſignification than the word *meſſuage;* conſequently, it is uncertain what is demanded by the ejectment. adjudged. 3 Leon. 228. S. C.

Poph. 197. 203. Noy, 86. Cro. Jac. 125. Style, 364. S. P. Sid. 295. S. P. adjudged. [Barnes, 173. 2 Str. 834. 3 Wilſ. 23.] (*d*) For this *vide* Cro. Eliz. 116. March, 96. 2 Roll. Abr. 80. [After verdict an ejectment for a meſſuage *and* tenement hath been holden good. Doe v. Denton, 1 Term Rep. 11.]

But an ejectment for a meſſuage or tenement called the *Black Swan* is good, becauſe the addition reduceth it to a certainty of a dwelling-houſe. Sid. 295. 3 Mod. 238. 4 Mod. 136.

So, an ejectment for a meſſuage or burgage in *H.* is good, becauſe both ſignify the ſame thing in a borough. Hard. 173. *& vide* Poph. 203.

An ejectment does not lie *de repoſitorio,* becauſe it ſignifies a *voider* or *cupboard,* as well as a *warehouſe,* and therefore uncertain what is demanded; but if it had been with an *Anglicè,* a warehouſe; this had confined it to that particular thing. Cro. Car. 555. Jon. 454. S. C.

An ejectment for one hundred acres of waſte, or *pro centum acris* (*a*) *montis,* was held naught for the uncertainty, becauſe both waſte and mountain comprehend ſeveral ſorts of lands; but for one hundred acres of (*b*) *bog* is good in *Ireland,* becauſe the word bog there hath but one ſignification, and comprehends but one ſort of land. Hard. 57. Hancock and Price, adjudged, becauſe it may contain land of any quality.

(*a*) Palm. 100. Stafford and Macdonnough, adjudged upon a writ of error out of Ireland, and the firſt judgment reverſed accordingly. Roll. Rep. 166. S. C. But both are denied to be law in 9 Vin. Abr. 336. pl. 19. and Stra. 71. (*b*) Cro. Car. 512. Mulcarry and Eyres, adjudged. Palm. 100. S. P. Salk. 254. pl. 1. Show. 338. S. C. cited, and admitted to be law. [So, it will lie for mountain in Ireland, becauſe there, the word "mountain" is rather deſcriptive of the quality, than of the ſituation of the land. Lord Kildare v. Fiſher, 1 Str. 71. So, for a "quarter" of land in Ireland; for it may be a term as well known there as mountain is; and that the courts will intend. 1 Burr. 623. 627. 629, 630. Cowp. 348. So, "20 *villis et terris*" in Ireland. 2 Keb. 745. 1 Burr. 627. In the caſe of Cottingham v. King, 1 Burr. 623. the following deſcription was holden to be ſufficient on *writ of error*, after judgment in the Common Pleas, affirmed by the King's Bench in Ireland; viz. "5000 meſſuages, 5000 cottages, 10,000 acres of land, &c. in all thoſe the lordſhips, manors, and late "diſſolved abbey or monaſtery of Boyle and Inſemacranaw, and quarter of land of Tallagh, with the "town and tenement of Boyle, and fairs and markets thereunto belonging, in the county of Roſcommon: and all thoſe the lands and hereditaments called Grangemore, and part of Sumternat, &c. a "large deer park, &c. and the parſonage of Longford, &c. in the county of Roſcommon: and a ſmall "park or field in the poſſeſſion of, &c." This caſe was after verdict; and after verdict, an ejectment may be preſumed to have been brought for ſuch things *only* of which it will lie, 1 Str. 54.

The plaintiff in ejectment declared upon the leaſe of a houſe, ten acres of land and twenty acres of meadow, by the name of a houſe and ten acres of meadow, be the ſame more or leſs, and had a verdict, but the judgment was arreſted; for the declaration was ſo repugnant and uncertain, that even the verdict could not help it, in regard the land mentioned in the declaration is of a different nature from that mentioned in the *pernomen;* beſides the number of acres is ſo different, that the words more or leſs cannot reduce it to any certainty, for it were unreaſonable to extend them to twenty acres more than was mentioned in the *pernomen.* Yelv. 166. 4 Mod. 143. Show. 364.

An ejectment for a manor ſeems ill, without deſcribing the quantity and ſpecies of the land contained therein. Hetl. 146. Lit. Rep. 301.

Latch. 61. See Runningt. 129. An ejectment lies for a garden, by the name of three roods of land, for it may be ſometimes uſed as a garden, and at other times ploughed. Godb. 6. adjudged, though it was ſaid it might more properly have been demanded by the name of a garden. An ejectment *pro quæ-*

tuor molendinis is good, without ſaying wind-mills or water-mills, becauſe both are comprehended under that name in the *regiſter*. Mod. Rep. 10. pl. 55.—An ejectment *de decem acris piſarum* was held good; for the court held ten acres of peas, and ten acres ſowed with peas to be all one, and therefore certain enough. 1 Brownl. 150.

2 Roll. Rep. 482. Warren and Wakely.

An ejectment was brought for ten acres of (*a*) wood, and ten acres of underwood; it was inſiſted (in error) that this was a *bis petitum;* but the objection was diſallowed, becauſe plainly they are of different natures; and thoſe who argued for the error ſeemed by their argument to have admitted it themſelves, becauſe they inſiſted that no ejectment lay of underwood, which ſhews it muſt be of a different nature from the wood: but that objection was alſo diſallowed, becauſe the nature of underwood is ſo well underſtood in the law, ſo that the ſheriff will have certainty enough to direct him in the execution.

[In the caſe of Savile v. Borlace, Dom. Proc. 1735, it was decided, that *bis petitum* was no objection in ejectment.

1 Burr. 626. 630. See too Harebotle v. Placock, Cro. Jac. 21.] (*a*) Where the declaration among other things was of ſo many *acres ligni* inſtead of *boſci*, it was moved to amend it before the trial came on at bar; but it was denied, and the jury directed to find ſeparate damages as to that particular. Carth. 402. cited to have been ſo ruled in the caſe of Thompſon and Leech.

Goodtitle v. Alker, 1 Burr. 133.

[An ejectment will lie for part of a highway; for though the publick have a right to paſs over it, yet the freehold and all the profits belong to the owner of the ſoil, ſubject to the publick ſervitude or eaſement attached to it. But it muſt be deſcribed as *land;* and though it be built on, ſuch a deſcription will be ſufficient.]

Yelv. 118. adjudged upon a writ of error out of Ireland.

An ejectment was brought *de caſtro, villâ & terris*, without expreſſing the number and certainty of acres; and it was held ill on a verdict, and a writ of error brought thereon, becauſe it was too generally demanded, and it was impoſſible for the ſheriff to know what quantity of land he muſt deliver upon the *habere facias poſſeſſionem*.

11 Co. 25. Harpin's caſe. Moor, 837. pl. 1130. Roll. Rep. 68. S. C. Palm. 101. S. C. cited.

An ejectment *de omnibus & omnimodis decimis in decem acris in D.*, without ſaying *garbarum fœni, lanæ agnellorum*, or ſome other certainty of the nature or quality of the tithes, is ill, as it would be for one hundred acres of land, without expreſſing the ſeveral natures and qualities of the land; for in this action the plaintiff muſt be as particular and certain in his demand, as he would be of land.

11 Co 25. Hard. 57. Dyer, 116.

But in this action the plaintiff is not obliged to ſet forth the quantity of every ſort of tithe, as he muſt do of every ſort of land, becauſe it is in its nature uncertain, the quantity depending entirely on the goodneſs and fruitfulneſs of the land and ſeaſons; and, therefore, an ejectment *pro quâdam portione granorum & fœni* was held good, becauſe impoſſible to ſay how much the quantity would be.

3 Lev. 66. Hutchinſon and Puiler, adjudged.

An ejectment for a certain place called the *Veſtry* in *D.* is well enough, becauſe that place belonging to a church, and being called a *veſtry*, is perfectly known, and therefore the thing demanded is ſufficiently deſcribed to have execution thereof.

Carth. 277. Andrews and Whit-

In ejectment in the county palatine of *Durham*, the plaintiff declared upon a demiſe *de mineriis carbonum in parochia de D.* generally,

nerally, not saying how many mines, and had a verdict, and judgment upon a writ of error brought in *B. R.*: the error assigned was in the declaration, because of the uncertainty thereof; for not setting forth the number of coal-mines, so as the sheriff might know of how many to give possession; and for this reason the court inclined, that the judgment was erroneous; but then the plaintiff producing several precedents in *Durham*, and alleging that all the entries there in ejectments for coal-mines were the same as in this case, the judgment was affirmed.

tingham, 4 Mod. 143. Comb. 201. Show. 364. Salk. 255. pl. 2. S. C.

3. Of the Demise and Right of Entry in the Lessor of the Plaintiff, and of the Ouster.

Although by the modern practice the plaintiff is not obliged to prove the lease mentioned in the declaration, for that is confessed by the rule of lease, entry, and ouster, which he is obliged to enter into; yet that being only designed for expedition in the trial of the right, and not to give the plaintiff a right of action which he had not at law; therefore it must appear by the declaration, that the plaintiff had actually the possession, and was ousted thereof by the defendant. Hence it is, that (*a*) if *A.* a lessee for years, makes a lease to *B.* at will, and *B.* is ejected, *A.* cannot have this action upon that ouster, because though the possession of *B.* was in law the possession of *A.*, yet the trespass *vi & armis*, which is complained of in this action, must be against the actual possession, and that was in *B.**

(*a*) Roll. Rep. 3. * But *A.* may maintain an ejectment, if the person who ousted *B.* refuses to deliver up the possession to *A.* See the next note.

So, if *A.* be lessee for years, the remainder to *B.* for years, and *A.* be ejected, and then his term expire, *B.* shall not have an ejectment on the ouster of *A.*, because the possession was not actually in him, and therefore he cannot complain of a trespass done to another.

Also, the lessor of the plaintiff must have a right of entry when this action is brought; for if his entry were taken away he is a disseisor, and cannot enter to make a lease to try the title; and therefore where tenant in tail makes a discontinuance, the issue in tail is put to his *foremedon*, and cannot have his ejectment, because his entry by the discontinuance is taken away.

Vide tit. Discontinuance.

Also, by the statute of limitations 21 *Jac.* 1. *c.* 16. none shall make an entry into lands, but (*b*) within twenty years after their right or title, which shall first descend or accrue to them; but this act hath the usual savings for infants, feme coverts, *&c.* which *vide* under title *Limitations*.

(*b*) Where the plaintiff was nonsuited, because not able to prove that he had been in possession for twenty years. Keb. 681. Hard. 461. [Twenty years adverse possession is not only a negative bar to the action or remedy of the plaintiff, but takes away his right of possession, and gives a positive title to the defendant: for the plaintiff must shew a right of *possession* as well as of property; and therefore, the defendant need not plead the statute of limitations, as in other cases. 1 Burr. 119. And by Holt, C. J. "a possession for twenty years is like a descent which *tolls* entry, "and gives a right of possession which is sufficient to maintain an ejectment:" as where *A.* had the possession of lands for twenty years without interruption; *B.* then acquired the possession, on which *A.* was put to his ejectment: here, though *A.* was plaintiff, yet his possession for twenty years was deemed a good title, and he recovered accordingly. Stokes v. Berry, 2 Salk. 421. For, if no other title appears, a clear undisturbed possession for twenty years, is evidence of a fee. Cowp. 397.] This statute

ſhall not affect the king or his tenant. Hard. 176. 2 Leon. 206. Cro. Eliz. 331.——Not a common perſon whoſe tenant has been in poſſeſſion, and has paid the rent, for the poſſeſſion of the tenant is the poſſeſſion of the landlord. 2 Keb. 127.——So, the poſſeſſion of one joint-tenant is the poſſeſſion of the other, ſo as to prevent the ſtatute from being a bar in the ejectment; ſo of coparceners, Salk. 285. pl. 19. *Vide* tit. Joint-tenants, &c. vol. 3. 688-9.

Cro. Jac. 511. Lev. 170. Sid. 223. 262. 344. Saund. 12. Raym. 135.

If a rent be granted in fee, or otherwiſe, to *B.*, with a clauſe or proviſo, in caſe it be in arrear, to enter and hold the land till the arrears be ſatisfied out of the profits thereof; if the rent be in arrear *A.* may recover the poſſeſſion in an ejectment; for this proviſo creates an intereſt in the land to anſwer the rent. And regularly, whoever hath an intereſt may demiſe the ſame to another, and, conſequently, the perſon claiming under ſuch demiſe may maintain an ejectment. And this is now a ſettled point whether the rent be created by grant at common law, or by way of uſe. But in this caſe there muſt be an (*a*) actual entry made, becauſe the title of the land accrues by the grantee's entering (*b*).

(*a*) For it ſeems now clearly agreed that the confeſſion of leaſe, entry, and ouſter, is not a confeſſion of any entry ſufficient to make out the plaintiff's title, where an entry is neceſſary thereto, but the party muſt actually enter, as appears by Saund. 319. Sid. 233. Mod. 10. Vent. 42. 332. 3 Keb 218. Salk. 246. pl. 2. Skin. 424 But by the ſtat. 4 Geo. 2. c. 28. in all caſes between landlord and tenant, the landlord for non-payment of rent may deliver a declaration in ejectment, or ſerve the ſame, as by the ſtatute is preſcribed, and ſuch ſerving ſhall be ſufficient without a demand or re-entry. [(*b*) Under a proviſo of this kind, the grantee muſt make his entry during the term, for the proviſo operates no longer than the term continues. Johns v. Whitley, 3 Wilſ. 127. To avoid a fine, levied *with proclamations*, (though it is otherwiſe in the caſe of a fine at *common* law, Jenkins v. Prichard, 2 Wilſ. 45.) there muſt be an actual entry, and the action muſt be commenced within a year *afterwards*, and the demiſe muſt be laid ſubſequent to the entry. Oates v. Brydon, 3 Burr. 1897. Berrington v. Parkhurſt, 2 Str. 1086. 4 Br. P. C. 353. In all other caſes, Lord Mansfield ſaid, the confeſſion of leaſe, entry, and ouſter is ſufficient, 3 Burr. 1897. And in the caſe of Goodright v. Cator, Dougl. 483. it was ruled not to be neceſſary to take advantage, by ejectment, of the uſual clauſe in a leaſe, to re-enter for non-payment of rent. However, the reporter of this laſt caſe, hints a doubt, whether *actual* entry be not alſo neceſſary to prevent the operation of the ſtatute of limitations, 21 J. 1. c. 16; and after citing Bull. N. P. 102. ſays, "ſo held on a trial at bar in Ford v. Grey, unleſs there be "ſome ſpecial reaſon to the contrary." H. 2 Ann. B. R. 1 Salk. 285. *Actual* entry is alſo neceſſary (as the ſame reporter ſtates) to enable a perſon who has recovered in ejectment, to maintain treſpaſs for the meſne profits, againſt one who was occupier when the title accrued, but not at the time of the ejectment. Bull. Ni. Pri. 87.] And, note, that if a man enters and delivers a declaration in behalf of the leſſor of the plaintiff; this is no entry to avoid a fine, unleſs an expreſs authority was given for that purpoſe, becauſe the entry muſt be purſuant to the intention, and that was to deliver a declaration in order to try the plaintiff's title, and not to make any title to the leſſor of the plaintiff. Mod. 10. Saund. 319. Vent. 42. [But if a man enter on the premiſes, on behalf of the leſſor of the plaintiff, though without any previous authority for that purpoſe, and the leſſor afterwards aſſent to the entry, before the day of the demiſe laid in the declaration, ſuch *aſſent* will be equal to an actual entry, and need not be either by deed or in writing. Fitchet v. Adams, 2 Str. 1128.]

Cro. Eliz. 800. Noy, 33.

A. covenanted to ſtand ſeiſed of land to the value of 100 *l. per ann.* to the uſe of himſelf for life, and after to the uſe of his daughters, who ſhould be unmarried at the time of his death, till they ſeverally ſhould receive and levy 500 *l.* a-piece, the remainder to his ſon; *A.* died the 30 *Eliz.* and the eldeſt ſon entered 42 *Eliz.*; the eldeſt daughter (there being four of them) brought her ejectment, but did not recover the lands, becauſe her entry was taken away, ſhe having paſſed the time allowed her to enter and receive the profits; otherwiſe ſhe might keep the other daughters out of the perception of the profits: for if the eldeſt daughter lets the ſon enjoy during the time the profits may be levied, ſhe lapſes her time, and muſt therefore have remedy againſt the ſon who received the profits in her prejudice, and cannot charge the land with her

Note: That in theſe caſes the uſual method now is, to apply to a court of equity.

her portion which is then onerated with portions to be raiſed for the younger ſiſters.

The plaintiff muſt lay the commencement of his ſuppoſed leaſe in his declaration to have been preceding the ouſter and ejectment by the defendant; for though ſuch ouſter be a wrong, yet it can be no wrong to the plaintiff if it was done before his title commenced; (*a*) as where the plaintiff declared on a leaſe made the 27th of *April anno primo regis*, and laid the ouſter by the defendant to be the 26th of *April anno primo prædict.*, this was held bad, becauſe it was plain the plaintiff had no title till the 27th, and therefore that ouſter the 26th was no treſpaſs or injury to him. Law Ejectm. 76. (*a*) Yelv. 182.

So, if the leaſe had been made 27 *April*, *habend. a dict.* 27 *April*. *virtute cujus* the plaintiff entered and was poſſeſſed till the defendant *poſtea eodem* 27 *die Aprilis* did eject him; this is bad; becauſe the ejectment was before the plaintiff's title commenced, for the leaſe did not commence till 28 *April*. 1 Sid. 8. 3 Mod. 198. Cro. Jac. 135. 258. Cro. Jac. 96. 2 Bul. 29. *cont.*

But if the leaſe be made the 27th, *habend.* from *thenceforth*, there, the ejectment may be laid the 27th, becauſe the leaſe commences the 27th, and an ejectment may be the ſame day the plaintiff's title commences. Cro. Jac. 258. 5 Co. 1. [As the leaſe is now conſidered as a fiction, theſe caſes cannot have much (if any) weight at preſent.]

But the law doth not neceſſarily oblige the plaintiff expreſsly to mention the day of the ouſter, ſo it appears to be after the term commenced, and before the action brought; for where the declaration was on a demiſe the 25th of *March primo regis*, for three years, by virtue whereof the plaintiff entered and was poſſeſſed, until the defendant *poſtea*, *viz. anno ſupradict.* entered and ejected him, without ſpecifying the day of the ejectment; this was held good in error; for the action being commenced *ſecundo regis*, and the ejectment laid to be *primo*, it was plain from the declaration, that the ouſter and ejectment were after the plaintiff's title commenced, and before the action brought. Cro. Jac. 311. Merrel and Smith.

Neither is the plaintiff, as it ſeems, neceſſarily obliged to allege the particular day of his entry in the declaration; and therefore where the plaintiff declared on a leaſe to commence at a future day, *virtute cujus* he entered, and was poſſeſſed till ejected by the defendant; this was held good on a writ of error, becauſe it is ſaid he entered by virtue of the leaſe, which could not be before it commenced, for he could not enter by virtue of the leaſe till the leaſe commenced: *aliter*, if the declaration had been *prætextu cujus* he entered, for the plaintiff might enter unlawfully, or before his time, under a pretence of the leaſe. 2 Roll. Rep. 466. Latch. 199.

The plaintiff declares in ejectment in the Common Pleas, and after an imparlance (as the courſe of the court is) makes a ſecond declaration; if in ſuch caſe the plaintiff by the firſt declaration ſhould lay the ejectment and ouſter before the commencement of his term, or omit any matter of ſubſtance in the firſt declaration though the ſecond were right, and the ouſter were laid after his term commenced, yet the plaintiff ſhall not recover, becauſe the declaration Law Ejectm. 78. Cro. Jac. 311.

declaration on the imparlance-roll is the material one on which the action is grounded, and muſt be ſupported by it, and the plea-roll is but a recital of the other, and therefore ought to begin with an *alias prout patet*, &c.

2 Vent. 174. Sid. 432. And though the declaration in law relates to the firſt day of the term, becauſe the term is in law conſidered as one day, yet the plaintiff may declare on a leaſe made ſome time after the firſt day of the term, and ſhall recover thereon. But then it muſt appear to the court that the declaration was filed after the day of the commencement of the ſuppoſed leaſe, for otherwiſe the plaintiff complains of an ejectment before he had title; and if the time of filing a bill were not examinable, the act of law, which makes the relation of bills to the firſt day of the term, would be an act of injury to the plaintiff, and delay his right; for then a man ejected out of a leaſe made in term-time could not complain till term was over.

Law Ejectm. 79, 80. but *vide* Carth. 401, 402. The plaintiff declares on a leaſe made the 6th of *May anno* 7 of the king, &c. ſetting forth, that the plaintiff was poſſeſſed *quouſque poſtea* the defendant the 18th day *ejuſdem menſis anno ſexto ſupradict.* ejected him: it was objected in arreſt of judgment, that the ejectment was laid to be *anno ſexto*, which was the year before the commencement of the leaſe, that being laid to begin the 6th of *May anno ſeptimo*: but the declaration was allowed to be good by the court, becauſe the ejectment was laid to be the 18 *ejuſdem menſis*, which could not be if it were done in the 6th year, and therefore they rejected the word *ſexto* as inconſiſtent and void.

Cro. Jac. 662. Rutter and Miles. So, where the declaration was of a leaſe 22 *May*, *habendum a primo die Maii* for three years, *virtute cujus* the plaintiff entered and was poſſeſſed *quouſque poſtea*, viz. *eodem die & anno*, the defendant ejected him; this on a writ of error was allowed a good declaration, though it was inſiſted, that *eodem die & anno* muſt refer to the firſt day of *May*, which was the laſt antecedent, and then the ejectment was laid to be twenty-one days before the leaſe was made.

Law Ejectm. 81. The plaintiff in ejectment declared, that whereas *J. S.*, by indenture the 9th day of *June* (without ſaying when it was made or delivered), did demiſe, &c. *habend. a die dat. ſigillationis & deliberationis indenturæ prædict.*, *virtute cujus* the plaintiff entered and was poſſeſſed till the defendant the ſame day ouſted him. It was moved in arreſt of judgment, that it was uncertain by the declaration when the term began, neither the day of the date, nor of the ſealing and delivering, being mentioned in the declaration: yet judgment was given for the plaintiff, becauſe after a verdict the leaſe ſhall be intended not only to bear date, but alſo to be ſealed and delivered the day mentioned in the declaration, which was the 9th, for all deeds are preſumed to be delivered the day that they bear date, till the contrary appear.

Law Ejectm. 81. But where the limitation of the leaſe is altogether uncertain, the plaintiff cannot recover, becauſe where the commencement of the leaſe is uncertain, the leaſe is void in itſelf, and then the plaintiff cannot have a title: beſides, the court cannot poſſibly perceive

perceive whether the ejectment was before or after the plaintiff's title accrued, if such uncertain lease could give him one. Otherwise it is, where the limitation or commencement is impossible; for in such case the lease commences from the delivery, as if it had no date, and then the court may judge whether the ejectment is laid to be before or after the commencement: But there is this further reason for the difference, for the impossible limitation is rejected, because it could not be part of the agreement or contract; but an uncertain limitation is part of the contract, and vitiates the whole agreement, because the court cannot reduce it to any certainty.

Thus, where the plaintiff declared on a lease, *habend. a die datûs indenturæ prædict.* without mentioning an indenture before; this was held bad, for the uncertainty when the lease commenced. Hetl. 63. Brady v. Johnson.

But if the plaintiff had declared on a demise to him *per quoddam scriptum obligat. habend. a die datûs indent. prædict.* this had been good, because the *scriptum obligatorium* shall be intended an indenture. Vent. 137. 2 Keb. 796.

The plaintiff declared on a lease of the fourth part of a house, in four parts to be divided, by force of which he entered *in tenement. predict.* and was possessed till the defendant ejected him *de tenementis prædictis.* It was objected in error, that the plaintiff laid the ouster to be of more than by his lease he had a title to, for the ouster was *de tenementis prædict.* which at least must be understood of the whole house, and the lease was only of the fourth part: but the objection was over-ruled, because *de tenementis prædict.* shall be intended only of the fourth part of which the lease was made. Besides, it was but just he should recover as much as he had title to, though he laid his ejectment for more. Law Ejectm. 82, 83.

The plaintiff declared on a demise the sixteenth day of *January*, by an indenture dated the second day of *January*, without saying *primo deliberat.* the sixteenth; yet the declaration was held good; for though all indentures shall be presumed to be delivered the day they bear date, unless the contrary be shewn, and that therefore this lease must commence the second day of *January*, which, if true, would be a different lease from what the plaintiff declared upon; yet in regard he declared on a demise the sixteenth, it must necessarily be intended that it was delivered on the sixteenth, because it cannot possibly be a demise before a delivery, and therefore the delivery must necessarily be intended the day the demise is said to have been made, and not the day of the date of the indenture. Cro. Eliz. 890. Law Ejectm. 83.

But where the plaintiff does not make mention of any particular day when the demise was made, but only in general says, that *J. S.*, by his indenture bearing date 1 *January*, did demise to him, so that it doth not appear by the plaintiff's own shewing, when the lease commenced, the law in such cases construes the delivery to have been the day it bears date; and so the declaration was held to be good, and not void for the uncertainty of the commencement of the lease, as was objected. Cro. Eliz. 773. Law Ejectm. 83, 84.

Though by the modern practice the plaintiff is not obliged to prove the leaſe mentioned in the declaration, for that is confeſſed by the rule, and by that means the miſchief of any variance between the leaſe declared on and the leaſe produced and proved on the trial is avoided, which was a danger the plaintiff was expoſed to, and often miſcarried in by the old method of proceeding; yet in the modern practice the plaintiff muſt take care to declare on ſuch a leaſe as ſuits with his leſſee's title. And therefore (*a*) if there be ſeveral leſſors, and you lay the declaration *quod demiſerunt*, you muſt ſhew in them ſuch a title that they might demiſe the whole, for the word *demiſerunt* muſt be taken in pleading, according to the legal ſenſe it bears; ſo that, if any of the leſſors have not a legal intereſt in the whole premiſes, he cannot in law be ſaid to demiſe them, for it is only his confirmation where he is not concerned in intereſt; and therefore the confeſſion of this joint leaſe doth not help, becauſe you do not confeſs the title by the rule.

Law Ejectm. 84.

(*a*) Cro. Jac. 613. 2 Keb. 376.

So, where the plaintiff declared on a leaſe made by *A.* and *B.*, and it appeared on the trial that *A.* was tenant for life, remainder to *B.* in fee; this on a ſpecial verdict was adjudged againſt the plaintiff, becauſe it could not be the leaſe both of *A.* and *B.*, to paſs the land *in præſenti* to the plaintiff, for during the life of *A.* it could not be his leaſe only, becauſe he was the tenant in poſſeſſion, and *B.*'s joining in the leaſe amounted only to a confirmation, but could paſs no intereſt during the life of *A.*; and therefore the allegation of the plaintiff, that *A.* and *B.* did demiſe, was not proved.

6 Co. 14. b. 15. a. Poph. 37. Co. Lit. 42. Jones, 305. Roll. Rep. 299. Raym. 142. 2 Jon. 137.

If the plaintiff declares on a leaſe made by *A.* and *B.*, and on the trial it appears that they are (*b*) tenants in common, the plaintiff cannot recover; but if *A.* and *B.* had been joint-tenants, a joint leaſe to the plaintiff had been good, and might have declared *quod demiſerunt*; and the reaſon of the difference is, that tenants in common are in of ſeveral titles, and therefore the freehold is ſeveral; and if they be diſſeiſed they ſhall be put to their ſeveral actions: as therefore the lands of tenants in common are to be conſidered as different eſtates depending upon different titles, the plaintiff ſhall not recover, becauſe they were to allow the plaintiff to try two ſeveral and different titles in one iſſue at the ſame time; ſo that the plaintiff to make out his title muſt ſhew and prove that each demiſed the whole to him, elſe he doth not prove the declaration, whereas the diſcovery of the tenancy in common proves the contrary; for as they have different titles to a moiety only, ſo they could not each of them demiſe the whole (*b*). But joint-tenants are ſeiſed *per moy & per tout*, and they derive by one and the ſame title, and therefore each may be ſaid to demiſe the whole; and as they muſt join in an action for any violation of their poſſeſſion, ſo for the ſame reaſon too their leſſee on their joint demiſe. And coparceners ſeem to ſtand on the ſame foundation and reaſon, becauſe both coming in as one heir, the poſſeſſion muſt be joint as that of joint-tenants (*c*).

Show. Rep. 342. 2 Vent. 214. Comb. 190. Carth. 224. [Heatherley v. Weſton, 2 Wilſ. 232. acc.]

(*b*) Where ejectment is brought by one tenant in common againſt another, there muſt be an actual ouſter of one by the other, elſe he ſhall not be compelled to confeſs leaſe, entry, and ouſter. *Per* Holt, C. J. 7 Mod. 39.

[(*c*) Yet in the old caſe of Milner v. Robinſon, Moor, 682. it was allowed a good exception to the declaration, that the plaintiff declared that two coparceners *demiſerunt*. Heretofore, to avoid difficulty in ſuch caſes, the way was for

for coparceners, joint-tenants, andt enants in common to join in a leaſe to a third perſon, and for that leſſee to make a leaſe, after the ancient courſe, to try the title.]

In ejectment the plaintiff declared upon two demiſes of ſeveral lands by ſeveral parties, but laid only one *habendum*, *viz. habendum tenementa prædicta* ſo demiſed by the aforeſaid ſeveral parties for ſeven years, and lays in his declaration, that the defendant entered into all the aforeſaid tenements, *& ipſum* (the plaintiff) *a firmâ ſuâ prædictâ* (in the ſingular number) *ejecit, expulit & amovit;* and it was aſſigned for error, that the declaration was ill for want of another *habendum*, for that the verdict is general, and it is uncertain to which demiſe this ſingle *habendum* relates: but the court held, that *reddendo ſingula ſingulis* it was well enough. Carth. 224. Furden and Moor, adjudged in B. R. upon a writ of error. Comb. 190. S. C. adjudged. 2 Vent. 214. S. C. adjudged in C. B.

If the heir brings an ejectment, and pending the ſuit his anceſtor dies, yet he ſhall not recover, becauſe every man muſt recover according to the right he had at the time of the action brought; for during the lifetime of the anceſtor the ejectment was done to him only, and therefore to be puniſhed by the anceſtor; for one man cannot complain in a court of juſtice of an injury done to another. Raym. 463.

[A plaintiff cannot recover *againſt* his own covenant; and a licence to inhabit amounts to a leaſe.] Right v. Proctor, 4 Burr. 2208.

A leaſe made by a guardian to try the title of an infant ſeems good; for though ſuch leaſe may be voidable as to the infant, yet a ſtranger cannot defeat it: and if the leſſee ſhould not be allowed to maintain his ejectment on ſuch leaſe, the infancy would deprive the minor of that remedy of puniſhing the treſpaſſor, which perſons of full age are entitled to; which were to deny the minor the common right and privilege of other ſubjects. Hard. 330. [But a leaſe made by the *teſtamentary* guardian of an infant is void. Parry v. Hodgſon, 2 Wilſ. 129.

135. And if the leſſor of the plaintiff claim title as guardian in *ſocage*, he may be called upon to prove that the infant is not *fourteen* years of age. 1 Bl. Com. 461. 5 Term Rep. 471.—It has been long ſettled, that an infant himſelf may make a leaſe without rent to try his title. 3 Burr. 1806. 2 Term Rep. 161. 5 Br. P. C. 570.]

A man may bring an ejectment on a joint leaſe made by baron and feme, of the lands of the wife, if the leaſe were made by herſelf in perſon, whether it be by parol or indenture; for the contracts of the wife relating to her own eſtate are but voidable during the coverture, that ſhe may have the benefit of them after the death of her huſband, if they ſhall be for her intereſt to confirm them: but the huſband ought to join in the leaſe, becauſe they are conſidered in the law but as one perſon, and he having, during the coverture, an intereſt in the property of his wife, the whole proprietor would not join in the leaſe, without the huſband: and as on ſuch joint leaſe each may be ſaid to demiſe the whole, the leſſee might according to the ancient practice, maintain his ejectment on ſuch demiſe. [But it was not neceſſary, that the huſband and wife ſhould join in a leaſe to try the title to her eſtate; he alone might make a leaſe for that purpoſe;] becauſe during the coverture he hath the power of her property; and therefore all his 2 Co. 61. Cro. Jac. 332. 417. 617. Cro. Eliz. 470. 488. See Cowp. 201. Dougl. 53. Cro. Jac. 322.

his contracts relating to it are good during his life, becauſe his pleaſure muſt determine her who hath reſigned her will to him; though after his death ſhe may avoid the leaſe.

Cro. Jac. 617. Gardiner and Norman.

But if the plaintiff declares on a joint leaſe by baron and feme, and the leaſe appears on the evidence to have been executed by a third perſon, by virtue of a letter of attorney from the huſband and wife, ſuch evidence will not maintain the declaration, becauſe ſhe cannot delegate a power to a third perſon to act for her, having already devolved all power and authority on her huſband. But the letter of attorney, though void as to the wife, remains as to the huſband; and hence it hath been held, that the leſſee might, in this caſe, declare on that leaſe as the leaſe of the huſband only.

Cro. Eliz. 469. 535. Owen, 18. Latch. 199. Hardr. 330. 2 Lutw. 803.

[A copyholder may declare on a leaſe for any number of years without forfeiture: and the leſſee of a copyholder for a year, may ſuſtain an ejectment; for his eſtate is warranted by law, and it is the moſt eaſy way for him to recover the poſſeſſion.

Co. Lit. 398. a. 4 Co. 26. a.

Doe v. Staple, 2 Term Rep. 684. (a) Goodtitle v. Way, 1 Term Rep. 735.

In ejectment, the plaintiff muſt recover on a *legal* title. Therefore (*a*), the truſtee of a term for the benefit of creditors, not having notice of an agreement for a leaſe made previous to the grant of a term, has been permitted to maintain an ejectment againſt the tenant in poſſeſſion under the agreement: for the title of the tenant, being only a doubtful equity, cannot be ſet up againſt the legal title of the truſtee.

Roe v. Lowe, 1 H. Bl. 446.

So, it *ſeems* to have been determined, that if an *equitable* tenant in tail grant a leaſe for a long term, under ſuſpicious circumſtances of fraud or impoſition, it will not prevent truſtees, in whom the legal eſtate is veſted, from recovering in ejectment againſt the leſſee. And in conformity with the principle laid down, the tenant, againſt whom his landlord had brought an ejectment, was deemed competent to ſhew that the title of the latter had expired; conſequently, that he had no legal right to turn him out of poſſeſſion.]

England v. Slade, 4 Term Rep. 682.

(E) Of the Plea and General Iſſue in Ejectment.

Law Ejectm. 89.

THE general rule in the iſſue of this action is, that whatſoever bars the right of entry is a bar to the plaintiff's title: therefore the plaintiff muſt prove ſeiſin within twenty years in himſelf or his anceſtors, or muſt prove a ſeiſin in the perſon that has a particular eſtate in the land, and that he claimed within twenty years after the reverſion accrued, or that he was an infant, *non compos*, impriſoned, beyond the ſea, or, if a woman, under coverture, at the time when the title accrued, [and that he claimed within twenty years after he came of age, &c., for every plaintiff in ejectment muſt ſhew a right of *poſſeſſion*, as well as of property; and therefore the defendant need not plead the ſtatute of limitations, as in other actions.]

3 Burr. 119.

Fine

Fine and nonclaim, or a deſcent caſt, which takes away the entry, are good pleas in this action in bar of the plaintiff's right of entry. *Vide* tit. Fines and Recoveries, and Deſcent.

Accord is a good plea in ejectment, as is alſo ancient (*a*) demeſne. 9 Co. 77. Petoe's caſe.

[(*a*) But this cannot be pleaded without leave of the court and affidavit. 3 Wilſ. 51. 2 Burr. 1046.]

(F) Of the Verdict and Judgment in Ejectment.

AS the verdict is the ground of the judgment, it ought not to be entered for more land or different parcels than the defendant was found guilty of: but a variance between the verdict and judgment, occaſioned by the miſpriſion or default of the clerk in entering the judgment, is not fatal, but hath been amended by the court after a writ of error brought. As, where the plaintiff had judgment *quod recuperet terminum* of a meſſuage and ten acres of land, and the verdict acquitted the defendant *quoad* the land; here, though the judgment was larger than the verdict; yet becauſe it appeared to be the miſpriſion of the clerk, who had not purſued the verdict, which ought to have been his guide in making up the judgment, and no miſtake in point of law in giving the judgment, therefore the party ought not to ſuffer for ſuch miſpriſion, ſince the ſtatute of 8 *H.* 6. *c.* 12. gives the judges, in affirmance of their judgment, power to amend and reform what in their diſcretion ſeems to be the miſpriſion of clerks.

If the plaintiff hath a verdict for all, the entry of the judgment is, that the plaintiff *recuperet terminum verſus def. de & in tenementis prædict.* & (*b*) *quod def. capiatur.* F. N. B. 220. Cro. Eliz. 144.

(*b*) But it ſeems, that ſince the ſtatute 5 & 6 W. & M. c. 12. which takes away the *capias pro fine*, no judgment of *capiatur* ſhall be entered againſt the defendant, nor any thing in lieu thereof, but the clauſe ſhall be totally left out of the judgment: but then the plaintiff is to pay the officer, in lieu of the fine, ſix ſhillings and eight pence, which is to be allowed the plaintiff in his coſts. Carth. 390. Linſey and Sir Talbot Clerk. 5 Mod. 285. S. C.

But if the judgment in ejectment be entered *quod recuperet poſſeſſionem termini prædict.*, this is as well as if it had been *recuperet terminum præd.*, becauſe both ſignify the ſame thing, the poſſeſſion itſelf being to be recovered on the *habere facias poſſeſſionem.* Law Ejectm.

And hence it is, that if the term expires pending the ſuit, the plaintiff cannot recover the poſſeſſion, becauſe the court cannot give the plaintiff judgment for the land, when it appears upon the face of the record, that his title to it is determined; yet he (*c*) ſhall have his judgment for damages, becauſe the treſpaſs ſtill remained. Sav. 28. (*c*) Co. Lit. 285.

In ejectment againſt baron and feme, the huſband was acquitted and the wife found guilty; the judgment was *quod capiantur*; and held good, becauſe that is only for the fine, which the huſband muſt pay, for the wife cannot. Cro. Car. 406. Mayo and Coghill.

If the defendant be acquitted of part, and judgment be entered *quod def. ſit quietus quoad* that part whereof he is acquitted; this is error, becauſe the judgment in this action is not final, as in the writs of right, and the judgment in this action doth not protect Cro. Eliz. 673.

protect the defendant from any further ſuit, but only acquits him againſt the title ſet up by the plaintiff in the action. But ſince it appears that the plaintiff's demand was groundleſs as to that part whereof the defendant was acquitted, the judgment as to that part muſt be ſet down to be *quod def. eat inde ſine die*; the plaintiff as to that having no farther cauſe to detain him longer in court.

(a) How far the death either of the plaintiffs or defendants makes an abatement, *vide* tit. Abatement, and Moor, 469. Cro. Car. 513—14. Jon. 401. Law Ejectm. 97—8. The death of one plaintiff or defendant, where there is another ſurviving, not to abate the ſuit. 8 & 9 W. 3. c. 11. § 7.—And the death of a party between verdict and judgment, not to be error, provided judgment be entered within two terms. 17 Car. 2. c. 8. [(b) This latter part of the judgment hath been holden to be unneceſſary; becauſe on ſuggeſting the death, it is awarded by the court, "that further proceedings ſhall ſtay againſt the perſon deceaſed." 1 Burr. 363.]

If one of the defendants (a) die after a verdict, the plaintiff ſhall have judgment againſt the ſurvivors, on his ſuggeſting the death of one on the roll, but then the judgment muſt be entered as to the perſon deceaſed *quod quer. nil capiat, &c.* (b)

Roll. Rep. 34. Cro. Jac. 356.

If an ejectment be brought againſt baron and feme, and the plaintiff have a verdict againſt both, and before judgment the huſband die, the plaintiff may on the ſuggeſtion have judgment againſt the wife, not only becauſe this is a treſpaſs committed by the wife, and that therefore ſhe is puniſhable for her own act, which is injurious to another; but becauſe where the wife is found guilty of the ejectment, ſhe muſt have obtained that unlawful poſſeſſion, either jointly with her huſband, and then it ſurvives, or, ſhe had the whole poſſeſſion in her own right; and in either caſe the plaintiff may puniſh her, and recover the poſſeſſion, which is wholly in her on the death of her huſband.

(G) Of the Writ of Execution: And herein,

1. Of the Time when the Writ is to be ſued.

Vide tit. *Sci. Facias.* (c) Where the defendant in ejectment dying, a *ſcire facias* went out againſt the terre-tenants of the lands, the writ was demurred unto; for that the heir was not named, nor was it alleged that any ſtrangers had intruded; but the court ruled it well, for the heir may come in as a ter-tenant. Sid. 317. 2 Keb. 143. But for this *vide* Cro. Car. 295. 312. Eyres and Taunton. Cro. Jac. 506. 2 Brownl. 145.——Where in ejectment there was judgment againſt the teſtator, and a *ſcire facias* againſt the executor, without naming him terre-tenant; it was objected, that in ejectment the defendant is ſuppoſed to be a diſſeiſor, and that the lands deſcend to his heir at law, the plaintiff took out a new *ſcire facias* and amended the fault. Carth. 2.——Where judgment in ejectment was for two meſſuages, and after a year a *ſcire facias* upon it recited a judgment of one meſſuage only, to which *nul tiel record* being pleaded, it was moved to amend it, but denied, for there may be ſuch a judgment; and this does not appear to be erroneous on the face of it. 6 Mod. 310. (d) It ſeems to have been doubted, whether a *ſcire facias* lay to revive a judgment in ejectment after the year, becauſe by the common law it lay only in real actions; and at the time of Weſtm. 2. c. 45. which extends it to perſonal actions, the term or poſſeſſion was not recovered in this action; but it ſeems now agreed, that a *ſcire facias* lies to revive the judgment in this action after the year, as well as in any other. Sid. 351. Okey and Viccars, Salk. 258. pl. 11.

ALTHOUGH after judgment the plaintiff is entitled to, and may ſue out the writ of *habere facias poſſeſſionem*; yet if he neglect to ſue out execution within a year after the judgment, he muſt bring (c) a *ſcire facias* (d), as on all other judgments, otherwiſe the court will award a writ of reſtitution *quia erronice emanavit*.

[But

[But if execution be taken out within, and continued beyond, the year, there is no neceſſity for a *ſcire facias*. No preſumption can then ariſe, that the plaintiff hath releaſed the execution; becauſe, having been duly taken out, it may be owing to the neglect of the ſheriff that it was not executed. 2 Inſt. 471. 2 Leon. 77. Runningt. Eject. 429.

If the plaintiff die within the year and a day, his executors cannot take out execution without a *ſcire facias*; for they are not parties to the judgment: though if execution has been regularly ſued out in the lifetime of the teſtator, the ſheriff may execute it after his death; becauſe the authority is from the court, and not from the party. The writ of poſſeſſion has relation to its *teſte*; therefore, though it be not actually ſued out till after the death of the leſſor of the plaintiff, yet if it be *teſted* before his death, it is regular.] Runningt. *ibid.* 14 H. 7. 16. Doe v. Roe, 4 Burr. 1970.

But if the plaintiff hath a judgment, with ſtay of execution for a year, he may, after the year, take out his execution without the *ſcire facias*, becauſe the delay is by conſent of parties, and in favour of the defendant; and the indulgence of the plaintiff ſhall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage and at his inſtance. 6 Mod. 288. Roll Rep. 104.

But it ſeems this delay of execution, being only the compromiſe or agreement of the parties, is never entered on the roll; and therefore after the year the plaintiff ought to move the court for the *ſcire facias*, leſt the execution ſhould be ſuſpended *quia erronicè emanavit* after the year without the *ſcire facias*. Keo. 785. 6 Mod. 288, and the above authorities.

So, if the defendant brings a (*a*) writ of error, and thereby hinders the plaintiff from taking his execution within the year; and the plaintiff in error is nonſuit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *ſcire facias*, becauſe the writ of error was a *ſuperſedeas* to the execution, and the plaintiff muſt acquieſce till he hears the judgment above. Beſides, while the cauſe is depending on the writ of error, it is ſtill *ſub judice*, whether the plaintiff ſhall recover the land or not. 5 Co. 88. a, Cro. Eliz. 416. 2 Inſt. 471. 6 Mod. 288.

(*a*) But if the party be tied up by an injunction out of Chancery for a year, he cannot take out execution after the year without a *ſcire facias*, becauſe the courts of law do not take notice of Chancery injunctions as they do of writs of error: beſides it might be no breach of the injunction to take out execution within the year, and continue it down by *vic. non miſit breve*, [which, it ſeems, cannot be done in the caſe of a writ of error, becauſe that removes the record out of the court where judgment is given; and therefore there can be no proceedings below, till it be affirmed and returned to the inferior court.] Salk. 322. pl. 9. 6 Mod. 388. S. C. Stra. 301. ——* But now, according to the caſe of Michel v. Cue, *et Ux.* in B. R. 32 Geo. 2. 2 Burr. 660. if a delay of execution for a year hath ariſen from the defendants, by bills for injunctions, and by obtaining time for payment, execution may be ſued out without a *ſcire facias*: and if a rule to ſhew cauſe why it ſhould not be ſet aſide is obtained, the court will diſcharge it with coſts. And this ſeems founded on reaſon; and *qu.* if this doctrine will not extend to caſes in ejectment?—— A *ſcire facias* lies upon a judgment in ejectment where a ſtranger enters after judgment. R. Lut. 1268. 3 Lev. 100. Clift, 676, 677.

[Tenant for years had judgment in ejectment: the term incurred: then he brought a *ſcire facias quare executionem habere non debet of the land*, and his damages and coſts. The defendant demurred. It was holden by the court, that though the defendant might have a *ſcire facias* for the damages and coſts, yet this being for the term likewiſe, which was incurred, it was ill; and a new *ſcire facias* Sedgwick v. Goſton, Skin. 161.

ought to iſſue. It was afterwards argued by *Holt*, that the *ſcire facias* was good for the damages; but the court thought otherwiſe, and a new *ſcire facias* was granted.]

2. How the Writ is to be executed.

1 Burr. 366. Runningt. Eject. 432. [As execution ſhould be iſſued according to the right and juſtice of what has been really recovered, the plaintiff muſt be careful not to take out execution for more than he had right to recover.

1 Burr. 629. And that the ſheriff may not labour under any difficulty in executing the writ of poſſeſſion, the practice *now* is, (different indeed from what it was formerly,) for the plaintiff himſelf not only to point out to the ſheriff that which, in execution of the writ, he is

5 Burr. 2673. 3 Wilſ. 49. to deliver him poſſeſſion of; but to take poſſeſſion, at his peril, of only that which he has title to: for ſhould he take poſſeſſion of more than he has recovered and proved title to, the court will, in a ſummary way, interpoſe and ſet it right.]

5 Co. 91. b. The words of the writ are *quod habere facias poſſeſſionem*, ſo that there muſt be a full and actual poſſeſſion given by the ſheriff, and conſequently, all power neceſſary for this end muſt be given him. If, therefore, the recovery be of a houſe, the ſheriff may juſtify breaking open the door, if he be denied entrance by the tenant, becauſe the writ could not be otherwiſe executed.

[1 Roll. Abr. 886.] If the plaintiff recover ſeveral meſſuages in the poſſeſſion of different perſons, the ſheriff muſt go to each houſe and deliver the poſſeſſion thereof; and this is done by turning the tenants out of each of the houſes: for the delivery of the poſſeſſion of one meſſuage, in the name of all, is not a good execution of the writ, becauſe the poſſeſſion of one tenant is not the poſſeſſion of the other, but each hath his ſeveral poſſeſſion.

Roll. Abr. 886. But it ſeems by *Roll.* that if all the meſſuages had been in poſſeſſion of one tenant, it had been ſufficient to give poſſeſſion of one in the name of all; but without doubt the ſureſt and beſt way is, for the ſheriff to remove all the tenants entirely out of each houſe, and when the poſſeſſion is quitted, to deliver it to the plaintiff.

Leon. 145. Upton and Wells. [*Qu.* Whether the courts would not now hold it to be a full execution of the writ.] If the ſheriff turns out all perſons he can find in the houſe, and gives the plaintiff, as he thinks, quiet poſſeſſion, and after the ſheriff is gone there appear ſome perſons to be lurking in the houſe; this is no good execution, and therefore the plaintiff ſhall have a new *habere facias poſſeſſionem*, becauſe he never had execution.

Where the recovery was of land, and there was more demanded than recovered, as ſuppoſe the demand for 500 acres, and a verdict and judgment only for 100 acres, it ſeemed doubtful formerly how the ſheriff was to give execution. (*a*) *Roll.* ſays, it is ſufficient to give the plaintiff poſſeſſion of two or three acres in the name of the whole. And this indeed ſeems the ſafeſt way for the ſheriff, when he executed the writ at his peril; for if he gave poſſeſſion of any land not recovered, and not in the *habere facias poſſeſſionem*,

(*a*) Roll. Abr. 886.

ſeſſionem, he was a treſpaſſer, and puniſhable in an action of treſpaſs. But becauſe the *habere facias* is to give the plaintiff the benefit of his judgment, and that cannot be done without an actual poſſeſſion be given of the whole quantity, it hath been held by (*a*) others, that the ſheriff does not diſcharge his duty by giving one acre in the name of all; but he ought in ſuch caſe to ſet forth all the acres particularly, otherwiſe it would leave the execution uncertain, and conſequently, not give the plaintiff the full benefit and advantage of his judgment. But *note*, (*b*) at this day the practice is for the plaintiff to give the ſheriff ſecurity to indemnify him from the defendant, and then the ſheriff to give execution of what the plaintiff demands.

(*a*) Palm. 289.

[(*b*) 1 Burr. 620. 5 Burr. 2673.]

If the execution be for twenty acres, it ſeems the ſheriff muſt give twenty acres, according to the common eſtimation of the county where the lands lie.

Roll. Rep. 410.

3. How the Plaintiff is to be quieted, and what Relief he has when his Poſſeſſion is diſturbed.

And here it is further obſervable, that this writ of execution is only returnable at the election of the plaintiff; and the court, at the inſtance of the defendant, will not direct the writ to be returned. This ſeems to be left to the choice of the plaintiff, that he may take what is moſt for his advantage, in order to have the full benefit of his judgment: the beſt way to effect that is, to ſuffer him to renew the execution at his pleaſure till full execution be had. For the plaintiff cannot renew execution after one *habere facias* is returned and filed, becauſe it then appears on record, that the plaintiff hath had the benefit of his ſuit; and then the new execution is but *actum agere*, and, conſequently, ſuperfluous; and therefore the court will not oblige the ſheriff to make any return, but at the deſire of the plaintiff.

Roll. Abr. 886. 2 Keb. 245. Roll. Rep. 353. Palm. 289. 2 Brownl. 253. 6 Mod. 27.

If the writ be returned by the ſheriff, though not filed, it ſeems no new *habere facias* ſhall iſſue, becauſe when the return is made, it becomes a record, which the court is entitled to.

2 Brownl. 216.

But where the writ is neither returned nor filed, there is then no act of record, by which it appears to the court that the plaintiff hath had any benefit by his judgment; and there upon a ſuggeſtion, *vic. non miſit breve*, the plaintiff is entitled to a new writ, becauſe the omiſſion of the officer ſhall not turn to the plaintiff's delay or prejudice. But the new writ cannot iſſue till the return of the firſt writ be out; becauſe till the return be paſt, *non conſtat* to the court, but the ſheriff may do his duty, and the plaintiff thereby have the full benefit of his judgment; in which caſe there can be no occaſion for a new *habere facias*.

Palm. 289.

If the officer be diſturbed in the execution of the writ, on an affidavit the court will grant an attachment againſt the party, whether he be the defendant or a ſtranger: for the writ is the proceſs of the court, and any diſturbance given to the execution of it is a contempt of the authority of the court from whence it iſſues, and as ſuch will be puniſhed. The proceſs is not underſtood to be

6 Mod. 27.

executed, nor the execution complete, till the ſheriff and his officers be gone, and the plaintiff left in quiet poſſeſſion.

Keb. 479. Ratcliff and Tate.

But after the poſſeſſion given, either on the *habere facias poſſeſſionem*, or agreement of the parties, the law ſeems to make a difference where the plaintiff is turned out of poſſeſſion by the defendant, and where by a ſtranger. When it is done by the defendant himſelf, the plaintiff may have either a new *habere facias* or an attachment, becauſe the defendant himſelf ſhall never by his own act keep the poſſeſſion which the plaintiff has recovered from him by due courſe of law. But where a ſtranger turns the plaintiff out of poſſeſſion after execution fully executed, the plaintiff is put to another action, or to an indictment for the forcible entry. For the title was never tried between the plaintiff and a ſtranger; and he may claim the land by title paramount to the plaintiff, or he may come in under him; and then the recovery and execution in the former action ought not to hinder the ſtranger from keeping that poſſeſſion which he may have a right to. If the law were otherwiſe, the plaintiff might by virtue of a new *habere facias* turn out even his own tenants, who came in after the execution executed; whereas the poſſeſſion was given him only againſt the defendant in the action, and not againſt others not parties to the ſuit.

(*a*) Style, 318.

Thus in the caſe of (*a*) *Fortune* and *Johnſon*, the court was moved for an attachment againſt *Johnſon*, for ejecting one who had been put into poſſeſſion by an *habere facias*: but becauſe it appeared that *Johnſon* claimed under an elder judgment, the court would not make any rule in it, becauſe it was title againſt title, and therefore left them to take their courſe at law.

2 Bl. Rep. 892.

[But in the caſe of a tenant, (who cannot be conſidered as a mere ſtranger,) it is otherwiſe. As in *Davis* v. *Doe*, an attachment was granted, and that abſolute, in the firſt inſtance, againſt the tenant in poſſeſſion, on an affidavit that he had been ſerved with a rule of court, (which had been made abſolute,) for delivering up the poſſeſſion, and had refuſed ſo to do.]

Style, 408. Law Ejectm. 113.

The plaintiff had judgment in ejectment, and by agreement afterwards, the defendant was to hold the land for the reſidue of his term, and held it accordingly for ſome time, when the plaintiff took out an *habere facias* and executed it. The defendant moved the court for reſtitution on ground of the agreement; but the court would not grant it, but left the defendant to his action on the caſe on the agreement, for the judgment was entered abſolutely (*a*). But if the judgment had been entered with a *ceſſet executio* for ſuch a time, and the plaintiff had taken out execution within the time, the defendant might have had reſtitution, becauſe the judgment was entered with this limitation, that the plaintiff ſhould not have the fruit of it till ſuch a time. But *quære*, how could that appear to the court? ſince it ſeems the *ceſſet executio* is not entered on the roll. The difference ſeems to have been between a judgment by confeſſion, and a judgment on verdict. Where the former is given with a *ceſſet executio*; if the execution be afterwards taken contrary to the agreement, the

[(*a*) This deciſion is not entitled to much, if to any attention. For in the caſe ſtated, nothing can be more evident than that the execution was iſſued contrary to *good faith*; and whenever that appears, the court, in the con-

court will ſet it aſide, and lay the attorney by the heels: but where judgment is given on verdict, there, the verdict is the foot and ground of the judgment, and the court will not take notice of the ſubſequent agreement of the parties, but leave them to their remedy (*a*).

ſcientious exerciſe of its ſummary juriſdiction, will interpoſe and correct it.

Runningt. Eject. 437. (*a*) Yet according to the modern practice, if the truth be manifeſted to the court by affidavit, the party may obtain relief from its ſummary juriſdiction.]

(H) Of the Meſne Profits, and how to be recovered.

ALthough in ejectment the plaintiff, if he prevails, is to recover damages, yet the damages which he hath ſuſtained by being kept out of the meſne profits are not (*b*) recoverable in this action; becauſe it is never laid with a (*c*) *continuando*, and therefore comprehends only the damages ſuſtained in the particular act of ouſter complained of. [Indeed, the action of ejectment, as now conducted, is altogether a mere fiction, brought by a *nominal* plaintiff againſt a *nominal* defendant, for a *ſuppoſed* ouſter, and of courſe for mere *nominal* damages. The object at this day propoſed to be recovered by it is quite changed from what it was in its original ſtate; for, as formerly, damages only were recoverable by it, and not the term; ſo now the term only is ſought for by it, and not damages. For a ſatisfaction in damages, therefore, a ſubſequent action is to be brought, which ſubſequent action is in *form*, an action of treſpaſs, *vi et armis*, but in *effect* to recover the rents and profits of the eſtate. It is *in form* an action of treſpaſs, becauſe it is conſequent and as it were, ſupplemental to the action of ejectment, and therefore muſt neceſſarily be of the ſame ſpecies with it. It may be brought by the leſſor of the plaintiff in his own name, or in the name of the nominal leſſee; but in either ſhape it is equally his action; for it is not in any manner affected by the fiction in the ejectment. And it may be brought in the name of the nominal leſſee as well where the judgment is by default, as where it is upon a verdict; for there is no diſtinction between judgment by a default, and upon verdict; in the one, the right of the plaintiff is tried and determined againſt the defendant; in the other, it is confeſſed.

Pract. Reg. C. P. 62. [3 Wilſ. ~~118~~ 119. 2 Burr. 688. 3 Term Rep. 17. 547. (*b*) It ſeems certain, that the plaintiff may recover the whole meſne profits in the ejectment; and that is apparent from 16 & 17 Car. 2. which enacts, that in caſe the judgment be affirmed on the writ of error, the court may award a writ of inquiry as well of the meſne profits, as of the damages by any waſte committed after the

firſt judgment. Perhaps it may be anſwered, that the court will take notice that the proceedings in ejectment are merely fictitious, and only to enable the plaintiff to get poſſeſſion, and that it is never uſual to recover more than ſmall damages for the ouſter, without any conſideration had of the meſne profits. And it is certain the courts do frequently take that into conſideration; otherwiſe the leſſor would not be entitled to recover at all for the time laid in the declaration, ſince, by his own ſhewing, his leſſee, and not himſelf, was entitled to the action. But if the plaintiff were, upon the judgment in the ejectment being affirmed in error, to have a writ of inquiry, it would probably, if rightly pleaded, prevent him from recovering any thing in a ſubſequent action of treſpaſs; and therefore, if the demiſe were laid any time back, it would be adviſeable for the plaintiff in ejectment to take (as he may) judgment for his coſts on the writ of error, without having any writ of inquiry. Bull. Ni. Pri. 83. In Traherne v. Greſſingham, Barnes, 87. it is ſaid by the court, that the actions for meſne profits (which are grown very faſhionable) tend to create double expence: that the plaintiff ſhould be ready at the trial of the ejectment to prove his damages, which may be recovered in that action, without bringing a ſecond for meſne profits. (*c*) But it was formerly thought, that *antecedent* profits were not recoverable at law; and therefore it was uſual for the plaintiff to go into equity for an account of the meſne profits. 1 Vern. 105. 3 Wilſ. 118. 2 Burr. ~~688~~ 660. 3 Term Rep. 17. 547.]

Runningt. Eject. 439. Skin. 267. Salk. 260.

If the action be in the name of the nominal plaintiff, the court, upon application, will ſtay the ſuit, till ſecurity be given for anſwering the coſts: and if ſuch a plaintiff releaſe the action, his releaſe will be ſet aſide, as a contempt of court.

Lill. Pr. Reg. 499. 2 Str. 960.

It was formerly holden, that if the action for meſne profits were brought in the name of the leſſor of the plaintiff, or after a judgment by default, the defendant in ſuch action was at liberty to controvert the plaintiff's title, the leſſor of the plaintiff in the one caſe, and the tenant, who had never appeared, in the other caſe, being no parties to the record, and therefore no eſtoppel ariſing either againſt, or in favour of either of them. But it is now ſettled, that after a recovery in ejectment, the tenant is eſtopped from controverting the title in a ſubſequent action for meſne profits; provided the plaintiff proceed only for thoſe profits from the time of the ouſter complained of in the ejectment: but if he proceed for *antecedent* profits, he muſt prove his title to the premiſes whence they aroſe, to ſhew his right to receive them.

Dacoſta v. Atkins, Hil. 4 G. 2. Bull. Ni. Pri. 87. 2 Burr. 688. Barnes, 472.

Bull. Ni. Pri. 87.

Hence it ſhould ſeem, that in order to prove the plaintiff's title in an action for the meſne profits, it is only neceſſary to produce the judgment in ejectment; and ſo is the practice, where the judgment is after verdict: but after judgment by default, the practice is different: then, it is uſual not only to produce the judgment, but alſo to prove a writ of poſſeſſion executed. This latter proof, however, does not ſeem to be neceſſary; for if the tenant be concluded by the judgment in ejectment from controverting the plaintiff's title, he is, conſequently, concluded from controverting his poſſeſſion, becauſe poſſeſſion is part of his title.

Runningt. Eject. 442.

Bull. Ni. Pri. 87.

But if this action be brought againſt a precedent occupier, the judgment in ejectment is no evidence againſt him; and therefore in ſuch caſe, it is neceſſary for the plaintiff to prove his title, and alſo an actual entry; for treſpaſs being a poſſeſſory action cannot be maintained without it. But it may admit of doubt what proof of an actual entry will be ſufficient. It has been ſaid, that the plaintiff will be entitled to recover the meſne profits only from the time he can prove himſelf to have been in actual poſſeſſion; and therefore, if a man make his will and die, the deviſee will not be entitled to the profits till he has made an actual entry. Others have holden, that when once he has made an actual entry, that will have relation to the time his title accrued, ſo as to entitle him to recover the meſne profits from that time, and they rely on the caſe in 1 *Sid.* 239. which was treſpaſs brought for the meſne profits *devant le leaſe*, and nothing ſaid in the caſe about proving an actual entry antecedent to it. They ſay too, that if the law were not ſo, the courts would never have ſuffered plaintiffs in ejectments to lay their demiſes back in the manner they now do, and by that means entitle themſelves to profits they would not otherwiſe be entitled to. However, ſuppoſing a ſubſequent entry has relation to the time the plaintiff's title accrued, yet certainly the defendant may plead the ſtatute of limitations, and by that means protect himſelf from all but the laſt ſix years.

Stanynough v. Couſins, Barnes, 456.

1 Roll. Abr. tit. Treſpaſs *per* Relation.

In

In this action the plaintiff muſt prove the value of the meſne profits; for the judgment in ejectment does not prove any thing as to that. In eſtimating it, however, the jury are not confined to the mere rent of the premiſes; they may give *extra* damages, and after judgment by default, the coſts in ejectment are recoverable, and are therefore uſually declared for as damages, in the action for meſne profits. 3 Wilſ. 121. 2 Term Rep. 547.

Bankruptcy is no plea in bar to this action. Goodtitle v. North, Dougl. 584.

A plaintiff may, if he pleaſes, wave the treſpaſs, and recover the meſne profits in an action for uſe and occupation. But in the action for uſe and occupation he cannot recover the profits any farther than to the time of the demiſe in the ejectment; for this action does not ſpring out of the ejectment as the action of treſpaſs does, but, when applied to the ſame thing, is totally inconſiſtent with it, this being founded on a contract, that on a tort; in the one, the plaintiff ſays the defendant is his tenant, and therefore muſt pay him rent; in the other, he ſays he is no longer his tenant, and therefore muſt deliver him up the poſſeſſion.] Birch v. Wright, 1 Term Rep. 386.

(I) Of bringing a new or ſecond Ejectment.

ONE of the advantages attending this action is, that a man may have a remedy *toties quoties*, he being allowed to bring as many ejectments as he pleaſes (*a*). But this has ſometimes proved a very great miſchief, and yet it ſeems to be without remedy: for though it has been attempted in Chancery, after three or four ejectments, by a bill of peace, to eſtabliſh the prevailing party's title; yet it hath been always denied to alter the courſe of the law, for that every termor may have an ejectment, and every new ejectment ſuppoſes a new demiſe; and the coſts in ejectment are a recompence for the trouble and charge to which the poſſeſſor is put. But where the ſuit begins in Chancery for relief touching pretended incumbrances on the title of lands, and that court has ordered the defendant to purſue an ejectment at law, there, after one or two ejectments tried, and the right ſettled to the ſatisfaction of the court, it hath ordered a perpetual injunction againſt the defendant; becauſe there the ſuit was firſt attached in that court, and never began at law; and ſuch precedent incumbrances appearing to be fraudulent and inequitable againſt the poſſeſſor, it is within the compaſs of the court to relieve againſt them. (*a*) 10 Mod. 1.

If a man has (*b*) a verdict in ejectment, and coſts are taxed, and an attachment iſſues for non-payment of them, the defendant ſhall not have an ejectment againſt the plaintiff in the ſame court till he hath paid thoſe coſts; but he may proceed in ejectment in another court without coſts paid: the reaſon is, becauſe the ſame court will ſee an obedience paid to their rules before they will ſuffer the diſobedient perſon to proceed in a cauſe of the ſame kind; but one court cannot take cognizance of the rules of another Sid. 279. (*b*) So, if the plaintiff is nonſuit, he cannot bring a ſecond ejectment, without paying the coſts of the firſt.

Salk. 255. pl. 4. Comb. 110. [1 Salk. 255. Barnes, 153.] another court. [But this diſtinction now no longer prevails; and the courts of *Weſtminſter Hall* conſider a former ejectment in *another* court in the ſame light, as a former *ejectment* in the *ſame* court, and will in either caſe equally ſtay the proceedings in a new ejectment, till the coſts of a former be paid.

Doe v. Law, 2 Bl. Rep. 1158. A former ejectment had been brought in the King's Bench, where the defendant, in *Hilary* term 13 *Geo.* 3., obtained a rule for coſts for not proceeding to trial, which were taxed at 85*l.* 8*d.* after which the cauſe was tried in the ſame term by a ſpecial jury, and a verdict for the defendant; and his coſts were taxed on the *poſtea* on the 11th *June* 1777, at 273*l.* 10*s.*; total 358*l.* 10*s.* 8*d.*; no part of which was paid. It was moved in *C. P.* to ſtay the proceedings in this cauſe till the coſts of the former were paid. For the plaintiff it was urged, that the application came too late. The declaration was delivered before the eſſoign-day of *Eaſter* term 1777. Notice of trial was given for the ſittings after *Trinity* term, *viz.* the 19th of *June* 1777. The plaintiff had been at the expence of preparing for trial, and bringing his witneſſes to town; and the motion was not made till *Friday* the 13th of *June*. In ſupport of the motion it was alleged, that the cauſe was ſo clear at the laſt trial, and the parties had reſted ſo long, that the defendant did not think them in earneſt till notice of trial was given. He then proceeded to tax his coſts in order to ground this application, which otherwiſe he would not have done, the leſſor of the plaintiff being inſolvent. The court, on conſidering all the circumſtances, made the rule abſolute.

Doe v. Law, 2 Bl. Rep. 1180. An ejectment brought by the *fraudulent* aſſignee of an inſolvent was ſtayed, till the coſts of former ejectments, which had been brought by the debtor himſelf, were paid.

Smith v. Barnardiſton, 2 Bl. Rep. 904. Where there is manifeſt vexation and oppreſſion, the court will ſtay the proceedings in a ſecond ejectment, even though the leſſor of the plaintiff did not enter into a conſent-rule in the former cauſe.

Benn v. Denn, Barnes, 180. But where the leſſor of the plaintiff was in cuſtody, under an attachment for non-payment of coſts in a former ejectment, and brought a new ejectment upon the ſame demiſe, the court refuſed to ſtay the proceedings therein, till the coſts of the former ſhould be paid.

Roberts v Cook, 4 Mod. 379. But *qu.* whether the courts would not now interpoſe, and Though the principle of this rule be founded in a ſuppoſed vexation of the party, yet, where a *defendant* againſt whom there had been a verdict in a former ejectment, afterwards brought an ejectment againſt the former plaintiff, the court would not ſtay the proceedings in the latter till after the coſts of the former ejectment were paid.]

conſiſtently with the principle ſtay the proceedings; for though both actions be not commenced by the ſame perſon, yet, in truth, it is equally vexatious to proceed in the latter, till the coſts of the former action be diſcharged? Runningt. Eject. 420.

Salk. 258. pl. 12. *per* Holt, C. J. But no new ejectment ſhall be brought by the defendant after recovery againſt him, till he has quitted the poſſeſſion, or the tenants have attorned to the plaintiff; ſo that he be in poſſeſſion, and the defendant out.

[Where

[Where a defendant in ejectment, pending a writ of error, brings a new action, the court will ſtay the proceedings on the ſecond ejectment, till the error is determined. So they will, pending a ſpecial verdict.] 1 Salk. 259. Andr. 298.

Election.

(A) In what Caſes an Election is given.

(B) To what Perſon: And herein of him that is to do the firſt Act.

(C) Where it ſhall be ſaid to continue, or be determined.

(D) What ſhall be ſaid a ſufficient Election.

(A) In what Caſes an Election is given.

IF a man grants twenty acres, parcel of his manor, without any other deſcription of them; yet the grant is not void, for an acre is a thing (*a*) certain, and the ſituation may be reduced to a certainty by the election of the grantee. Keilw. 84. 2 Co. 36. (*a*) But if a man ſells 20 *l.* worth of his land, parcel of a manor; this is void, it being neither certain in itſelf, nor reducible to a certainty, for no man is made judge of the value. 2 Co. 36. Keilw. 84.

So, if one being ſeiſed of a great waſte (*b*) grants the moiety of a yard-land lying in the waſte, without aſcertaining what part, or the ſpecial name of the land, or how bounded; this may be reduced to a certainty by the election of the grantee: but it is otherwiſe in the caſe of the king's grant, for there can be no election in his caſe, and therefore the grant is void for incertainty. Leon. 30. Noy, 29. 1 Co. 86. (*b*) But if *A.* ſeiſed in fee of 100 acres makes feoffment of eighteen, without any deſcription of their ſituation, &c. it is void, and no election can reduce it to a certainty, becauſe a feoffment with livery cannot operate *in futuro*. Roll. Abr. 725. N. Bendl. 148. And. 11. Hob. 174. Moor, 181. S. C. & *vide* tit. Feoffment.

So, if a man levies a fine *come ceo que il ad de ſon done* of an houſe and an hundred acres of land in *D.* where he hath there an houſe and 118 acres, (*c*) the conuſee may elect which 100 acres he will have, (*d*) for the election is given to him (*e*) by the fine. Roll. Abr. 725. (*c*) Moor, 84. 102. S. P. N. Dyer, 280. Margin. S. P. (*d*) That *ceſtui que uſe* ſhall have it. Moor, 102. pl. 247. 602. pl. 832. adjudged. —— Where the deviſee

deviſee of two acres not aſcertained ſhall have the election. N. Dyer, 280. margin.——Upon a covenant, in conſideration of marriage, to ſtand ſeiſed of ſo much land as ſhall be of the yearly value of forty marks; it hath been a queſtion, whether they, to whom the aſſurance was made, might enter into any part of the land of the value of forty marks, at their election, and hold the ſame in ſeverality; or if they ſhould be only tenants in common with the other; and whether they may chuſe one acre in one place, and one acre in another; and ſo through the whole land where they pleaſe? 3 Leon. 27. & *vide* Keilw. 84. Dyer, 280. Roll. Rep. 187. Lit. Rep. 218. (*e*) But if the conuſee renders it back to the conuſor for a certain number of years, the conuſor hath the election given him, which hundred acres he will have, and he may elect. Roll. Abr. 725.

5 Co. 24. Palmer's caſe. Cro. Eliz. 819. Way, 32. Moor, 691. S. C. Jon. 276. S. C. cited. Hob. 174. like point.

If a man grants 600 cords of wood out of a large wood, the grantee hath election to take them, when and in what part of the wood he pleaſes, without any appointment of the grantor, and, conſequently, may aſſign his intereſt in them to a third perſon, and he ſhall have the like election.

5 Co. 24. in Palmer's caſe.

But if one grants to me 1000 cords of wood, to be taken at my election, and the grantor or a ſtranger cuts down part of the wood, I can take no part of that which is cut down, but muſt ſupply myſelf out of the reſidue ſtill remaining.

Vent. 271. Motteram and Jolly. 2 Lev. 142. S. C. by the report of which *A.* granted twenty of his beſt trees, &c. and adjudged the grantor ſhould not take any in the mean time, at leaſt without requeſt to the grantee to make his election; and ſo it was not like Palmer's caſe, for that being only of ſo many loads of wood, it was ſufficient if ſo many were left for the grantee.

But if *A.* covenants with *B.* that he ſhall have twenty of the beſt trees in the wood of *A.* to be taken at the election of *B.* within ſuch a time; it is a breach of the covenant in *A.* to cut down any trees within that time, becauſe the latitude of election which *B.* had is thereby abridged.

2 Roll. Abr. 428. but for this *vide* head of Rent.

If rent be reſerved payable at the church of *S.* or *D.* upon condition, &c. the leſſee hath his election to pay it at either place; and therefore to take advantage of the condition, the leſſor muſt demand it in ſuch places, where by his own agreement he has permitted the tenant to pay it.

Benſon v. Benſon, 1 P. Wms. 129.

[Where money is agreed by articles to be laid out in land, the party, who would have the ſole intereſt in the land, when bought, may elect to have the money paid to him, and that it ſhall not be laid out in land.

Short v. Wood, 1 P. Wms. 471. Edwards v. Counteſs of Warwick, 2 P. Wms. 173. Oldham v. Hughes, 2 Atk. 453. Trafford v. Boehm, 3 Atk. 447. Cunningham v. Moody, 1 Vez. 176. Counteſs of Holderneſſe v. Marquis of Caermarthon, 1 Br. Ch. Rep. 377. *Contra*, Eyre's caſe, 3 P. Wms. 13. and Mr. Onſlow's caſe mentioned in the note to Eyre's caſe.

So, if the party being adult, could by fine levied acquire the entire intereſt in the lands when ſettled (as tenant in tail with the immediate remainder to himſelf in fee): but otherwiſe, if a recovery would be neceſſary, as in caſe of a tenant in tail with remainder over.

Earlom v. Saunders, Ambl. 242. Carr v. Ellifon, 2 Br. Ch. Rep. 56.

But this rule will not apply where an infant becomes ſo entitled; for an infant is incapable of making an election to vary the nature of his eſtate.]

(B) To what Perſon: And herein of him that is to do the firſt Act.

IT is laid down as a general rule, that in caſe an election is given of two ſeveral things, he who is the firſt agent, and ought to do the firſt act, ſhall have the election. Co. Lit. 145. 2 Co. 37. a. ſame rule. [Doug. 14, 15.]

As, if a man grants a rent of 20 *s.* or a robe to one and his heirs, the grantor ſhall have the election, for he is the firſt agent by payment of one or delivery of the other. Co. Lit. 145. a.

So, if a man makes a leaſe, rendering a rent or robe, the leſſee ſhall have the election. Co. Lit. 145. a.

But if I contract with you to pay you a robe, or twenty ſhillings, at *Eaſter*, you may, after the feaſt, bring debt for the one or the other. Co. Lit. 145. a.

So, if a man leaſes lands for years, reſerving weekly nine quarters of wheat, or the value thereof, as it ſhall then be ſold in the market of *W.*, if the leſſee pays neither of theſe at the time appointed, the leſſor may have his action, at his election, for the wheat only; for though the leſſee might have paid any of them, at his election, at the day, yet after the day, the law gives the election to the leſſor. Roll. Abr. 725. Denny and Parnell.

If *A.* gives one of his horſes in his ſtable to *B.*, *B.* hath the election which horſe to take, for he is the firſt agent by taking the horſe. Co. Lit. 145. Moor, 82. Dyer, 91.

If one grants to another twenty loads of maple to be taken in his wood of *D.*, there, the grantee ſhall have the election, for he ought to do the firſt act, *viz.* fell and take the ſame. Co. Lit. 145. a.

If one ſeiſed in fee of a manor aliens the manor, except one cloſe called *N.* part of the manor, and there are two cloſes called *N.* which are part of the manor, and one contains nine acres, and the other but three acres, the alienee ſhall not chuſe which of the ſaid cloſes he will have; but the alienor ſhall have the election, which of the ſaid cloſes ſhall paſs. Leon. 268. Sir Thomas Lee's caſe.

If I have three daughters, and I covenant that *J. S.* ſhall diſpoſe of one of them in marriage, it is at my election of which, and after requeſt, I am bound to deliver her to him. Moor, 72. pl. 197. Dal. 73. S. C.

If an obligation be conditioned to pay *B.* or his heirs annually 12*l.* at *Midſummer* and *Chriſtmas*, or to pay him or his heirs, at any of the ſaid feaſts, 150*l.*, the obligor hath election to pay the 12*l.* or the 150*l.*, but he ought to continue the payment of the 12*l.* annually, until he pays the 150*l.* Though he may at any time determine the payment of the 12*l.* by payment of the 150*l.* Cro. Jac. 594. Abbot and Rockwood, adjudged.

If *A.* covenants with *B.*, that *A.* or his ſon *C.*, or either of them, ſhall work with *B.* at the grinding and poliſhing of glaſs, *B.* paying to each of them ſo much, *&c.* and *B.* requeſts *C.* to work with him, *&c.* if he doth not, the covenant is broken, for *B.* had the election to require both or any of them to work with him. 2 Sid. 104. Sir Paul Neele and Reeve, adjudged.

In

Lev. 54, 55. Sayer and Glean, adjudged.

In debt on an obligation, that if a ſhip put to ſea, and either the goods or the obligor come ſafe, he ſhould pay ſuch a ſum over and above the uſe allowed by the ſtatute; the defendant pleaded, that the obligor died before he returned, and inſiſted, that he, as his executor, had an election to pay at which of the contingencies he pleaſed, and that therefore, the teſtator never returning, no action accrued: but it was reſolved, that the payment ſhould ariſe on either of the contingencies; and that this being agreeable to the intention of the parties, the law ſupplies the words, *which ſhould firſt happen.*

(C) Where the Election ſhall be ſaid to continue, or be determined.

Co. Lit. 145. a. 2 Co. 37. Moor, 85. Keilw. 78.

WHERE the things granted are annual, and to have continuance, the election (where the law gives it him) remains to the grantor, as well after the day as before; otherwiſe, when to be performed *unicâ vice.*

Co. Lit. 145. a. (*a*) Yet it ſeems that if a leſſor reſerve yearly a rent, or a pair of ſpurs, and the leſſee fail of payment at the day, the leſſor may diſtrain for either of them; for in this caſe the leſſee loſes his election only *pro hac vice.* Roll. Abr. 725. Co. Lit. 90. b. (*b*) Fol. 152.

As if I grant to another for life an annuity or robe at *Eaſter*, and both are behind, the grantee ought to bring his writ of annuity in the diſjunctive; for if he ſhould bring it for the one only, and recover, this judgment would (*a*) determine the election for ever; for he ſhould never have a writ of annuity afterwards, but a *ſcire facias* upon the judgment; which reaſon *Fitzherbert* (*b*) in his *Natura Brevium* not obſerving, held an opinion to the contrary.

Co. Lit. 145. a. 2 Co. 37. a. Same rule. (*c*) When election creates the intereſt nothing paſſes till election. Hob. 174.—As if a man grants one of his horſes in a ſtable; the election muſt be made in the time of the parties. Co. Lit. 145.—But if a man gives one of his horſes to *A.* and *B.*, and after *A.* dies, yet *B.* may elect, becauſe this was a thing in intereſt in them, and no expreſs election limited. Roll. Abr. 725.—But if a man gives one of his horſes to be elected by *A.* and *B.*, if *A.* dies before election, *B.* cannot elect. Roll. Abr. 725—6. (*d*) For if he ſhould, he ſhould take as a purchaſer, where named only by way of limitation. Leon. 254.

When nothing paſſes to the feoffee or grantee (*c*) before election to have the one thing or the other; there, the election ought to be made in the lifetime of the parties; and the (*d*) heir or executor cannot make the election.

Co. Lit. 145. a. 2 Co. 36. a. 37. a. Same rule. Lutw. 803.

But where an eſtate or intereſt paſſes immediately to the feoffee, donee, or grantee; there, the election may be made by them, or their heirs or executors.

Co. Lit. 145. a.

When one and the ſame thing paſſeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take this; there, the intereſt paſſeth immediately, and the party, his heirs or executors, may make election when they will.

2 Co. 35. Sir Rowland Heywood's caſe.

If *A.* being ſeiſed in fee of a manor, part in demeſne, and part in a leaſe for years rendering rent, and part in copyhold, in conſideration of a ſum of money, by indenture grants, bargains, and

ſells

ſells it to *B.* to hold for ſeventeen years from the death of *A.*, and after *A.* covenants to ſtand ſeiſed thereof to the uſe of himſelf and the heirs of his body, and dies, and *B.* enters; (*a*) he may elect whether he will take by the common law, or by bargain and ſale, for *A.* had power to paſs it either way; and if he ſhould be obliged to take by demiſe at common law, then *B.* would loſe the rents reſerved upon the leaſes for years for want of an attornment. It was alſo holden, that this election remained notwithſtanding the alteration of the eſtate by the ſecond indenture, and the death of the leſſor.

2 And. 202. S. C. adjudged. Poph. 95. S. C. Hob. 159. S. C. cited.

(*a*) A bargain and ſale is enrolled *quind. paſch.* and at the ſame time the bargainor levies a fine to the bargainee, he may elect to take by one or the other. 4 Co. 72. a. and for this *vide* 3 Leon. 16. 2 And. 161.

If a man levies a fine *come ceo*, &c. of an houſe and 100 acres of land in *D.* (where he hath there 118 acres), and the conuſee renders to the conuſor for 100 years, and after the conuſor dies, his executor may elect which of the 100 acres he will have, becauſe this was a thing in intereſt in the teſtator.

Roll. Abr. 725.

[*A.* died indebted by one bond to *B.*, and by another bond to *C.*, and left *B.* and *J. S.* executors. *B.* intermeddled with the goods, and died before probate, and before any election made to retain. It was inſiſted, but the point was afterwards waved, that as *B.* might have retained the goods in his hands, his executors had now the ſame power. However, in a preceding caſe, where *A.* lent money on bond to *B.* who dying inteſtate, *C.* took out adminiſtration to him, after which *C.* dying, *A.* took out adminiſtration *de bonis non*, &c., to *B.* it was determined (*inter al.*) that *A.* might, out of the aſſets of *B.*, retain for ſuch bond-debt contracted before he took out adminiſtration; and though *A.* happened to die before he had made any election in what particular effects he would have the property altered; yet the court ſaid, it muſt be preſumed he would elect to have his own debt paid firſt, and this being preſumed, there would be no difficulty as to altering the property; for as the executors of *A.* were to account for the aſſets of *B.*, they muſt, on that account, deduct the amount of the money lent by *B.* to *A.*]

Croft v. Pyke, 3 P. Wms. 183.

Weeks v. Gore, Mich. 1720, cited *ibid.*

There was a compoſition between the prebendary of *A.* and the abbot and convent of *B.*, that the prebendary of *A.* and his ſucceſſors, for all time to come, ſhould have their election yearly, either to receive tithes in kind of corn or grain ariſing within certain lands of the abbey, or elſe to receive five marks to be paid by the ſaid abbot and convent in lieu thereof; ſo as ſuch election was notified to the abbot, or any of the monks or porter of the abbey, &c. The lands came to the king by the 31ſt of *H.* 8. and from him to the defendant, and the prebend came to the king by the 1ſt of *Edw.* 6. of chanteries, &c. and from him to the plaintiff. Upon admitting the compoſition good, it was adjudged that the power of election was gone, becauſe it cannot now be made according to the compoſition: but in this caſe, it was ſaid by *Hale* Ch. Baron, that in one (*b*) *Southwell*'s caſe, in 44 *Eliz.* where an abbot had a quantity of wood, to be taken yearly in ſuch a wood, or a ſum of money

Hard. 381. Sir William Ingolby and Wivel.

(*b*) Which *vide* in Poph. 91.

money at his election; it was held, the election was transferred to the king by the ſtatute of diſſolution of monaſteries.

Co. Lit. 145. a. 2 Co. 37. a. S. P.

If one enfeoffs another of two acres, to hold the one for life, and the other in tail, and he before election makes a feoffment of both; in this caſe, the feoffor ſhall enter into which of them he will, for the feoffee, by this wrongful act, hath loſt his election.

Tyſſen v. Benyon, 2 Br. Ch. Rep. 5.

[By ſettlement, previous to the marriage of the plaintiffs *Samuel Tyſſen* and *Sarah* his wife, bearing date 24th *September* 1779, *Francis John Tyſſen* deceaſed, the plaintiff's father, agreed to convey certain lands and other eſtates, and it being, among other parcels, recited, that certain farms, *&c.* at *Foulden* in *Norfolk*, were of the rent of 550*l.* he covenanted before the end of twenty-four calendar months, to purchaſe lands in the county of *Norfolk*, ſufficient to make up, with the farms at *Foulden*, the ſum of 500*l.* a year, and to convey the ſame to uſes, or to convey other farms, *&c.* at *Hackney* in *Middleſex*, of ſufficient value to make good ſo much as the farms, *&c.* in *Norfolk*, ſhould be deficient of 500*l.* a year. By an indorſement on the deed (before the execution thereof) it was agreed by the parties, that it ſhould be at the option of *Francis John Tyſſen*, within twenty-four calendar months after the marriage, either to convey the lands according to the covenant, or to pay the truſtees 12,000*l.* to be laid out in the purchaſe of other lands to be ſettled to the like uſes; and in the mean time to be placed out at intereſt, and the intereſt to be received by the perſons entitled, according to their reſpective intereſts. The marriage took place, and there was no iſſue, except a daughter, who was one of the plaintiffs. *Francis John Tyſſen*, died 9th *September* 1781, having made his will, bearing date the day of his death, whereby he gave annuities charged upon his eſtates in *Middleſex*, *Eſſex*, *Norfolk*, and elſewhere, and gave and deviſed all his manors, *&c.*, to truſtees for payment of debts and legacies, and for other purpoſes, and to allow the plaintiff *Samuel*, ſuch ſum of money yearly during his life, as they ſhould think proper, the remainder to accumulate during his life, and after his death to be laid out to certain uſes therein declared. The conveyance, covenanted to be made by the ſettlement, having never been made, or the money paid; the plaintiffs filed their bill, praying that *Francis John* might be declared to have made his election to pay the 12,000*l.* or that an election might now be made: and if the perſons intereſted ſhould elect to pay the 12,000*l.* it ſhould now be raiſed; and, if the election ſhould not be conſidered as having been made, and ſhould not be now made, that a proper part of the teſtator's eſtate in *Norfolk* ſhould be conveyed upon the truſts in the marriage articles. The plaintiffs, by the bill inſiſted, that *Francis John Tyſſen*, by the deviſe of the premiſes covenanted to be conveyed, (included in the general deviſe,) had made his election to pay the 12,000*l.* and if not ſo, that the defendants by letters and acts ſtated in the bill, had made ſuch election. The heir at law and executors ſubmitted the queſtion of election, and ſaid that the teſtator's debts having exceeded his perſonal eſtate, they had no fund

out of which to pay the 12,000*l.* but the real eſtate. Lord Chancellor ſaid, that although the teſtator had covenanted to convey in twenty-four months, and therefore, after that time he had loſt his election; yet, after that time, as it lay in recompences, the court would have permitted it to be made good; and, after his deceaſe, he having given both his real and his perſonal eſtate to the ſame perſon, that perſon might perform either part of the covenant, and the court would not hold the deviſee bound by the teſtator not having made his election within twenty-four months: but in the events which had happened, his lordſhip decreed the eſtate at *Foulden*, to be conveyed to the uſes of the ſettlement, and to be made equal to 500*l. per annum*, by the conveyance of other parts of the eſtates.

If a teſtator is bound to ſettle within four months after his marriage, lands of 100*l. per annum* upon his wife, or to leave her 2000*l.*, and die within the four months, and the four months elapſe without any election being made by the executors; yet, under ſuch circumſtances, a court of equity will enlarge the time, and relieve againſt the lapſe.] Eaſtwood v. Vinke, 2 P. Wms. 617.

(D) What ſhall be ſaid a ſufficient Election.

IF a man gives two acres to another, to hold the one for life and the other in fee, and the donee after makes a feoffment of one acre; (*a*) this is an election to have the fee in that. Plow. 6. Roll. Abr. 726.

(*a*) That when one who is both executor and deviſee enters generally, without claim or demonſtration of election, he ſhall have the thing deviſed, as executor, which is his firſt and general authority. 10 Co. 47. b. *& vide* Plow. 520. Cro. Eliz. 223. 2 Co. 37. b.

If a man leaſes two acres for life, the remainder of one acre in fee, and after licenſes the leſſee to cut trees in one acre; this is an election that he ſhall have the fee in the other acre. Plow. 6. Rol. Abr. 726.

When the election is given to ſeveral perſons, there, the (*b*) firſt election made by any of the perſons ſhall ſtand. Co. Lit. 145. a. 2 Co. 37. a.

ſame rule. (*b*) Where an election made by tenant for life ſhall bind him in remainder. Moor, 102.

As if a man leaſes two acres to *A.* for life, the remainder of one acre to *B.*, and of the other acre to *C.*, *B.* or *C.* may elect which of the acres they will have, and the firſt election by one binds the other. 2 Co. 36. b.

[Where a party ſhall be put to an election, ſee tit. "*Wills and Teſtaments.*"]

Error.

A Writ of error is (*a*) a commiſſion to judges of a ſuperior court, by which they are authoriſed to examine the record, upon which a judgment was given in an inferior court, and on ſuch examination to affirm or reverſe the ſame, according to law.

(*a*) Therefore differs from another writ or action. Jenk. Rep. 25. 2 Inſt. 40. Yelv. 209.—But yet, if by the writ of error the plaintiff therein may recover, or be reſtored to any thing, it may be releaſed by the name of an action. Co. Lit. 288. b.—In a writ of error to reverſe a fine as couſin and heir of the conuſor, it need not be ſhewn in the writ of error, how he is couſin; for it is but a commiſſion to examine errors, and needs not ſuch certainty as other writs. Cro. Jac. 160.

Co. Lit. 289. b. This writ lies where a man is grieved by an error in the foundation, proceeding, judgment or execution of a ſuit.

But for the better Underſtanding hereof I ſhall conſider,

(A) In what Caſes a Writ of Error will lie: And herein,

1. In what Caſes a Writ of Error is the proper Remedy to be relieved againſt an erroneous Judgment.
2. On what Judgments a Writ of Error will lie.
3. In what Court the Judgment muſt be given on which a Writ of Error will lie.

(B) Who may bring a Writ of Error, and againſt whom: And herein of the Perſons neceſſary to be made Parties thereto.

(C) Of the Time of bringing a Writ of Error.

(D) Of the Manner of bringing it: And herein,

1. Of the Form of the Writ, and where the record ſhall be ſaid to be removed.
2. What is neceſſary to be removed; and herein of removing the Record, or a Tranſcript.

(E) Of alleging Diminution and granting a *Certiorari*.

(F) Of the *Scire Facias*.

(G) Of

(G) Of the Proceedings after the Record removed: And herein of the Abatement of the Writ of Error.

(H) How far the Writ of Error is a *Superſedeas*.

(I) To what Court a Writ of Error lies: And herein,

1. Of Writs of Error into Parliament.
2. Of Writs of Error into the Exchequer-Chamber.
3. Of reverſing Judgments in the Court of Exchequer.
4. Of Writs of Error into the King's Bench.
5. Of Writs of Error in the Common Pleas and other Inferior Courts.
6. Where a Writ of Error lies in the ſame Court in which the Record is.

(K) Of aſſigning Errors: And herein,

1. Of the Manner of aſſigning Errors.
2. Of aſſigning Errors in Fact and in Law.
3. Of aſſigning that for Error which appears contrary to the Record.
4. Of aſſigning that for Error which is for the Party's Advantage.
5. Where the Matter aſſigned for Error is aided by the Appearance of the Party, and in not being taken Advantage of in proper Time.
6. Where Matters which might be aſſigned for Error are aided by a Releaſe, and the Conſent of Parties.

(L) What Defence the Defendant in Error may make: And herein of pleading a Releaſe.

(M) Of the Judgment to be given on the Writ of Error: And herein,

1. Where on a Writ of Error, Part only, or the whole Judgment ſhall be reverſed.
2. What Judgment ſhall be given on the Reverſal of the firſt.
3. To what the Parties ſhall be reſtored on the Reverſal of the firſt Judgment.

(A) In what Caſes a Writ of Error will lie: And herein,

1. In what Caſes a Writ of Error is the proper Remedy to be relieved againſt an erroneous Judgment.

REgularly, an erroneous judgment given in a court of record can (*a*) only be reverſed by writ of error.

(*a*) When a ſtatute is erroneouſly acknowledged, as before one that has no authority, or if a ſtatute merchant hath but one ſeal, *&c.* an *audita querela* lies, and not a writ of error; but if a ſtatute is well acknowledged, and the execution erroneous, a writ of error lies. Cro. Eliz. 233. 810. Owen, 142. Dyer, 35. pl. 27. Leon. 233. ——A judgment in a copyhold court reverſed upon petition to the lord, and the party reſtored to his damages by *audita querela*. 4 Co. 30. b.—Where the fact aſſigned for error is in the ſuggeſtion of the writ itſelf, and not in any of the proceedings in the cauſe, no writ of error lies, but the party muſt bring an *audita querela*. Carth. 282. 4 Mod. 314. Salk. 262. pl. 3. but for this *vide* tit. *Audita Querela*.

28 Aſſ. 17. Roll. Abr. 742. S. C. 2 Bulſ. 242. S. P.

Therefore, if the tenant in a *cui in vita* dies ſeiſed (*b*) pending the writ, and after judgment is given againſt him, which is erroneous, and after the recoverer ſues execution againſt the heir, and he brings an aſſiſe, he ſhall not avoid this judgment againſt his father, by ſaying, that his father died pending the writ; for the judgment is not void, but only voidable.

(*b*) So, if in ejectment the defendant had died after verdict and before judgment, his heir could not avoid the judgment but by writ of error. Roll. Abr. 742.—Note, that this is aided by 16 & 17 Car. 2. c. 8. and cannot be taken advantage of on a writ of error; for which *vide* tit. Amendment and Jeofail.

Roll. Abr. 742. Cole and Lave, adjudged.

In an action upon the caſe, if the plaintiff be nonſuit, and after it be entered, that he *reliquit actionem ſuam, & fatetur ſe nolle ulterius proſequi*, upon which coſts are aſſeſſed; though it be admitted, that this judgment is erroneous, becauſe this is not any nonſuit, as it is entered; yet in an action of debt for the coſts, the defendant ſhall not avoid it by plea without a writ of error; for it is a judgment *de facto* not void, but only voidable by Writ of Error.

Roll. Abr. 742. Cro. Eliz. 119. S. C. Leon. 101. S. C.

If a man recovers againſt the principal, and ſues a *ſcire facias* againſt the bail, they cannot ſay the principal died before the judgment, and (*c*) ſo avoid the judgment by plea, for it is againſt the record.

(*c*) But it is a good plea by way of excuſe for not bringing in the body, but not to avoid the judgment, being a record, which muſt be avoided by writ of error. 2 Mod. 308. & *vide* Godb. 377. and tit. Bail in Civil Cauſes. [But by ſtat. 17 Car. 2. c. 8. the death of either party between verdict and judgment ſhall not be alleged for error, ſo as the judgment be entered within two terms after the verdict.]

2 Inſt. 513. but for reverſing erroneous fines and recoveries, *vide* head of Fines and Recoveries.

If a fine is levied without an original, or of more than is contained in the original, it is not void, but only voidable by writ of error.

Roll. Abr. 742-3. Style, 246. S. C. for this *vide* head of Infancy and Age.

If an infant ſuffers a common recovery, in which he comes in as vouchee in his proper perſon, and not by attorney or guardian; though this ſhall not bind him, but that he may in a writ of error avoid it, becauſe it is error in law; yet at his full age he cannot enter into the land, and avoid it by his entry, before he has reverſed

verſed it in a writ of error, becauſe he himſelf is privy to the judgment, and may reverſe it by ſuch means, and he is not a ſtranger to the judgment; for judgment ought not to be ſubverted by matter *in pais*, without matter of record, as a recognizance or fine by an infant where he appears by attorney, and not by guardian.

If *A.* levies a fine to *B.*, who grants and renders to *A.* and his wife, and the heirs of the body of *A.*, this is not void as to the wife, though ſhe is no party to the original, but only voidable by writ of error. 3 Co. 5. a.

By the practice of the court of (*a*) *Common Pleas*, a defendant coming in by *capias utlagatum* the ſame term in which an exigent is returnable, may avoid the outlawry without writ of error, by ſhewing that he purchaſed a *ſuperſedeas* out of the ſame court, and delivered it to the ſheriff before the *quinto exactus*, &c. or by ſhewing any other matter apparent on record, which makes the outlawry erroneous; as the want of an original, or the omiſſion of proceſs, or want of form in a writ of proclamation, &c. or a return by a perſon appearing not to be ſheriff, or a variance between the original and exigent, or other proceſs, or the want of ſuch addition as required by 1 *H.* 5. *c.* 5. 2 Hawk. P. C. c. 50. § 1. Roll. Abr. 742-3.

(*a*) But whether an outlawry on the crown ſide of the King's Bench can be reverſed in the ſame or different term with a writ of error, *vide* 2 Hawk, P. C. *ibid.* and tit. Outlawry.

If one be attainted upon an erroneous indictment, he cannot be relieved but by writ of error, for the judgment being *quod ſuſpendatur*, &c. which is the judgment of law due for the offence, it muſt be preſumed to have been given, for that he was guilty of the offence. But if judgment of acquittal is given upon ſuch indictment, the king need bring no writ of error; but the offender may be newly indicted, for the judgment being *quod eat ſine die*, &c. may be given as well for the inſufficiency of the indictment as for the party's innocence. 3 Inſt. 214.

And any judgment whatſoever, given by perſons who had no good commiſſion to proceed againſt the perſon condemned, may be falſified, by ſhewing the ſpecial matter, without writ of error, becauſe it is (*b*) void; as, where a commiſſion authorizes to proceed on an indictment taken before *A.*, *B.*, *C.*, and twelve others, and by colour thereof the commiſſioners proceed on an indictment taken before eight perſons only. 3 Inſt. 231. Hawk. P. C. c. 50. § 3.

(*b*) A judgment in the Marſhalſea, where none of the parties were of the king's houſtel, was void, and being *coram non judice* might be avoided by plea. 10 Co. 77. a. Brownl. 24. & *vide* Lev. 23. 204. 234. Yet a writ of error alſo lies to reverſe ſuch judgment. Cro. Eliz. 502. 6 Co. 20. Roll. Abr. 744. Sav. 36. 2 Jon. 209.

If one is attainted of felony, and after, by relation of a general pardon, the felony is pardoned, he ſhall be diſcharged, (*c*) for he hath no remedy by writ of error, or otherwiſe, to reverſe the attainder. 6 Co. 5. a.

(*c*) So, if a fine impoſed in a leet be unreaſonable or againſt law, as joint, where it ſhould be ſeveral, it may be avoided by plea and judgment of the court in which the ſuit is depending, for there is no other remedy. 11 Co. 44. Godfrey's caſe reſolved. Roll. Rep. 75. S. C.

In debt upon a bond againſt an adminiſtrator, if he pleads a judgment recovered againſt the inteſtate, and that he hath not aſſets 2 Mod. 308. Randal's caſe, & *vide*

Vaugh. 94. Gilb. Eq. Rep. 308. * Qu. If this could be done now, ſince the ſtatute of 8 & 9 W. 3. c. 11. § 6. if there was an interlocutory judgment againſt the inteſtate in his lifetime, and final judgment after?

aſſets *ultra*, *&c.*, the plaintiff may reply, that an action was brought againſt the inteſtate, and that he died before the judgment; and that after his death, judgment was given; for being a ſtranger to the judgment, he can neither bring error nor deceit, and has no way to avoid it but by plea*.

Cro. Eliz. 489.

If a man is found guilty upon an indictment of felony, and prays his clergy, and it is allowed him, and he is burnt in the hand, he cannot avoid this by writ of error, becauſe he is convicted only, and not attainted. But the record being removed by *certiorari* into the crown-office, if there be a fault in the indictment, it may be diſcharged, and reſtitution awarded to the party of his goods ſeiſed for that cauſe.

Raym. 433. Phorbes's caſe.

If a man had been indicted upon the ſtatute of 3 *Jac.* 1. *c.* 4. for abſenting from his pariſh church, and thereupon proclamations had been made, that he ſhould render his body, *&c.* which not being done, he had been convicted according to that ſtatute, yet no writ of error would have lain thereupon; for by the ſtatute, after proclamations made and the default recorded, the ſame was a conviction of the offence; as if the ſtatute gave proceſs for the forfeiture; and if there was a fault in the record, the party's remedy was in the Exchequer to quaſh it there.

Co. Lit. 259. 2 Hawk. P. C. c. 50. § 6.

By the common law, *in favorem vitæ*, an outlawry of treaſon or felony might be avoided by plea, that the defendant was in priſon, or in the king's ſervice beyond the ſea, *&c.* at the time of the outlawry pronounced againſt him. But it ſeems that no outlawry for any other crime againſt a party rightly deſcribed can be avoided by the plea of any matter of fact whatſoever.

2 Hawk. P. C. c. 50. § 2.

One who purchaſes land of a perſon who afterwards is outlawed of felony, or condemned upon his own confeſſion, may falſify the record, not only as to the time wherein the felony is ſuppoſed to have been committed, but alſo as to the point of the offence: but where a man is found guilty by verdict, a purchaſer cannot falſify any more than the party, as to the point of the offence, but only as to the time.

2. On (*a*) what Judgments a Writ of Error will lie.

Co. Lit. 288. b. (*a*) Whether it lies on a judgment given on a *habeas corpus*. Salk. 504. pl. 1.

No writ of error can be brought but on a judgment, or an award in nature of a judgment, for the words of the writ are, *ſi judicium redditum ſit*, *&c.*

Roll. Abr. 744. [Newell v. Pidgeon, 1 Str. 235. Box v. Bennett, 1 H. Bl. 2432. Kempland v. Macauley, 4 Term Rep. 436.] (*b*) A man may aſſign errors in law or fact, upon a judgment given againſt him by default. 19 Aſſ. 8. Roll. Abr. 675. S. C. (*c*) How upon a bill of exceptions, *vide* 2 Inſt. 427. and tit. Bills of Exception.

If the plaintiff be (*b*) nonſuit at the *niſi prius*, upon which coſts are taxed by the ſame jury, by the ſtatutes 23 *H.* 8. *c.* 15. 4 *Jac.* 1. *c.* 3. and judgment given for them againſt the plaintiff, the plaintiff may have a writ of error upon (*c*) this judgment.

If a man brings a writ of falſe judgment in the *Common Pleas* upon a judgment given in ancient demeſne, and reverſes the judgment there, a writ of error lies upon this judgment, for this is a matter of record. Roll. Abr. 744.

If a man is indicted for felony, and thereupon a *capias* and *exigent* is awarded, but he dies before any attainder, his adminiſtrators may have error upon this award of the exigent, becauſe by the award of the *exigent* his goods were forfeited; and this is *ad grave damnum, &c.* though the principal judgment can never be given. 11 Co. 41. b. cited from the 18 H. 7. Rot. 3. Eaton's caſe. Cro. Jac. 359. Roll. Rep. 85. S. C. cited.

If one be outlawed upon an indictment of treaſon, felony, or treſpaſs, but the proceſs and order preſcribed by the ſtatutes of 6 *H.* 8. *c.* 4. and 8 *H.* 6. *c.* 10. are not obſerved, the outlawry may be reverſed by writ of error, which (*a*) *ex merito juſtitiæ* ought to be granted. 3 Inſt. 31. (*a*) Upon a caſe ſtated and referred to all the judges, it was holden by ten of them, that writs of error were *ex debito juſtitiæ*, and not *ex merâ gratiâ*, except in treaſon and felony; but Price and Smith held, that the ſubject could not of right demand them in any criminal caſe. 2 Salk. 504. but for this *vide* Roll. Rep. 175. 3 Bulſt. 71. 2 Leon. 194. Sid. 69.—And note, that as the law is now ſettled, a perſon attainted of treaſon or felony, before he can have a writ of error to reverſe his attainder, muſt aſſign his errors, and thereupon have leave from the court to proſecute his writ of error. 2 Hawk. P. C. c. 50. § 11.——Alſo, no writ of error for the reverſal of an attainder of treaſon or felony is to be allowed without an expreſs warrant from the king or the conſent of the attorney general. 3 Mod. 42. Sid. 69. 2 Hawk. P. C. c. 50. § 12. Ld. Raym. 154. Vern. 170. 175.

A writ of error lies to reverſe an attainder of high treaſon, though ſome have held the contrary, by reaſon of 33 *H.* 8. *c.* 20. that every attainder of treaſon by the common law ſhould be as effectual as if by authority of parliament; for the ſtatute is to be intended of law attainders by due courſe of law, and not of erroneous or void attainders; and ſo it was held in a parliament held the 28 *Eliz.* when it was enacted, that no attainder of high treaſon, where the party was executed for the ſame, ſhould be avoided by plea or error: but this act extended only to attainders before that time, where the party had been executed, not to attainders after. 3 Inſt. 215. *& vide* 3 Bulſt. 71. Raym. 1, 2.

If one be convicted upon an indictment of recuſancy for abſenting from church for one month, upon which judgment is given, that he ſhall forfeit 20*l.* but it is not *ideo capiatur*; this omiſſion being apparently to the prejudice of the king, it was held a writ of error would lie notwithſtanding the words of 3 *Jac. c.* 4. that no ſuch indictment ſhall be avoided, diſcharged, or reverſed, for want of form or other defect whatſoever, other than by direct traverſe to the point of not coming to church. Cro. Car. 504. Marquis of Winchester's caſe, adjudged, and upon ſuch error the judgment reverſed accordingly, the king by his attorney having ſignified his pleaſure, that it ſhould be reverſed, if erroneous. Jon. 407. S. C. by which report, the writ of error was brought by the king, and there held, that a writ of error lay for the king, for he was not concluded by the words of the ſtatute of 3 Jac. c. 4.

If it be entered in an inferior court, that the plaintiff *recuperare debeat*, whereas it ought to be *recuperet*; this is (*b*) no judgment; ſo (*c*) no writ of error lies thereupon, for the words of the writ are *ſi judicium redditum ſit.* Style, 265. (*b*) That it is but an award, *vide* Roll. Abr. 751.

(*c*) Where the judgment was, that he ſhould recover *ſuper recuperationem*, where it ſhould have been *ſuper recognitionem*. Yelv. 157.

17 E. 3. 5. b. 19. b. Roll. Abr. 749. S. C.

In an aſſiſe of darrein preſentment, if the parties demur upon the title, and it is adjudged for the plaintiff, and that he ſhall have a writ to the biſhop; a writ of error lies upon this judgment before the damages inquired of, becauſe there were no damages at the common law, and then the writ would lie preſently; and the addition of damages given by the ſtatute, to be inquired of by the ſheriff, ſhall not ſtay the writ of error; and if it be affirmed, it may be inquired of the damages where it is affirmed.

17 E. 3. 21. 33. Roll. Abr. 749-50. S. C.

If a man recovers by default in a writ of *coſenage* or *aiel*, a writ of error lies upon this before the damages are inquired of, becauſe the damages are but an addition to the common law given by the ſtatute; and ſo the judgment for the principal continues as it was at common law.

Roll. Abr. 750. Lord Barkley and Counteſs of Warwick. Cro. Eliz. 635. Moor, 643. Noy, 71. S. C. adjudged. Cro. Jac. 324.

In a writ of partition, if the judgment be given *quod partitio fiat*, and thereupon a writ be directed to the ſheriff to make partition, no writ of error lies hereupon, for the judgment is not complete till the ſheriff's return, and the ſecond judgment, which the law requires herein, *viz. quod partitio præd. foret firma & ſtabilis in perpetuum*; for before that, the plaintiff may be nonſuit, or he may, upon the return of the ſheriff, ſuggeſt to the court, that the partition is not equal, and ſo have a new partition, and may alſo releaſe before the laſt judgment.

2 Bulſt. 104. like caſe adjudged, & *vide* 2 Roll. Rep. 125. 2 Bulſt. 119.

11 Co. 39. b. Cro. Eliz. 636. 2 Leon, 68. 2 Bulſt. 119, 120.

So, if in an action of account, judgment is given *quod computet*, and thereupon the defendant brings a writ of error; yet the record ſhall not be removed till the entire matter of the account be determined, *ne curia domini regis deficeret in juſtitiâ exhibendâ.*

3 Bulſt. 233. Godb. 258. Cro. Jac. 224. 2 Roll. Rep. 125. Style, 290. Cro. Jac. 356. Roll. Rep. 85.

Roll. Abr. 750. but for this *vide* Brownl. 127. 11 Co. 40. Roll. Abr. 760. Style, 290.

But if a woman recovers in a writ of dower, a writ of error lies before the writ of inquiry of damages awarded, and before the third part aſſigned by metes and bounds, for the judgment is perfect as to the realty, and the damages are given by the ſtatute by way of addition.

March, 88.

Roll. Abr. 751. Cro. Eliz. 235. 636. Leon. 309. Latch. 212. Noy, 95. Leon. 193. Dyer, 291. 3 Bulſt. 233. Palm. 6. 2 Roll.

So, if the plaintiff recovers in an *ejectione firmæ* by confeſſion, *nihil dicit*, *non ſum informatus*, or demurrer, a writ of error lies before a writ of inquiry of damages executed (*a*); (*b*) for the judgment, *quod recuperet poſſeſſionem*, is perfect, and the plaintiff may preſently have execution thereupon; and therefore, if the defendant were to be hindered from bringing a writ of error before a writ of inquiry executed, it might be in the plaintiff's power, by refuſing to bring or execute the writ of inquiry, to delay the plaintiff for ever.

Rep. 126. Latch, 133. Style, 109. And. 145. March, 8. Keb. 327. and Carth. 205. S. P. per Holt, Ch. Juſt. [(*a*) If the defendant do not, at the trial, confeſs leaſe, entry, and ouſter, according to the rule, he cannot have a writ of error; becauſe, in ſuch caſe, the judgment is againſt the caſual ejector; and error cannot be ſued in the name of the caſual ejector, Roe v. Doe, Barnes 181. George v. Wildom, 2 Bur. 757. neither can it be ſued, in ſuch caſe, in the name of the defendant, for he has not made himſelf party to the record.] (*b*) So, in debt, but otherwiſe in treſpaſs and caſe, where the damages are the principal. Cro. Eliz. 255.

So,

So, if a man recovers in *quare impedit* upon a demurrer, the defendant may have a writ of error before the writ of inquiry of damages returned, for such writ may be awarded out of the King's Bench, if the judgment be affirmed there. Roll. Abr. 750, 751. *vide* March, 89. Noy, 66.

If a man recovers in a *quare impedit*, and after brings a writ *quare non admiſit* againſt the biſhop, a writ of error lies on the judgment in the *quare impedit*, and the record ſhall be removed, though the other writ of *quare non admiſit* be not yet diſcuſſed. Roll. Abr. 751. Godb. 439.

If a *quare impedit* be brought againſt two, and one plead to iſſue, and the other confeſs the action upon which judgment is given, he ſhall not have a writ of error till the matter is determined as to the other; for the writ of error muſt rehearſe all that are parties to the original; and as to one, judgment is not given; and if the record is removed before the entire matter is determined, there would be a failure of right. 11 Co. 39. a.

If in a *formedon* the tenant has judgment for part, no writ of error lies until the entire matter in demand is determined, for the judgment is, *ſi judicium inde redditum ſit*, which word *inde* goes to the entire demand. 11 Co. 39. b. Dyer, 291.

If debt be brought againſt divers by ſeveral *præcipes*, and judgment given againſt one, he may have error before determination of the matter as to the others; for there being ſeveral counts, the record of his count and the pleading ſhall be ſevered from the original, and removed in *B. R.*, and yet the original ſhall remain in *C. B.*, for otherwiſe the court of Common Pleas could not proceed to determine the reſidue without the original. And my Lord *Coke* ſays, it ſeems to him, that in this caſe, if there be error in the original upon a *certiorari*, the chief juſtice ſhall only certify the tenor of it. 11 Co. 41. a. 2 Roll. Rep. 125. Dyer, 291. March, 89.

If in a *quo warranto* judgment be given as to part of the liberties claimed, that they ſhall be ſeiſed, and that the defendants *capiantur pro fine*, and as to the other part, *curia adviſari vult*, a writ of error lies before any judgment given for the other part. Palm. 1, 2. adjudged upon a writ of error upon a judgment given in a *quo warranto* againſt the corporation of Dublin. 2 Roll. Rep. 113. S. C. —— * Error does not lie on a peremptory *mandamus*. Stra. 536. —— Nor on a *mandamus* when the return is allowed. Stra. 625. *

3. In what Court the Judgment muſt be given on which a Writ of Error will lie.

No writ of error will lie of any judgment that is not given in a court of (*a*) record.

(*a*) Not of a judgment given in an inferior court, as the county-court, &c. Co. Lit. 288. b. Nor of a decree or ſentence in Chancery proceeding according to equity. 37 H. 6. 14. Bro. Error, 95. Roll. Abr. 744. —— But of a judgment given in the limited court of Chancery, culled the petty-bag, which proceeds according to the common law, and holds plea of *ſcire facias* for repeal of the king's letters patent, petitions, *monſtrans de droit*, traverſes of offices, *ſcire facias* upon recognizances, executions upon ſtatutes, and pleas of all perſonal actions by or againſt an officer or miniſter of the court, a writ of error lies in B. R. Roll. Abr. 744. Dyer, 315. 4 Inſt. 80. Plowd. 395. & *vide* Roll. Rep. 287. Moor, 570. Vern. 131.

The authority of the juſtices of *Trailbaſton* was by act of parliament and by the general rule of law, and if they erred in judgment, a writ of error lay in *B. R.* to reverſe their judgment. 2 Inſt. 540. 4 Inſt. 186.

Roll. Abr. 743, 744. Berry's caſe. 2 Jon. 167. S. C. cited, and a conviction upon the ſtatute

If a man be convicted (*a*) upon the ſtatute of 7 *Jac.* 1. *c.* 11. by two juſtices of the peace, for killing partridges, upon proof or confeſſion of the party, without indictment; this judgment may be reverſed in *B. R.* being removed there by *certiorari*, without any writ of error: ſo, if the conviction had been on the (*b*) ſtatute againſt ſhooting, or ſuch like.

of hunting in a park, being removed by *certiorari*, exceptions allowed to be taken thereto. (*a*) Vent. 33. Like point *per Cur. vide* Raym. 389. where error was brought upon a conviction of a riot before juſtices of peace, and ſheriff, upon the view, upon 13 H. 4. 7. (*b*) *Vide* Jon. 171.

Cro. Jac. 404. Rice's caſe adjudged.

But if an erroneous judgment be given upon an indictment of barratry at the ſeſſions of peace, and the party fined thereupon, and committed till he pays it, and he remove the indictment and proceedings by *certiorari*, and himſelf by *habeas corpus*, yet he cannot be relieved, unleſs he brings a writ of error.

Lev. 113. agreed *per Cur.* in the

But a record of force made by juſtices of peace upon the view, may be quaſhed upon motion, without a writ of error.

caſe of the King and Chaloner. Sid. 156. S. C. and S. P. *per Cur.* and ſaid that a writ of error would not lie, becauſe they were not a court.

Salk. 263. pl. 5. Ld. Raym. 213. 252. 454.

Wherever a new juriſdiction is erected by act of parliament, and the court, or judge, that exerciſes this juriſdiction, acts as a court or judge of record, according to the courſe of the common law, a writ of error lies on their judgment; but where they act in a ſummary method, or in a new courſe different from the common law, there, a writ of error lies not, but a *certiorari*.

(B) Who may bring a Writ of Error, and againſt whom: And herein of the Perſons neceſſary to be made Parties thereto.

Roll. Abr. 747. Dyer, 90.

NO perſon can bring a writ of error to reverſe a judgment, who was not (*c*) party or (*d*) privy to the record, or who was not (*e*) injured by the judgment, and therefore is to receive advantage by the reverſal thereof.

(*c*) Where in ejectment, error may be brought either by leſſor or leſſee. Sid. 317. & *vide ante*. (*d*) As heirs and executors; but if an erroneous judgment be given againſt the parſon, the patron cannot have a writ of error. Godb. 377. ——That error and attaint always deſcend to ſuch perſon to whom the land ſhould deſcend, if no ſuch recovery or falſe oath had been. Leon. 261. (*e*) Hence it is, that no man can have a writ of error to reverſe a fine that took any eſtate by it. 5 Co. 39. Tey's caſe. ——And for the ſame reaſon the conuſor cannot aſſign any error in the grant and render, becauſe by that the eſtate which paſſed from him by his conuſance is reſtored to him; and therefore he ſhall not be admitted to defeat the eſtate which by his own agreement he accepted. 5 Co. 39. b.

9 H. 6. 46. Br. Error, 9. Roll. Abr. 749. S. C.

So, a writ of error does not lie againſt any, but him who is party or privy to the firſt judgment, his (*f*) heirs, executors, or adminiſtrators.

(*f*) F. N. B. 107.——If a man recovers land by judgment, and dies without heir, againſt whom the writ of error ſhall be brought, is left a *quære*. 9 H. 6. 49. Roll. Abr. 749.

Roll. Abr. 749. Roll. Rep. 302.

And therefore on a judgment for recovery of land, the writ muſt be brought againſt him who was party to the judgment, although

although he hath nothing in the land, and not againſt the tenant; and on ſuch writ the judgment may be reverſed: but there muſt go (*a*) a *ſcire facias* againſt all the tertenants.

(*a*) That to reverſe a fine or recovery, there muſt go a *ſcire facias* againſt all the tertenants. Carth. 112.

Upon this rule, that none ſhall have a writ of error to reverſe a judgment, but he who is privy to it, and hath ſome prejudice thereby; it hath been reſolved, that if one hath lands on the part of his mother, and loſeth by erroneous judgment, and dies, the heir of the part of the mother ſhall have the writ of error. Leon. 261. 2 Sid. 56. *& vide* Owen, 68. Godb. 377.

So, the younger ſon, when entitled to the land by the cuſtom of borough engliſh, ſhall bring the writ of error, and not the heir at common law; for this remedy deſcends with the land. *& vide* Bridg. 79. Owen, 68. Leon. 261. 4 Leon. 5. adjudged, Roll. Rep. 311.

So, if there be an erroneous judgment, tenant in tail female, the iſſue female, and not the ſon, ſhall bring the writ of error. Dyer, 90. Leon. 261. Roll. Abr. 747.

So, if a man ſettles land to the uſe of himſelf and the heirs of his body, the remainder to his own right heirs, and dies, leaving iſſue only a daughter, who levies a fine, and dies without iſſue, and *J. S.* brings a writ of error as couſin and collateral heir of the daughter, yet he ſhall never reverſe the fine; for there could no right deſcend to him from the daughter, becauſe ſhe had but an eſtate-tail, which determined by her death without iſſue; and it does not appear that the remainder in fee was in the daughter as right heir, wherefore *J. S.* ſhall not reverſe the fine, *quia de non apparentibus & non exiſtentibus eadem eſt ratio*, eſpecially in a court of judicature, where the judges cannot take notice of any thing that does not come judicially before them, and appear in the pleading. Dyer, 89. Cro. Eliz. 469. 3 Lev. 36.

If there be tenant in tail, the remainder in fee, and in a *præcipe* brought (*b*) againſt tenant in tail, an erroneous judgment be given againſt tenant in tail, and he after die without iſſue, he in remainder may have a writ of error; for when the ſtatute *de donis* gave liberty to limit a remainder after an eſtate-tail, the law gave ſuch actions to him in remainder as belonged to privies in eſtate. 3 Co. 3. b. agreed in the Marquis of Wincheſter's caſe. [Tenant in remainder may bring error of a common recovery where the tenant in tail, *vouchee*, dies before the judgment; and he need not ſet out a complete title, but only ſhew the connection and privity between him and the perſon againſt whom the recovery was had. Sheepſhanks v. Lucas, 1 Burr. 410. In ſuch caſe *ſcire facias*, or any warning to the *heir*, is not neceſſary. *Id.*] (*b*) So, if tenant in tail levy a fine, and before proclamation paſſes, a *præcipe* be brought againſt the conuſee, who vouches the tenant in tail, &c. for when the tenant in tail comes in as vouchee, it is as of his old eſtate; ſo that the privity between the tenant in tail and him in remainder continues. Bridg. 69. Roll. Rep. 311.

If tenant in tail male have iſſue a ſon and a daughter by one venter, and a ſon by another, and die, and the eldeſt ſon make a feoffment, and a common recovery be had againſt the feoffee, in which the eldeſt is vouched, and he vouch over the common vouchee, and after the eldeſt die, the youngeſt ſon may have a writ of error; for though the eldeſt ſhould have rendered a fee ſimple to the feoffee, according to his loſs, yet he ſhould have recovered but an eſtate-tail, *viz.* ſuch an eſtate as he had when the Leon. 261. Owen, 68. Godb. 377.

the warranty was made, which would have deſcendad to the youngeſt, and, conſequently, the writ of error ſhall be brought by him.

Roll. Abr. 747. Dyer, 89. If there be ſeveral parties to an erroneous fine, they ſhall all join with the party that is to enjoy the land, though they themſelves can have nothing; and this is ſaid to be neceſſary only by way of conformity.

Leon. 317. Cro. Eliz. 215. S. P. adjudged, and the fine reverſed *quoad* the infant only: for this *vide* head of Fines and Recoveries. But if tenant for life, and he in remainder in fee, (being an infant,) join in a fine, the infant alone may bring error; for the error is in reſpect of the perſon of the infant, which is the cauſe of the action for him, and for no other.

Roll. Abr. 748. 755. A writ of error may be brought by him that is made party by the law, though he was not originally party to the ſuit, as he who comes in as vouchee.

Roll. Abr. 755. 796. If tenant in tail within age comes in as vouchee by attorney in a common recovery, he in remainder may aſſign this for error; for he is party in intereſt to the recovery; and where a man's intereſt is bound by another's act, it is but reaſonable he ſhould be allowed to free himſelf from the miſchief of it, by taking advantage of any error in it.

Cro. Eliz. 2. 3 Co. 4. If *A.* be tenant in tail, the remainder to *B.*, and *A.* ſuffer an erroneous recovery, and the common vouchee releaſe to the recoverer; yet if *A.* die without iſſue, *B.* may, notwithſtanding the releaſe, reverſe it by writ of error; for the common vouchee is only called in for form; as he really has no intereſt in, or title to the land, ſo really neither does he make any recompence to the perſon that loſes the land; and therefore it were unreaſonable to carry the notion of the imaginary recompence ſo far as to ſuppoſe him a real ſufferer, and thereby give him the privilege of ſetting aſide a conveyance by which he is no way affected.

3 Co. 4. (*a*) 8 H. 4. 5. Bro. Error, 39. If he in the remainder be made privy to the record by *aid prier*, he ſhall have a writ of error during the life of the tenant for life: ſo, (*a*) if he be received by default of the tenant for life.

49 E. 3. 21. b. Roll. Abr. 748. So, if a feme be received by the default of her baron, and loſe the land by judgment, the baron and feme ſhall have a writ of error thereupon.

2 Co. 57. Beckwith's caſe. Cro. Eliz. 129. Leon. 114. If baron and feme levy a fine, they may, by error, reverſe the fine, for nonage of the feme, during the life of the baron.

18 E. 3. 25. b. Dyer, 1. pl. 5. If the conuſor of a ſtatute aliens the land, and execution is ſued againſt the alienee, he may have a writ of error upon the execution.

Roll. Abr. 748. this is made a *quære*, becauſe, as there ſaid, he is not privy thereto, for the execution goes of the land of the conuſor; but Godb. 377. S. C. cited, and ſaid, that otherwiſe there would be no remedy; for the conuſor himſelf could not have error, becauſe the lands were not extended in his hands.

Roll. Abr. 749. Co. 111, 112. If pending a real action, the tenant aliens in fee, and after a recovery is had againſt him, he (*b*) himſelf may have a writ of error,

error, though he hath nothing in the land, becauſe he is privy to the judgment after his alienation and tenant in law. Cro. Eliz. 294. Palm. 254. S. P.

and when he is reſtored, the alienee ſhall enter upon him. (*b*) But the alienee cannot have a writ of error for want of privity. 2 Aſſ. 2. Roll. Abr. 749.

But if a fine be levied of 120 acres of land, and he, that has right to a writ of error, make a feoffment of the whole, he ſhall never reverſe the fine: but if the feoffment had been made, or a releaſe had been given of 20 acres only, he might yet have a writ of error to reverſe the fine as to 100 acres, becauſe he has not transferred his right to thoſe, and therefore may be re-inſtated, if the fine be erroneous. Roll. Abr. 788. Cro. Eliz. 468. Moor, 413.

So, if tenant in tail levies a fine which happens to be erroneous, and after ſuffers a recovery of part of the land only, of which the fine was levied; if the iſſue in tail brings a writ of error to reverſe the fine, the tenant may plead the recovery in bar for that part, becauſe for ſo much the recovery is an alienation, and therefore the iſſue ſhall never have a writ of error for that part of the land which he cannot have or enjoy, ſhould the fine be reverſed. Jon. 352. Roll. 789. Moor, 365.

(*a*) In a *præcipe quod reddat*, if the tenant diſclaims, he ſhall never have a writ of error, (*b*) becauſe by his diſclaimer he has debarred himſelf of all right in the land. 8 Co. 61. Beecher's caſe. (*a*) 3 Leon. 176. S. P. *per Cur. arguendo.* Roll. Rep. 302. S. P. *arguendo.* (*b*) Otherwiſe, where the tenant departs in deſpite of the court, or judgment is given upon his confeſſion. 8 Co. 62. a. F. N. B. 21. —— So, if upon his default. 2 Roll. Rep. 127. Palm. 56.

In a writ of annuity againſt an heir, upon an annuity granted by his anceſtor in fee; upon *non eſt factum* pleaded, if a verdict be found for the plaintiff, and thereupon judgment be given, that the plaintiff ſhall recover his coſts, damages, and arrears of the land deſcended from the ſame anceſtor, and thereupon a writ of execution be awarded to levy it of the lands deſcended; but no return thereof appear upon the record, and after the heir die inteſtate; his adminiſtrator cannot have a writ of error upon this judgment, in as much as he loſes nothing thereby; for if it be levied, it is of the lands deſcended, the which, or the profits thereof, he cannot have, or be reſtored to it, if he reverſes the judgment. Roll. Abr. 749. Franke and Stukely.

If *J. S.* binds himſelf and his heirs in a bond, and thereupon judgment is obtained againſt *J. S.*, and *J. S.* makes his will, and his heir at law executor, and dies, leaving lands, which deſcend to his heir, yet he ſhall not have a writ of error as heir, for he is not privy to the judgment *; and when an extent is made upon him, it is as tertenant: but after the lands are taken in execution, he may have a writ of error. Style, 38, 39. White and Thomas. *Per* Roll. * *Qu.* and ſee *poſt.*

If in a common recovery four huſbands and their wives are vouched, the voucher ſhall be intended to have been in, in the right of their wives, and the heir of any one of the wives may have a writ of error; for this charge in the realty did not ſurvive, and the heir of every of them being chargeable, the heir of any Leon. 291. Gravenor and Maſſey,

of

of them, and not of the ſurvivor only, may have error: adjudged, where error was brought as heir to one of the huſbands; but the plaintiff relinquiſhed that, and brought a new writ, and entitled himſelf as heir to one of the wives.

3 Leon. 176. the Queen and Biſhop of Glouceſter, adjudged, Cro. Eliz. 65.

If in a *quare impedit* judgment be given againſt the biſhop and incumbent, though the biſhop claimed nothing but as ordinary, and ſo loſt nothing; yet being privy to the record, he may for conformity join in error; for the plea of the biſhop is not ſo ſtrong as a diſclaimer.

S. C. adjudged; and Wray ſaid, that the biſhop had a loſs, for that the writ ſhall be to the archbiſhop for admiſſion and inſtitution, ſo that the biſhop having a loſs may therefore join. *Vide* 3 Mod. 134.

Moor, 686. pl. 949. Scroggs and Lord Mordant, adjudged, Cro. Eliz. 294.

If execution upon a judgment is ſued by *elegit*, and lands only extended, and after the defendant dies, his adminiſtrator may have a writ of error, for he is privy to the record, and may *in futuro* have loſs by it.

S. C. adjudged, at the end of which a *nota* is added, that the execution of the land may be avoided, and then the adminiſtrator may be damnified.

Cro. Eliz. 225. Marſh's caſe. Owen, 147. S. C. debated, Leon. 325. adjudged, and the outlawry reverſed accordingly;

If a man be outlawed for felony, and die, his executors may have a writ of error to reverſe it, for they are (*a*) privy to the judgment, and poſſibly may have all the loſs, as if the teſtator had only goods; and the objection, that the teſtator was attainted, and ſo had no goods, nor could make an executor, was held not material in this ſuit, which is to reverſe the outlawry, by which the diſability ariſes.

and by all the books it ſeems to be admitted, that the heir alſo might have had a writ of error in reſpect of the prejudice to him. 5 Co. 111. S. C. cited, Cro. Eliz. 558. S. C. cited. (*a*) *A.* being ſeiſed in fee, *B.* his eldeſt ſon, is outlawed for felony, *A.* dies, and *B.* enters and deviſes to *C.*, and dies, and *C.* enfeoffs *D.*, and whether *D.* could have a writ of error to reverſe this outlawry? Godb. 376. debated.

Cro. Eliz. 558. Noy, 126.

If a woman recovers her dower and damages, and the tenant brings a writ of error, pending which the woman dies, he may have a writ of error againſt her executor to avoid the judgment as to the damages, for that is a grievance to him as well as the loſs of the land.

Cro. Eliz. 558.

If in a real action the land and damages are recovered, and the tenant dies, and his heir, who in reſpect of the land ought to have a writ of error, releaſes all writs of error; yet the executor of the tenant may bring a writ of error to avoid the judgment as to the damages, for he that hath a loſs muſt have a remedy to redreſs it.

Bro. Error, 187. Roll. 747.

If a judgment be given againſt *B.*, and the money of *C.* attached by force of a foreign attachment in *London*, *C.* ſhall not have a writ of error, becauſe he comes in by garniſhment by the cuſtom, and is not party or privy.

Roll. Abr. 748. Hayward and Williams, Style, 254. 280. S. C.

If an action is brought againſt *A.* as a feme ſole, where ſhe is a feme covert, and ſhe pleads iſſue as a feme ſole, and judgment is given againſt her, and ſhe is taken in execution, ſhe and her huſband may bring a writ of error; for otherwiſe the huſband may be

be prejudiced in the loſs of the ſociety and comfort of his wife, and of her care in his buſineſs and family; and he hath no (*a*) other means to help him.

adjudged, though it was objected, that the

huſband was a ſtranger, for he had no other remedy to prevent the loſs of the ſociety of his wife, being taken in execution. Roll. Abr. 759. S. C. 2 Roll. Rep. 53. S. C. *per Cur.* but becauſe, in the aſſignment of error, it did not appear that ſhe was married when the original was ſued out, the judgment was affirmed. (*a*) But it is otherwiſe in the caſe of a fine, for the huſband may enter and avoid it. Roll. Abr. 748. *vide* tit. Fines and Recoveries.

So, if an action be brought againſt a feme covert and others, they all with the huſband may join in a writ of error. Roll. Abr. 747.

If there be three defendants, and they all appear by attorney, whereas one of them is an infant, and judgment be given againſt all; they muſt all join in a writ of error, for the judgment is entire, and cannot be naught as to the infant and good as to the reſt. Style, 406. If an infant plaintiff, in ejectment, or any perſonal action, appear by

attorney, and obtain a verdict, the judgment ſhall not be reverſed becauſe of ſuch appearance by attorney. Stat. 21 Jac. 1. c. 13. § 2.——But if an infant defendant appears by attorney, and judgment is given againſt him, error lies in the ſame court. Danver's Abr. 2 vol. tit. Error, fo. 12. pl. 13. and the caſes there cited.

So, if there be judgment againſt father and ſon, the ſon alone cannot bring a writ of error, for all the defendants ought to join in the writ; and if one of them refuſe, he muſt be ſummoned and ſevered; for otherwiſe this inconvenience would enſue, that every defendant might bring a writ of error by himſelf, and by that means delay the plaintiff from his execution for a long time, and from having any benefit of his judgment, though it might be affirmed once or oftener. Carth. 7, 8. Hacket and Herne. 3 Mod. 134. S. C. Yelv. 208, 209. S. P. [Walter v. Stokoe, 1 Ld. Raym. 71. Burr

v. Atwood, *id.* 328. Rous v. Etherington, 2 Ld. Raym. 870. Ginger v. Cowper, *id.* 1403. 1 Str. 606. Elkins v. Paine, 2 Ld. Raym. 1532. Ratcliffe v. Burton, Ca. temp. Hardw. 135. Vavaſor v. Faux, 1 Wilſ. 88. Knox v. Coſtello, 3 Burr. 1792. Laroche v. Waſsborough, 2 Term Rep. 738. all S. P.]

But if in treſpaſs againſt three, there is judgment againſt two of them by default, and the third juſtifies, and it is found for him, the two only may bring a writ of error, for he for whom the judgment is, cannot ſay, that the judgment was to his prejudice: alſo, in this caſe, the verdict and judgment for the third defendant will not help the want of an original *. Lev. 210. Hob. 70. & *vide* Style, 190. S. P. *cont.* * *Qu.* If the court will not give

leave to file an original? Or, if an original is ſued out, whether the court will take notice of the actual time of ſuing it?

If there be judgment againſt the principal, as alſo judgment againſt the bail, (*b*) the principal cannot have error on the judgment againſt the bail, nor (*c*) the bail on the judgment againſt the principal, nor (*d*) can they join in a writ of error any more than tenant for life, and he in remainder can join in ſuch a writ; for theſe are ſeveral judgments, and affect diſtinct perſons. (*b*) Roll. Abr. 749. 2 Leon. 4. Cro. Car. 408. 481. (*c*) Roll. Abr. 749. Style, 39.

Cro. Car. 408. Lev. 137. (*d*) Cro. Car. 300. 408. Jon. 360. Hob. 72. Cro. Jac. 384. Roll. Rep. 294. Cro. Car. 574. 561. Bulſt. 125. Lit. Rep. 93. Lev. 137.

But in (*e*) *Cro. Car.* it is ſaid, that if the writ of error, by the bail, had recited the firſt judgment (as of neceſſity it muſt) and the judgment in the *ſcire facias*, and alleged the error in the ſecond judgment, (*e*) Cro. Car. 481.

judgment, it had been well enough: but in (a) *Style* it is ſaid, that of late ſuch writ ought to abate for the whole *.

(a) Style, 374.

* The doctrine in the preceding clauſe I conceive is the eſtabliſhed law.

Carth. 447. Burr and Atwood.

Where on a *ſcire facias* execution was awarded againſt the bail, who brought a writ of error, which was *tam in redditione judicii quam in adjudicatione executionis* againſt the bail, &c.; on motion to quaſh the writ the court agreed, that the bail was not entitled by law to a writ of error upon a judgment againſt the principal in the original action, and therefore quaſhed the writ of error *quoad* all that related to the judgment in the original action, and no more; and the writ was ruled to ſtand good *quoad* the judgment againſt the bail upon the *ſcire facias*.

(C) Of the Time of bringing a Writ of Error.

(b) 22 H. 6. 7. Roll. Abr. 749.

IT was (b) formerly holden, that a writ of error could not be brought before the judgment given; and if it bore *teſte* before, it was no *ſuperſedeas*, for the words of the writ are, *ſi judicium redditum ſit*, &c.

(c) March, 140. Vent. 255. Moor, 461. [1 Term Rep. 280.]

But it ſeems now agreed, (c) that a writ of error that bears *teſte* before the judgment is good; and this is the uſual courſe for preventing and ſuperſeding execution; but (d) the judgment muſt be given before return of it.

(d) 3 Keb. 308. Vent. 96. Latch. 133.—It may be returnable the ſame term judgment is given. Sid. 104.—The judgment, when entered, hath relation to the day in Bank, ſo that a writ of error returnable after in the ſame term, will remove the record. Mod. 212.—Where judgment is not given, the ſpecial matter may be returned, viz. that no judgment was given. Sid. 466. Vent. 96. & *vide* Sid. 311.—[If the plaintiff defers ſigning judgment till the writ of error is ſpent, then ſigns it, and brings debt thereon, the court will order a new writ of error, at the expence of plaintiff's attorney. Arden v. Lamley, Barnes, 250. Jaques v. Nixon, 1 Term Rep. 280.]

March, 140.

But a writ of error, that bears *teſte* before any plaint entered, is not good.

Vent. 255. 3 Keb. 308. (e) Yet when a *certiorari* is awarded before any indictment found, but one is found before the return, it ſhould be removed; but for this *vide* tit. *Certiorari*.

So, where the defendant, upon an indictment of barretry, brought (e) a writ of error, bearing *teſte* before the aſſiſes, it was diſallowed, becauſe, if ſuch practice ſhould obtain, it would diſappoint all proceedings there.

By the 10 & 11 *W.* 3. *c.* 14. it is enacted, "That no fine or "common recovery, nor any judgment in any real or perſonal "action ſhall, from and after the firſt day of *May* 1699, be re"verſed or avoided for any error or defect therein, unleſs the "writ of error, or ſuit for the reverſing ſuch fine, recovery, or "judgment, be commenced or brought, and proſecuted with "effect, within twenty years after ſuch fine levied, or ſuch reco"very ſuffered, or judgment ſigned or entered of record: *Note*, "this ſtatute hath the uſual ſavings as to infants, feme coverts, "perſons *non compos*, in priſon, or beyond ſea."

(D) Of the Manner of bringing it: And herein,

1. Of the Form of the Writ, and where the Record ſhall be ſaid to be removed.

THE law does not ſeem to require the ſame exactneſs in writs of error as it does in other writs; therefore, it has been holden, that in a writ of error to reverſe a fine as couſin and heir of the conuſor, it need not be ſhewn in the writ of error, how he is couſin, for it is but a commiſſion to examine the errors, and needs not ſuch certainty. Cro. Jac. 160.

Neither need the plaintiff in error ſhew a title in a writ of error, unleſs it be in a ſpecial caſe, varying from the common courſe; as, where a ſpecial heir in tail brings error, or he in remainder, becauſe he is to entitle himſelf to the writ. Cro. Jac. 161. [1 Burr. 410.]

So, if a man brings a writ of error, to reverſe an outlawry, it need not be ſhewn in what action it was. Roll. Rep. 22.

But great certainty was formerly required in making the writ of error agree with the record; for as the writ was the ſole authority by which the judges were impowered to examine, &c. they could proceed only on that record which the writ or commiſſion authorized; nor could the defects herein, before the 5 *Geo.* 1. *c.* 13. be amended, becauſe by the former ſtatutes of amendment the judges were only enabled to amend in affirmance of judgment. *Vide* tit. Amendment and Jeofail. Carth. 368.

Therefore, where a writ of error was brought upon a judgment *in quadam loquelâ* by writ of certain land and paſture, without ſhewing in what action this plea was, it was held naught. 2 Roll. Rep. 22. Watſon and Bernard.

If an ejectment is brought againſt ſeven, and one dies, and judgment is given againſt the ſix, and laid *ad damnum* of the ſeven, the writ ſhall abate; though it might have been otherwiſe if the writ had concluded *ad damnum* of the ſix only. 2 Roll. Rep. 210. Palm. 152. adjudged; but, *per* Dodderidge,

if the writ of error had mentioned the ſeven only, according to the record, and concluded *ad damnum* of the ſix, it had been well.—If one of the parties is dead, yet he ought to be named in the writ of error. 2 Mod. 285. 1 Ld. Raym. 71. Carth. 368. 1 Stra. 606.

If in a *quare impedit* in *C. B. George Shirley* baronet recovers againſt *Underhill*, and he brings a writ of error, reciting a record between *George Shirley* knight and baronet and *Underhill*, and thereupon the record and proceedings are ſent in *B. R.* and a *mittitur* entered upon the roll, (*a*) yet the record is not removed. Hob. 327. Hutt. 41. Cro. Jac. 633. S. C. (*a*) Style, 153. Like point *per*

Roll. Ch. Juſt. who ſaid the variance was material, for theſe additions are made part of the name; otherways, where one is named gent. in the record, and yeoman in the writ.——Where a variance in the addition ſhall abate the writ. Sid. 104.——Where it was moved to quaſh a writ of error *inter A.* and *B. nuper de Kelſey in com. Warwici gent.* and the record certified was, *inter A.* and *B. nuper de Kelſey in com. Lincoln gent.* it was doubted, whether this variance in the addition would vitiate the writ, for that the addition was not of neceſſity; and at one time it may be, he was of one *Kelſey*, and at another time of another. Sid. 193. Keb. 117.——But for variances between the writ and record, *vide* Cro. Eliz. 92. 172. 198. Roll. Rep. 16. 2 Bulſt. 167. 174. Style, 193. 407. where the court by conſent of parties made a rule to proceed in the writ of error, notwithſtanding a variance for which it ought to have abated; of which the reporter makes a *quære*, the record not being well removed.

A writ

Style, 344. A writ of error was brought to remove a record *in curia manerii de Cuttingby*, where the record was, *in cur. cuſtod. libertat. Angliæ authoritate parliamenti de Cuttingby;* and ruled by *Roll*, that there was no direct oppoſition between them, for that both may ſtand together; and though *de facto* it is the court of the lord of the manor, yet virtually, and in dignity, it is the king's court.

2 Saund. 291. Gay and Adams. If a writ of error be directed *majori & aldermannis civitatis ſuæ* B. *ac majori & conſtabulario ſtapulæ* B. *nec non vicecom. ejuſdem ac ballivis majori & communitati ejuſdem cur. tolſ. ac ballivis & communitati cur ſuæ pulveriſat. & eorum cuilibet*, to certify the record of a judgment *loquelæ quæ fuit coram vobis in cur. noſtra civitat. præd. ſine brevi noſtro, &c.* and the record is certified thus, *viz. Placita in cur. dom. regis tolſ. civitat. præd. &c. coram* A. & B. *tam vicecomitibus com. civitat. præd. quam ballivis, majore & communitate ejuſdem civitatis*; this is a good writ of error to remove this record; for though it is not ſaid therein *coram vobis ſeu aliquibus veſtrum;* yet it ſhall be taken *diſtributivè, viz.* the judgment upon a plaint before all the ſaid officers, or any of them.

Roll. Abr. 752. Lewes and Webb. If a writ of error be (*a*) directed to Sir *Edward Littleton* (he being then Chief Juſtice *de Banco*) to certify a judgment *in querelâ quæ fuit coram vobis & ſociis veſtris*, where it was before Sir *John Finch*, then Chief Juſtice, the predeceſſor of Sir *Edward Littleton*, this writ ſhall abate.

(*a*) It muſt always be directed to them before whom the judgment is; *per* Godb. 44. Salk. 264-5.——To him who hath the cuſtody of the record wherein any judgment is given; as of a judgment in the Common Pleas, to the chief juſtice only; ſo upon a judgment in the Exchequer, to the treaſurer of the Exchequer and barons, to have the record before the chancellor and treaſurer of England; though it happen the treaſurer of England and of the Exchequer to be the ſame perſon. 4 Inſt. 105.

Roll. Abr. 752. So, if a writ of error be directed to *Oliver St. John*, he being Chief Juſtice *de Banco* to certify a judgment *in querelâ quæ fuit coram vobis & ſociis veſtris*, where it was before *Edmund Reeves & ſociis ſuis*, there not being then any Chief Juſtice; this is not good, but the writ ſhall abate.

Roll. Abr. 752. Clerk and Sprigg. But if a writ of error be directed to *Peter Pheaſant*, to certify a judgment *in loquelâ quæ fuit coram vobis & ſociis veſtris*, where it appears by the record, that it was held *coram Edmundo Reeves & Petro Pheaſant;* this is a good writ, for though in the return *Edmund Reeves* is firſt named; yet this is well enough, in as much as *Peter Pheaſant* is alſo named; and it does not appear which of them was the eldeſt.

Roll. Abr. 752. Sprye and Mill. Style, 191. 203. S. C. and S. P. adjudged. If a writ of error be directed to the mayor, aldermen, and recorder of *Launceſton* in *Cornubiâ*, and the record be certified by the mayor, aldermen, and deputy-recorder, the court being held by letters patent; this is not well certified, in as much as this ought to be certified in the name of the judges of the court; and it does not appear, that the recorder had power to make a deputy by the ſaid letters patent.

Yelv. 3. b. Lord Cromwell and Andrews. Cro. Eliz. 891. If an aſſiſe is ſummoned before juſtices of aſſiſe, and they are afterwards removed, and the Chief Juſtice *de B.* and another juſtice, are made juſtices of aſſiſe in the ſame county, and the aſſiſe is taken before them, & *propter difficultatem* adjourned in *B.* and judgment

judgment there given for the plaintiff, and a writ of error is directed to the ſame chief juſtice before whom the aſſiſe paſſed, reciting the aſſiſe ſummoned before the juſtices of aſſiſe by name, *& poſtmodum capt.* before the chief juſtice, *&c.* but does not recite how the aſſiſe came in *B. viz.* by adjournment, or otherwiſe; this writ of error is not good; for as it took notice of the change of the juſtices, *a fortiori* it ought to take notice of the adjournment, for by that both judges and court were changed. Noy, 44. S. C. adjudged. Godb. 248. Roll. Rep. 15. S. C. cited.

But in the (*a*) 5 *E.* 6. where judgment in a *quare impedit* by the ſtatute *Weſtm.* 2. was given by juſtices of *niſi prius*, and a writ of error thereof brought, without ſhewing where the judgment was given; it was held good; for the record beginning and remaining in the Common Pleas, it was held not material where the judgment was given; (*b*) and *Gawdy* ſaid, when the record begins in one place, and is finiſhed in another, there, of neceſſity, in a writ of error the proceedings in both places ought to be mentioned. (*a*) Dyer, 77. (*b*) Lord Cromwell v. Andrews, Cro. El. 891. Yelv. 3. S. C. and a diverſity taken between the caſe of an aſſiſe and a *quare impedit*, for the aſſiſe muſt originally commence before juſtices of aſſiſe, and yet by preſumption judgment ſhall be there given, and not in *B.*, but the *quare impedit* muſt begin in *B.*, and by intendment judgment ſhall be there given, though by the ſtatute to avoid a lapſe, judgment may be given before juſtices of aſſiſe. 2 Bulſt. 171. S. C. and S. P. cited.

If a writ of error be directed to ſeveral juſtices, and returned by part of them only; yet if it (*c*) truly recite the record, it is thereby removed, and a new writ of error lies *de recordo quod coram nobis reſidet.* Yelv. 212. Cro. Jac. 254. Sid. 349. (*c*) If the record vary from the writ of error, yet the inferior court ought to remove it. Vent. 97.

[Although the return to a writ of error from the Common Pleas be not ſigned by the chief juſtice *proprio manu*, yet this is no objection to proceeding on the writ of error. Blackwood v. S. S. Company, Ca. temp. Hardw. 344. 2 Str. 1063. S. C.

If a writ of error be directed to *W. W.* chief juſtice, and the return be only by *W. W.*, without adding "the chief juſtice "within named," yet if there are the words, "*as to me within* "*is commanded*," the return is good, for theſe words are enough to ſhew him to be the ſame perſon to whom the writ is directed.] Sullivane v. Seagrave, 2 Str. 695.

If a writ of error be brought upon a judgment in an aſſiſe *capt. coram* J. Fleming *nuper capitol. juſticiar. ad placita &* J. Dodderidge *uno juſticiar. ad placita coram nobis tenend. aſſignat. juſticiar. noſtris ad aſſiſas*; this writ is naught, for there was no ſuch record before *Fleming juſticiar. ad placita*, the words *coram nobis tenend. aſſignat.* being omitted, and thoſe after *Dodderidge* cannot refer to the firſt. Cro. Jac. 342. adjudged. *cont.* Dodderidge, who ſaid the addition was ſurpluſage. Godb. 248. Roll. Rep. 16. 2 Bulſt. 164.

If a writ of error be brought *in recordo & proceſſu aſſiſæ, &c. inter* A. & B. *ſummonit.*, without ſhewing which was plaintiff and which defendant, it is well enough, becauſe the precedents are both ways. Cro. Jac. 341.

And now by the 5 *G.* 1. *c.* 13. it is enacted, "That all writs "of error, wherein there ſhall be any variance from the original "record, or other defect, may and ſhall be amended, and made "agreeable to ſuch record by the reſpective courts where ſuch "writ or writs of error ſhall be made returnable." [Collins v. Muxworthy, Ca. temp. Hard. 194.]

1 Ld. Raym. 71. *Per* Forteſcue, J. 1 Str. 607.

[A writ of error was not amendable at common law, nor by any of the ſtatutes of amendments and jeofails, till the above ſtatute of 5 *G.* 1. for all amendments are granted for the ſupport of judgments; but the principal deſign of writs of error is to reverſe them. A writ of error was not amendable at common law, becauſe it has in its nature two things, *viz.* a *certiorari* to remove the record, and a commiſſion to examine it; and no court was ever allowed to amend its own commiſſion.

Sword-blade Company v. Dempſey, 2 Str. 892. 8 Fitzg. 201. S. C. 1 Barnard. 405. 421. S. C. So, where two were charged with a joint treſpaſs, and judgment was given againſt one only, the other being found not guilty, &c., a writ of error was afterwards brought in both their names, on an affidavit that this happened by the miſtake of the officer; the court of *B. R.* upon the authority of the above caſe, ordered the writ to be amended by ſtriking out the name of the perſon who was acquitted. Vereliſt v. Rafael, Cowp. 425.

An ejectment was brought againſt the Company and Mr. *Edwards*. After a verdict for the plaintiff, Mr. *Edwards* died, and a writ of error was brought laying the judgment to be *ad grave damnum* of the Company, and of *Mary Edwards* the daughter and heir, and ſhe and the Company jointly aſſign errors. It was moved to amend the writ and aſſignment by ſtriking out her name. And upon conſideration, the court were of opinion, that it was amendable by the above ſtatute, not only as a variance from the original record, which is really no way to the damage of Mrs. *Edwards*, but alſo by virtue of the general words *other defects*.

Gardner v. Merrett, 2 Str. 902. 2 Ld. Raym. 1587. S. C. Fitzg. 268. S. C.

There was a variance between the writ of error and the record; and as it ſtood in the paper, the court obſerved it, but neither party would move to amend it, for fear of paying coſts; upon which the court ſaid, the above ſtatute would warrant their amending it, which they did without coſts.

1 Barnard. 462. It appears from ſome of the reports of this caſe, that no coſts are payable upon amendments purſuant to the ſtatute, though at the prayer of the party; but if the prayer be alſo to amend the aſſignment of errors, the rule is with coſts, becauſe then the party comes for a favour of the court.

Wright v. Canning, 2 Str. 807. 2 Ld. Raym. 1531. S. C.

A writ of error was returnable before any judgment given, and on conſideration, it was holden to be ſuch a fault as is not amendable by this ſtatute.]

1 Barnard. 62. 65. S. C. Rejindoz v. Randolph, 2 Str. 834. S. P. Vice v. Burrow, *Id.* 891. S. P. Wilſon v. Ingoldſby, 2 Ld. Raym. 1179. However, in almoſt all caſes, the writ is ſued out before judgment ſigned, becauſe otherwiſe execution would iſſue inſtantly. *Per* Buller, J. Jaques v. Nixon, 1 Term Rep. 280.

2. What is neceſſary to be removed, and herein of removing the Record or a Tranſcript.

22 E. 3. 6. 40 Aſſ. 29. Roll. Abr. 753. 2 Str. 837.

On a writ of error of a judgment in the Common Pleas, or other inferior court, in every adverſe ſuit the record itſelf ſhall be removed, that it may remain as a precedent and evidence of the law in the like caſes.

Bendl. 51. Roll. Abr. 752. Dyer, 89. Godb. 248. 2 Roll. Rep. 233. F. N. B. 20.

But in the caſe of a fine the tranſcript only is removed, for fines are only a more ſolemn acknowledgment or contract of the parties, and therefore no memorials of the law, and need only be affirmed or vacated; if the former, the contract ſtands as it was; if the latter, the juſtices of *B. R.* may ſend for the fine itſelf, and reverſe it, or may ſend a writ to the treaſurer and chamberlain

lain to take it off the file. Beſides, ſhould the record itſelf be removed and affirmed, it could not be engroſſed for want of a chirographer in *B. R.*

Alſo, if a writ of error be brought in parliament of a judgment in *B. R.* the chief juſtice muſt go in perſon into the houſe with the record itſelf, and a tranſcript, which is to be examined and left there, and then the record to be brought back again in *B. R.* and if the judgment be affirmed, the court of *B. R.* may proceed on the record to grant execution; and therefore if the record itſelf ſhould be removed, and judgment affirmed, and the parliament diſſolved, there could not be any proceedings thereupon to have execution. 4 Inſt. 21. Cro. Jac. 341. Bulſt. 166. Roll. Abr. 753. Godb. 249. in which laſt book it is ſaid to be at the pleaſure of the parliament, to have either the record or tranſcript.

So, if a writ of error be brought in *B. R.* here, of a judgment in *B. R.* in *Ireland*, the record itſelf is not ſent, but a tranſcript only, by reaſon of the danger of the ſeas; but when it is come ſafe and entered in the rolls here, then it ceaſes to be a record in *Ireland*, and is a perfect record here; yet if the judgment be affirmed, the King's Bench in *England* ſhall not award execution, but ſhall ſend a ſpecial mandate to the chief juſtice in *Ireland* to do it. [It is the very record which comes here out of Ireland, and not the tranſcript of it. And it is no objection, that it ſhould be the tranſcript for fear of the peril of the ſea; for one might object in the ſame manner, that upon error in the Common Pleas, the tranſcript only is removed hither, for fear it ſhould be burnt or loſt, before it comes into the King's Bench. But in fact, when the record in both caſes arrives here, then it is the true record, and not before; and that which is in Ireland, or the Common Pleas, ceaſeth to be the record. *Per* Holt, C. J. in Coot v. Linch, 1 Ld. Raym. 427.]

If a writ of error be brought in *B. R.* to reverſe a judgment given in *B.* the (*a*) original ſhall not be removed, if it be not by ſpecial matter, as if error aſſigned in the original. 24 E. 3. 24. Roll. Abr. 753.

(*a*) Though the command of the writ is to certify *recordum & proceſſum*, yet the courſe is only to certify the declaration and pleas, omitting the writs. Bridg. 57.——All is certified which is with the chief juſtice; but the original and judicial writs remain with the *cuſtos brevium* and other officers, and are never certified, but where error is aſſigned for want of them. Cro. Eliz. 84. *vide* Leon. 22. Cro. Jac. 479. Roll. Abr. 790. pl. 6.——The writ is directed to the chief juſtice, who only certifies the body of the record, which remains with his clerk.

If a writ of error be brought in *B. R.* upon a judgment in an inferior court againſt the plaintiff, there, the court may reverſe the judgment, though the original be not removed, no error being aſſigned in the original; for this is removed but to ſue here upon the ſame original. 37 Aſſ. 5. Roll. Abr. 753.

[By the words of the ſtatute of 27 *El. c.* 8., which firſt gave the writ of error from the court of King's Bench to the Exchequer-chamber, the chief juſtice is to cauſe the record to be brought before the judges in the Exchequer-chamber; yet the practice hath always been to ſend only a tranſcript, the original record remaining in *B. R.* In the pleadings in *Weſtby*'s caſe, (3 *Co.* 67. *a.* 70. *b.*) the entry of the proceedings in error runs thus: "Afterwards, &c. the *tranſcript* of the record and proceedings, "&c. by a certain writ of the lady the queen of correcting er- "rors, &c. was brought to the juſtices, &c. in the chamber of "the Exchequer aforeſaid, according to the form, &c." Yet the ſubſequent part of the ſame entry ſays, "and thereupon the Dougl. 352. n. 3. Rutter v. Redſtone, 2 Str. 837. Tully v. Sparkes, *id.* 869. 2 Ld. Raym. 1571.

2 Term Rep. 737.

"*record* aforeſaid, *&c.* was ſent back, *&c.*" However, as to all legal effects, the record itſelf is conſidered to be removed.]

2 Saund. 254. Green and Cole. Lev. 309. S. C.

In an action of waſte brought in the *huſtings* in *London*, there was a verdict for the plaintiff, which was after quaſhed for the inſufficiency, and a new *venire* awarded, whereupon a verdict was given for the defendant, and judgment for him, and a writ of error being thereupon brought before ſpecial commiſſioners, it was reſolved, that the firſt verdict ſhould be certified in the record, becauſe it was not ſet aſide, for that the jurors had found againſt evidence, or for any undue practice or misfeaſance of the parties, but only for the inſufficiency thereof in point of law, which the court had adjudged upon the verdict appearing before them upon record *.

* So, where a defendant pleads in abatement, a demurrer, &c. and judgment of *reſpondeas ouſter*; the whole of theſe proceedings muſt be entered on record and certified.

50 Aſſ. 9. Roll. Abr. 753.

If a writ of error be brought in *B. R.* upon a fine levied in the *huſtings* of *Oxford*, the record (*a*) itſelf ſhall be removed.

(*a*) Where upon a writ of error to reverſe an outlawry upon an indictment of felony, the record itſelf, or a tranſcript only, ſhall be removed. Bulſt. 181.

Vent. 96. Sid. 466. Raym. 189. 2 Keb. 684. Ingoldſby v. Martin, 1 Str. 316.

If there be ſeveral records between the ſame parties with which the deſcription in the writ of error agrees, the inferior court may remove which of the records they pleaſe.

[If the writ is "*between* A. *late of* Weſtminſter *in the county of* "Middleſex," and the record only "*late of* Weſtminſter," if *Middleſex* is in the margin, it is well enough.

Anon. 1 Wilſ. 35. (*b*) Goodright v. Hugoſon, Ca. temp. Hardw. 351.

A defendant cannot have leave to tranſcribe the record (though plaintiff has not done it) in order to *non-pros* the writ, and have the benefit of the recognizance. But (*b*) if the plaintiff in error is dilatory, the defendant muſt give a rule to tranſcribe, and then if he will not, the defendant may *non-pros* the writ of error.]

(E) Of alleging Diminution and granting a *Certiorari*.

F. N. B. 25. a.

IF the judges of the Common Pleas, or other judges, upon a writ of error, will not certify all the record, the party that ſues the writ of error may allege diminution of the record, and pray a writ to the juſtices that certified the record before, to certify the whole record.

Sid. 40. (*c*) As Ely. Sid. 147.

But diminution cannot be alleged upon a writ of error brought upon a judgment (*c*) in any inferior court.

——The ſeſſions of peace. Sid. 364.——But may in error upon a judgment in Wales and counties palatine. Sid. 147. 364.——So, it may in error upon a judgment before juſtices of *Oyer* and *Terminer*. Sid. 40.

Salk. 266. pl. 11. Hale and Clare.

And therefore where in a borough-court a plaint was entered as the plaint of *A.* and *B.*, and the declaration was by *A. B.*, executor of *J. S.*, and on a writ of error in *B. R.* this variance was aſſigned for error: The court held, 1. That want of a plaint in an inferior court is the ſame as want of an original in the court of

of *Common Pleas*, and that this could not be a plaint in this action. 2. If ſuch variance had been in a record of the Common Pleas, diminution might have been alleged, and a good writ certified; but in records out of inferior courts, no diminution can be alleged, and the court muſt take them as they find them.

A man cannot allege diminution (*a*) contrary to the record which is certified. Roll. Abr. 764.

(*a*) In error to reverſe an outlawry upon an indictment for murder, it being aſſigned for error, that the *exactus* was *ad comitatum*, without ſaying *meum*, the court, upon the prayer of the attorney general, ſhewing the king had ſeiſed his lands, &c. awarded a *certiorari* to the coroners to certify where the *exact.* was, in order to amend the return. Latch. 210.——Upon a writ of error upon a bill of exceptions, diminution cannot be alleged, for the party muſt hold himſelf to the matter in the bill ſealed; and if it is not there, it was his folly to omit it, 2 Inſt 427.——Where the record is not rightly certified upon a writ of error upon an outlawry upon an indictment for felony. Bulſt. 181. but for this *vide* Godb. 267. 2 Roll. Rep. 353. Cro. Jac. 369.

As, if in a writ of error it be certified, that the judgment was *quod defend. ſit in miſericordiâ*, the defendant in the writ of error cannot allege diminution: *ſſ.* That the record is *quod capiatur*, becauſe this is contrary to the record certified. Roll. Abr. 764.

If upon a writ of error the record be certified, that a challenge was to the ſheriff for coſenage, and after thereupon a *venire facias* was awarded to the coroner upon diminution, it cannot be certified, that the challenge was after the return of the *venire facias*, becauſe this is contrary to the record before certified, for nothing can be certified but that which ſtands with the firſt record. Roll. Abr. 764. Roll. Rep. 200. Floyd and Bechel.

In a writ of error brought in *B. R.*, upon a judgment in the Common Pleas, the want of a warrant of attorney being aſſigned for error, the plaintiff prayed one *certiorari* to the chief juſtice, and another to the *cuſtos brevium*, both of whom returned *non inveni aliquod warrant.*, and the defendant dying, the plaintiff by journeys accounts brought a new writ of error againſt the ſon and heir of the defendant, who appearing alleged diminution, in that the warrant of attorney was not certified, and prayed another *certiorari* to the *cuſtos brevium;* and it was urged, the return was not *quod non habetur aliquod warran.*, but (*b*) *quod non inveni*, &c., ſo that if upon the ſecond a warrant ſhould be returned, it would not be repugnant: but it ſeemed to *Wray* Chief Juſtice, that it would be hard to grant a new *certiorari* in this caſe; but, if any variance could be alleged, it would be otherwiſe, as adjudged in the caſe of one *Laſſels*, where it was certified there was no warrant of attorney; and afterwards it was moved for another *certiorari* as it is here, and becauſe the original was *inter Laſſels executor. teſtamenti*, &c., where he was not named executor in the firſt *certiorari*; upon that matter a new *certiorari* was granted. Leon. 22. Dayrell and Thinn.

(*b*) *Vide* Cro. Jac. 277. Bulſt. 24., where upon the firſt *certiorari* it was returned, there was no warrant of attorney in that term wherein the action was commenced, and another *certiorari* was awarded.

After *in nulla eſt erratum*, the court, to inform their conſciences, may award a *certiorari* to (*c*) amend the record. Roll. Abr. 764. Style, 352.

2 Roll. Rep. 471. (*c*) So, they may award a *certiorari* to reverſe the judgment. Roll. Abr. 764. Cro. Eliz. 155. 281. 836. 2 Leon. 3. Cro. Jac. 6. 141. 445.

If after *in nullo eſt erratum* pleaded, another part of the record is brought in by *certiorari*, and made of record there, the court ought to reverſe the judgment, if the matter ſo requires. 5 Co. 37. Roll. Abr. 764.

Roll. Abr. 764-5. Jon. 139. S. C. [resolved that the *certiorari* was not well awarded; for after *in nullo eſt erratum* pleaded, neither the plaintiff nor defendant can allege diminution; for by the joinder they allow the record; and

After *in nullo eſt erratum* pleaded, if one party allege upon record, a diminution of the record to reverſe it, and pray a *certiorari* to certify it, and thereupon a writ of *certiorari* be ſued out, and the record be certified; but before it is entered of record, the court be informed of this matter, this ſhall not be received, becauſe it comes in by the prayer of the party after *in nullo eſt erratum* pleaded, which is not to be allowed: but upon information to the court, the court may grant it. [*Michaelmas* 2 *Car.* between *Weaver* and *Felton*, *B. R.* adjudged, and ſuch certificate diſallowed, and a new writ of *certiorari* granted by the court, which is entered, *Hil.* 1 *Car. Rot.* 647. and then the record of *Biſhop*'s caſe was ſhewn to the court, where the defendant did not plead *in nullo eſt erratum*, as the book is 5 *Co.* 37. *a.* but it paſſed againſt the defendant by *nil dicit*, and after diminution alleged, as it is in the book.]

a note is there added, that Biſhop's caſe in 5 Co. does not agree with the record; for there the defendant had not joined *in nullo eſt erratum*, but did not ſay any thing, *ideo remanet inde indefenſus.* Noy, 83. S. C. held accordingly, but yet the court *ex offi io* may award a *certiorari ad informandam conſcientiam*, and that which is certified ſhall be annexed to the record, and is called a rider-roll, and ſays, ſee 22 E. 4. 46. a. 28 H. 6. 10 Dy. 32. b. 9 E. 4. 32. b. Franklyn v. Reeves, Ca. temp. Hardw. 118. And note in Chapman's caſe, the difference is, if diminution be alleged in a thing collateral, as warranty of attorney, or any meſne proceſs that is not of the body of the record, it may be alleged after *in nullo eſt erratum*: but otherwiſe, if it be of the ſubſtance and parts of the record itſelf; as, if returned in the detinue only, where the firſt action was in the *debet* and *detinet*, for which ſee 1 H. 7. 21. which reconciles many differences.]

Roll. Abr. 765. Roror and Eſcort. * And probably filed after the firſt, and before the ſecond *certiorari.*

In treſpaſs in *B. R.* judgment was given for the plaintiff by default, and a writ of error brought *in camera ſcaccarii*, and there aſſigned for error, that there was not any writ of inquiry of damages filed; and upon a writ of *certiorari* it was certified, that there was not any ſuch writ. However, afterwards another *certiorari* was granted, and upon this the writ of inquiry was certified*, upon which the judgment was affirmed.

Roll. Abr. 765. Trevis and Scott.

So where in a writ of right in *B. R.* after judgment, a writ of error was brought *in camera ſcaccarii*, and the want of continuances aſſigned for error; and upon a *certiorari*, the want of continuances certified; yet after, upon another *certiorari*, the continuances were certified, and upon this the judgment affirmed.

Roll. Abr. 765. Godb. 407. adjorn. 2 Roll. Rep. 352. S. C. but no judgment. Cro. Car. 91. Style, 176.

If error be aſſigned in the original, and upon a *certiorari* granted an erroneous original be returned; and upon this *in nullo eſt erratum* be pleaded, and after the court *ad informandam conſcientiam* grant another *certiorari* for another original; and upon this a good original be certified; the court ought to intend that this is the original, upon which the judgment was given in favour of judgments, which ought to be intended to be good.

3 Leon. 106. Ray and Boaly.

In a writ of error, upon a fine, an error was aſſigned in the proclamations, upon which a *certiorari* went to the *cuſtos brevium*, and upon his certificate it appeared, that two of the proclamations were made in one day; but it appeared in the Chirograph-office, that the proclamations were duly made; and he making and being the principal officer as to them, and the *cuſtos brevium* having only an abſtract thereof; upon the prayer of the defendant a new *certiorari*

tiorari was directed to the chirographer, who having certified the proclamations duly made, after examination of the clerks of the Common Pleas by the juſtices in *B. R.* they awarded that the proclamations with the *cuſtos brevium* ſhould be amended according to thoſe in the cuſtody of the chirographer.

If a writ of error is brought upon a judgment in *B. R.* in *Ireland* in a writ of falſe judgment, upon a judgment in the *Toulſel*, (which is the court of the mayor and aldermen of *Dublin*); and it is aſſigned for error, that there was no plaint entered in the *Toulſel*, and that theſe words *per quod actio accrevit* were omitted in the concluſion of the declaration; if the defendant alleges diminution, yet he ſhall not have a *certiorari* to the chief juſtice *de B. R.* in *Ireland*, to certify the reſidue of the record, *&c.* and that if any part of the record be not before him, that he ſhould write to the mayor and aldermen to certify it, and that he ſhould certify it to this court; for by this plea of *in nullo eſt erratum* in *B. R.* in *Ireland*, he hath admitted the record well certified by the mayor and aldermen; and this court hath no authority to require the court of *B. R.* in *Ireland* to write to the mayor, *&c.* and the judgment *de B. R.* in *Ireland* only is here in queſtion; and ſuch writ being iſſued, a *ſuperſedeas* was granted to the whole, though it was prayed that the *ſuperſedeas* ſhould be as to the inferior court only: but at another day it being moved, that there might be a *certiorari* as to the words *per quod*, *&c.* it was granted. Palm. 285. Baniſter and Kennedy.

In a writ of error in the Exchequer-chamber upon a judgment in *B. R.* it was aſſigned for error, that in the bill, the plaintiff declared on a leaſe for three years; but in the plea-roll, upon which the iſſue was joined, and the record of *niſi prius*, it was upon a leaſe for five years, ſo that the bill and declaration vary; and diminution being alleged by the plaintiff, a bill was certified, in which it was only for three years; upon which the defendant had another *certiorari*, and thereupon a bill was certified, wherein he declared upon a leaſe for five years, which warranted the declaration upon the roll, and the *niſi prius*: and it was held by all the juſtices and barons, that the ſecond certificate, upon diminution alleged by the defendant, ſhould be received, for that warranting the roll and the record of *niſi prius*, ſhall be intended the true bill, and the other a fictitious one. Cro. Car. 91. between Howell John and Thomas.

A writ of error was brought upon a judgment in debt by confeſſion in *C. B.* and the want of an original was aſſigned for error; the defendant, before a *certiorari* returned, came in *gratis*, and pleaded a releaſe in bar, to which there was a demurrer; and it being agreed that the plea was ill for want of a *venue*, the queſtion was, whether the court *ex officio* might award a *certiorari*? And it was held by three judges, that though the party had (*a*) concluded himſelf by relying on his releaſe, yet the court was not bound thereby, but may award a *certiorari*; and if upon the return thereof it appeared that all the proceedings were right, they were obliged to give judgment on the whole record, according to conſcience and right: but *Holt* Chief Juſtice held, that the court in Salk. 263. pl. 15. 3 Salk. 399. pl. 3. Carlton and Mortagh. 6 Mod. 113. 206. S. C. 2 Ld. Raym. 1005. S. C. (*a*) Where the defendant had concluded himſelf by pleading *in nullo*

eſt erratum, yet the court granted a *certiorari* to remove the whole record, a line being omitted in the tranſcript, on affidavit that the record was right below. Salk. 270. upon a writ of error of a judgment in ejectment in the grand ſeſſions in Wales. [But this the court will do only in order to affirm a judgment, Berkley v. Howard, 2 Str. 907. not to reverſe it. Merryfield v. Berrey, *Id.* 765. Bowers v. Mann, *id.* 819.]

this caſe could not award a *certiorari*, becauſe the queſtion was not, whether error or not, but whether barred or not by the releaſe? which being the point referred to their judgment, they were not at liberty to depart from it.

Smith v. Stoneard, 3 Ld. Raym. 1156. 1 Salk. 267. S. C.

[A writ of error was brought of a judgment in the Common Pleas after a verdict. The plaintiff in error aſſigned for error want of an original, but did not take out a *certiorari*, as the courſe is, to get the want of the original certified: the defendant in error pleaded *in nullo eſt erratum*. It was objected, that there ought to have been a *certiorari* taken out, and a certificate made of the error; for it might be that there was an ill original, and if that were returned, the plaintiff in error might take advantage of it, and that would not be helped by the verdict, though the want of the original were. *Per Holt*, C. J. If the want of an original be aſſigned for error, and the plaintiff in error do not take out a *certiorari*, and get a return to it, and the want of an original certified; the courſe is for the defendant in error to go to the maſter of the office, and get a rule for the plaintiff in error to return his *certiorari* (*a*); and if he do not get it done, as is ordered by the rule, the aſſignment of error ſtands for nothing. But if the defendant in error will come in *gratis*, and confeſs the error, there need be no *certiorari* returned. And as to the matter, that there might be a bad original, *&c.* that is another ſort of error; and when the want of an original is aſſigned for error, the court will never intend, that there is a bad original. And the judgment was affirmed.

(*a*) Error for want of an original is not completely aſſigned, until the certificate is returned. Sterling v. Tanner, Com. Rep. 115.

Tyſon v. Hilyard, 2 Ld. Raym. 1122. 1 Salk. 269. S. C.

If upon error, diminution be alleged for want of original, warrant of attorney, *&c.* and a *certiorari* be ſued out, upon which a record is returned contrary to what is before returned, it cannot be received.

Diſmo v. Shirley, Yelv. 108. Booth v. Beard, 1 Keb. 327. Dyke v. Sweeting, 1 Wilſ. 181.

Where the want of an original is aſſigned for error, and it appears that all the proceedings are of the ſame term wherein the original is returnable, ſuch an original warrants thoſe proceedings, let it be of any return in that term. But an original of the term wherein final judgment is given, will not warrant the proceedings, if by the record it appears that there have been proceedings in the cauſe, in a term or terms before. The caſe of original writs differs from that of warrants of attorney; for it is ſufficient if a warrant of attorney be filed at any time pending the ſuit, let it be in which term it will; the ſtat. of *H.* 8. only requires a warrant of attorney to be filed in the cauſe; and the ſtat. of 4 *Ann.* requires it to be filed according to the courſe of the court; and that is to have it filed at any time pending the cauſe; and it is no matter when, ſo that it be in the ſame ſuit. But as to an original writ, it is otherwiſe, for if there be proceedings in the action in a term

a term preceding the return thereof, the original will not ſupport them.

The plaintiff in error aſſigned for error the want of an original, and had a *certiorari* upon which it was certified that there was no original; afterwards the defendant applied to the court of Chancery, and upon affidavit that inſtructions were given to the curſitor for an original, but that they were loſt, that court allowed the original to be ſupplied. Upon this the defendant in error prayed another *certiorari*, and an original was certified of the ſame term in which the default of an original was certified before. It was inſiſted, that this was irregular, for before the ſecond *certiorari* was returned, the defendant ought to have given a copy of the original to the plaintiff's attorney; and the maſter informed the court, that the courſe was ſo, when the ſecond original certified was of another term; but it being in the ſame term, the motion was not allowed.] Levin v. ——, Com. Rep. 118. 1 Ld. Raym. 695. S. C.

(F) Of the *Scire Facias*.

AFTER the record is (*a*) removed, and the plaintiff in error (*b*) has aſſigned his errors, which (*c*) may be either errors in fact or in law, he ſhall have a *ſcire facias ad audiendum errores* againſt the defendant, who thereupon may plead *in nullo eſt erratum*, a releaſe, *&c.* F.N.B. 20. (*a*) Muſt aſſign his errors, and ſue out a *ſcire facias ad audiendum errores* the ſame term, or the term next after the record is removed; otherwiſe the whole matter is diſcontinued, and he will be obliged to ſue a new writ upon the record directed to the juſtices before whom the record is removed, to proceed upon the record *quod coram vobis reſidet*. F. N. B. 20 G. But ſuch diſcontinuance is ſaved by the defendant's appearing, which he may do *gratis*. Sid. 173. Keb. 642. (*b*) Muſt aſſign his errors before he can have a *ſcire facias*, *&c.* F. N. B. 20 E. *Vide* Roll. Abr. 762. (*c*) If the matters which are aſſigned for error appear to the court to be no error, nor colour of error, it will not grant any *ſcire facias*. 18 H. 6. 18. Roll. Abr. 763.——The uſual practice is, that the defendant in the writ of error by conſent doth voluntarily take notice of the aſſignment of errors; and this conſent is teſtified by his pleading *in nullo eſt erratum*, and then there is no occaſion for a *ſcire facias ad audiendum errores*. Carth. 41.——If he does not, there muſt be a *ſcire facias*.

The Exchequer-chamber doth not award a *ſcire facias ad audiendum errores*, but notice is given to the parties concerned. Vent. 34. *Vide* Palm. 186.

If after a writ of error brought the defendant dies, yet the plaintiff in error may ſue out a *ſcire facias*, *&c.* againſt the (*d*) executor. Vent. 34. ſaid by the ſecondary to be ſo ruled in the caſe of Sir H. Thyn. and Corie.——But in Roll. Abr. 763. taken from the Year-book of 9 H. 4. 3. it is ſaid, that if a man be outlawed upon a proceſs at the ſuit of *A.* who dies, and he bring error to reverſe the outlawry, he ſhall not ſue a *ſcire facias* againſt the executor, becauſe he cannot proceed upon this original, which is abated by the death of the teſtator. Bro. Error, 44. S. C. (*d*) May be againſt an adminiſtrator generally, or by his particular name. Roll. Rep. 23. 2 Bulſt. 231.

[If the original plaintiff dies, pending error, his executor may have a *ſcire facias quare executio non* out of *C. B.* before the record is tranſcribed; but afterwards out of *B. R.* And the plaintiff in error may have a *ſcire facias ad audiend.* out of *B. R.* againſt the executor of defendant in error.] Wright v. Treweeke, Barnes, 432.

If a man condemned in an aſſiſe be outlawed for the fine of the king, and he bring a writ of error to reverſe the outlawry only, there 7 H. 4. 40. Roll. Abr. 763.

there ſhall not be any *ſcire facias* againſt the recoverer, becauſe the outlawry is at the ſuit of the king (*a*) only.

(*a*) But if the writ of error had been brought of the judgment and outlawry alſo, it had been otherwiſe. 7 H. 4. 4. Roll. Ab. 763.

The attainder of felony of a perſon who had any lands ſhall never be reverſed by writ of error (*b*) without a *ſcire facias* againſt all the tertenants and lords mediate and immediate. But it is (*c*) ſettled, that ſuch *ſcire facias* is not neceſſary in the caſe of high treaſon. It is (*d*) ſaid too, that it is not neceſſary in the caſe of felony, when it is ſuggeſted on the roll that the party had no lands, and the attorney general confeſſes it.

(*b*) Dyer, 34. pl. 20. Keb. 121. Sid. 316. Hard. 164.
(*c*) 2 Hawk. P. C. c. 50. § 13.
(*d*) 2 Salk. 495. pl. 5. Ld. Raym. 154. 12 Mod. 545. 668.

Upon a writ of error againſt the heir of him that recovers, a *ſcire facias* lies (*e*) againſt the heir and tertenants.

8 H. 4. 17. 2 Roll. Abr. 763.

(*e*) Anciently the writ againſt the tertenants was ſpecial, naming them; but of late the courſe hath been to word the writ generally. Bridg. 72.—The *ſcire facias* againſt the tertenants is not *ad audiend. errores*, but *ad audiend. proceſſum & record.* Lev. 72. *per cur.* Keb. 352.—An attaint lies againſt him who recovered, and againſt the tertenant. 2 Bulſt. 244. Roll. Rep. 37. 302. Bridgm. 72. And the judgment may be reverſed againſt the parties to the judgment and their heirs, though they have nothing in the land.

(*f*) If a writ of error is brought to reverſe a common recovery, the court (*g*) before the reverſal thereof, ought to award a *ſcire facias* againſt the tertenants; and this is not merely diſcretionary, but *ex neceſſitate juris*; for they may have matter to plead in bar as a releaſe, &c. *Hil.* 2 & 3 *Jac.* 2. between *Kingſton* and *Herbert*, 3 *Mod.* 119. *per cur.* but *adjornatur.*—[Sir *B. Shower* in his report of this caſe, 2 *Show.* 490. ſays, that the court were of opinion, that the awarding of a *ſcire facias* to the terre-tenants was not *ex neceſſitate*, but diſcretionary. And the ſame is ſaid in argument in *Comberbach*'s Report.]

(*f*) Leon. 290. Like point in a writ of diſceit to annul a fine of ancient demeſne lands, and that the tertenant is not bound thereby till, &c.
(*g*) It is the beſt way to award a *ſcire facias* againſt the tertenant, before the court proceeds to the examination of the errors, for he may have ſomething to plead in bar, and ſo ſave the court the trouble of examining the errors; and if the judgment ſhould be reverſed againſt the party and privy, yet the plaintiff could not have reſtitution till a *ſcire facias*, &c. Dyer, 321.——That ſuch *ſcire facias* may be granted before or after, at diſcretion. Hard. 163.

But this matter was fully debated in the caſe of (*h*) *Wynn* and *Lloyd*, where in a writ of error to reverſe a judgment given in a common recovery againſt the vouchee after *in nullo eſt errat.* pleaded, the court awarded a *ſcire facias* (upon a ſurmiſe of the defendant, that there were tertenants) to the tertenants; the ſheriff returned, that *A.* is tertenant, and a *ſcire feci*, and *A.* comes in and ſays that there are other tertenants, and prayed a *ſcire facias* to them, and had it; the ſheriff returned, that *B.* is tertenant, and *ſcire feci*, and *B.* coming in, ſays there are other tertenants, and prayed a *ſcire facias* to them. It was inſiſted, that the tertenant was not a party concerned in the reverſal of the judgment, but only as to his poſſeſſion, and therefore could not otherwiſe plead than as concerning his poſſeſſion; that by this means the delay might be infinite, for he that comes in upon this *ſcire facias* might as well plead that there is another tertenant, and ſo the plaintiff might be ſtaved off from ever having the benefit of his writ

(*b*) Lev. 72. 130. 146. Sid. 213. Keb. 54. 351. 388. 459. 717. 748. Raym. 16. 55. 70. 96. S. C. upon a judgment had in the grand ſeſſions in Wales.

writ of error: beſides, this ſurmiſe is contrary to the return of the ſheriff. On the other ſide it was urged, 1. That the *ſcire facias* ought to go out againſt the tertenants, and had in all caſes, where it ever was controverted, been awarded, as appears by the (*a*) books cited in the margin. 2. That it ought to go out againſt them all, becauſe any one of them may have a releaſe to plead, which may diſcharge or advantage the other. 3. That if it cannot be pleaded by the tertenant, yet it may be ſuggeſted to the court as *amicus curiæ*, and awarded *ex officio*; for it may be, that he who is not ſummoned, can plead in bar of the writ of error what will go to the whole, and eaſe the court of examining errors; and in that reſpect it may be awarded, and the proceedings ſtay. But the court held, that the awarding of a *ſcire facias* to the tertenants was not *ex neceſſitate juris*; and therefore when it is once out, and the tertenants are warned, there is no reaſon to grant it a third time; that here the delay was apparent; but if he could make it out, that he that is not warned had a releaſe of errors to plead, it being in their breaſts and diſcretion, it ſhould be granted; otherwiſe not.

(*a*) Dyer, 321. Cro. Jac. 392. Owen, 157. Bridg. 69, 70. 21 E. 3. 56. Cro. Car. 295. 313. Moor, 524. Cro. Eliz. 739. Co. Ent. 233.

But where a writ of error was brought to reverſe a common recovery, and a *ſcire facias* ſued out againſt him that was the nominal demandant in the writ of entry, and a *ſcire facias* was moved for to the tertenants, but oppoſed, becauſe the tertenant was an infant, and therefore the parol may demur during her nonage, which would greatly delay the plaintiff; and further, that if the infant ſhould die, the lands may remain to another; notwithſtanding this, the court awarded a *ſcire facias*; and it was held by *Holt*, C. J. that though the granting of a *ſcire facias* in ſuch caſes againſt the tertenants is diſcretionary, and not *ſtricti juris*, yet it hath been the conſtant courſe of this court to grant it; therefore he was of opinion not to depart from that which had been the uſual courſe of the court.

Carth. 111. Earl of Pembroke's caſe.

[And upon the authority of thoſe two laſt caſes Lord *Mansfield* ſaid, that by the eſtabliſhed mode of proceeding there muſt be a *ſcire facias* againſt the terre-tenants, otherwiſe it is an irregularity, but no more. But a *ſcire facias* to the heir is clearly not neceſſary.

Hall v. Woodcock, 1 Burr. 359. Sheepſhanks v. Lucas, *id.* 410.

In an information *qui tam*, &c. upon 5 *El.* for uſing a trade *contra formam ſtatuti*, there was judgment for the plaintiff, on which a writ of error was brought. *Per cur.* In the caſe of indictments, there needs no *ſcire facias* for the party to aſſign his errors, but a rule is ſufficient, becauſe the queen is always in court by her attorney-general. But a rule in this caſe being moved for, the court ſaid, they had ordered precedents to be ſearched for, but could find none; and therefore the defendant in error muſt proceed as he could by law.

The Queen v. Ford, Tr. 8 Ann. B. R. Vin. Abr. Error, (H. a.) p. 9.

If a plaintiff below brings error to reverſe his own judgment, and does not proceed, the court will make a rule to aſſign errors in a limited time, or his writ to be non-proſſed, for a *ſcire facias* would here be improper.

Johnſon v. Jebb, 3 Burr. 1772.

Where

Forteſcue Alland v. Maſon, 2 Str. 1258. Where in error from *Ireland*, the King's Bench affirmed the judgment on a collateral point, it was holden, that the plaintiff could not, on the defendant in error's coming of age, take out a *ſcire facias ad audiend. errores* in *B. R.* in *England*; for upon the affirmance of the judgment, the record muſt be remitted to *Ireland*.

Marſhal v. Cope, 2 Str. 917. Sambidge v. Houſley, 2 Term Rep. 17. A rule to aſſign errors was ſet aſide, becauſe given before any rule on the *ſcire facias quare executio non*. However, theſe rules may be ſerved together.

Thatcher v. Stephenſon, 1 Str. 144. On *ſcire feci* returned, if the defendant do not appear and join in error, the plaintiff may put it in the paper without taking out a rule to join in error.

Millar v. Yerraway, 3 Burr. 1723. A *ſcire facias* in error need not lie four days in the office before the return.]

Groſs v. Naſh, 4 Burr. 2439.

(G) Of the Proceedings after the Record removed: And herein of the Abatement of the Writ of Error.

Roll. Abr. 763. Bro. Error, 93. [1 Burr. 410.] IF the plaintiff in error aſſigns an error in fact, if the defendant will put in iſſue the truth of the fact, he ought to rejoin by denial of the fact, and ſo join iſſue thereupon, and ſhall not ſay (*a*) *In nullo eſt erratum*, for by this he acknowledges the fact alleged to be true.

(*a*) This is in nature of a demurrer. Cro. Jac. 29. Cro. Car. 53. Lev. 311.——It is a confeſſion of an error in fact well aſſigned. Raym. 231. Lev. 294. but not of a matter aſſigned contrary to the record. Cro. Jac. 12. 521. Raym. 231.

Roll. Abr. 763. But when an error in fact is aſſigned, if the defendant will acknowledge the fact to be ſo as alleged, and yet that by law this is not error, he ought to rejoin *in nullo eſt erratum*, for by this he acknowledges the fact, and yet that by law it is not error.

Roll. Abr. 763. Alſo if a man who is outlawed brings a writ of error to reverſe the outlawry, and aſſigns his errors, the king's attorney ſhall not plead *in nullo eſt erratum*, which amounts to a demurrer, as is done between common perſons; but upon the aſſignment of the error, the court ſhall give a day to the king's counſel to maintain the outlawry; and it is entered *curia adviſari vult* till the outlawry is reverſed or affirmed.

Roll. Abr. 763. [Upon error in the record, as, want of *capias*, or the like, there, he may ſay *in nullo eſt erratum*; and there, though the defendant confeſs the error, the court ought not to reverſe the judgment, till they be aſſured of the error. Br. Error, pl. 165. cites 7 E. 4. 16.] If error be alleged in the body of the record, *in nullo eſt erratum* is a good rejoinder, for this ſhall put the matter in the judgment of the court, the record being agreed to be ſo.

Roll. Abr. 764. Leon. 22. So, if error be alleged in a matter of record, which is not of the body of the record, but in a collateral thing, as *quod non habu-*

tur aliquod recordum of reſummons, *in nullo eſt erratum* is a good rejoinder; for if the plaintiff in the writ of error does not pray diminution, and thereupon procure a certificate from the inferior court, that there is not any reſummons before the rejoinder entered, this aſſignment is of no effect, but void, inaſmuch as this is to be tried by the record itſelf, and no diminution can be alleged after rejoinder entered; for if the defendant will confeſs the error, yet the court ought not to reverſe the judgment, till they are aſcertained of the error by the record itſelf.

If a writ of error abates or diſcontinues by the act and default of (*a*) the party, a ſecond writ of error ſhall be no *ſuperſedeas:* otherwiſe, if it abates or diſcontinues by (*b*) the act of God or the law.

Keb. 658. (*a*) As if a plaintiff in error be non-ſuit, he ſhall not have a writ of error again. Salk. 263. pl. 4. Ld. Raym. 91. 5 Mod. 228. Comb. 393. 12 Mod. 105. Comb. 19. S. P. (*b*) A writ of error abated by the death of the lord chief juſtice Foſter, and a ſecond writ was ſued out and allowed; and it was held a *ſuperſedeas*. Keb. 658. 686.——A writ of error does not abate by the death of the defendant in error; but a *ſcire facias ad audiendum errores* may be taken out againſt his executor. Vent. 34. Salk. 264. *Secùs*, if the plaintiff in error dies. Yelv. 208. but for this *vide* Moor, 701. Sid. 419. Carth. 236. and Godb. 68. A diverſity where a writ of error ſhall abate in a real action, though not in a perſonal action.——Three join in bringing a writ of error, the defendant pleads outlawry in abatement as to one of them; but the court held this no good plea, becauſe they are all compellable to join. Palm. 151. [For if they do not all join, the writ will be quaſhed. 1 Ld. Raym. But though the writ, in ſuch caſe be quaſhed, yet the record is removed by it. 2 Ld. Raym. 1403. 1 Str. 606. Where two join in a writ of error, and one will not aſſign errors, the court will give the other time to ſummon and ſever. 2 Str. 783. But if one of two perſons againſt whom judgment hath been given, dies after judgment, error may be brought by the ſurvivor without the executor of the other. 1 Str. 234.]

(H) How far the Writ of Error is a *Superſedeas*.

AFTER a writ of error ſhewn, the plaintiff ought not to take out execution, but the defendant ſhall have four days time to get it (*c*) allowed, and four days time more to put in bail, if the caſe require it; and if he (*d*) paſſes that time, the writ of error ſhall be no farther a *ſuperſedeas*.

2 Keb. 129. (*c*) By the clerk by indorſing a *recepi* thereon. Vent. 255. Mod. 112. S. P. and that he muſt not keep the writ in his pocket. (*d*) That the very ſealing of the writ of error is a *ſuperſedeas* to the execution. Mod. 28. *per* Kelynge. [A writ of error is ſaid to be a *ſuperſedeas* from the allowance. Barn. 376. 1 Term. Rep. 279. but as it is the practice to ſue out the writ of error before judgment is ſigned: the courts have ſaid, it ſhall not operate as an allowance till the judgment is actually ſigned, and the party ſhall be allowed four days after the ſigning of the judgment to put in bail; for before the judgment no bail can poſſibly juſtify. As to the ſervice of the allowance, *that* is only material to bring the party into contempt, if he proceeds to ſue out execution afterwards. Jaques v. Nixon, 1 Term Rep. 279. Doe v. Bracebridge, *ibid.*]

Where judgment in a *formedon* was pronounced 16 *Novemb.* and a writ of error brought by the tenant bearing *teſte* 27 *Novemb.* and then allowed, and *in majorem cautelam* a *ſuperſedeas* made out againſt executions, and the demandant obtained a writ of ſeiſin, bearing *teſte* 9 *Octob.* before, by warrant of the judgment, which was afterwards entered but as of *Octav. Mich.* being the laſt continuance; this being made appear to the court, and they being ſatisfied that the judgment was pronounced 16 *Novemb.*, before which time the defendant could not have a writ of ſeiſin, nor the plaintiff a writ of error, they held this ſuch a trick as would defeat

Hob. 329. Clanrickard v. Liſle, *& vide* 3 Lev. 312.

feat any writ of error: and therefore a new *superſedeas* was awarded againſt that writ of execution, *quia erronicè*.

Mod. 28. Hughes and Underwood. [See *acc.* Laroche v. Waſſbrough, 2 Term Rep. 737.]

If a writ of error is taken out to remove a record between ſuch and ſuch perſons, and ſome of the parties are omitted; ſo that in ſtrictneſs the writ does not agree with the record, yet it is notwithſtanding a *ſuperſedeas*, and no execution can be taken out, for the court below (*a*) cannot judge of the fitneſs of it, though it may be quaſhed in the court of which it iſſues.

(*a*) That if the record vary from the writ of error, yet the inferior court ought to remove it. Vent. 97.

Roll. Abr. 491. Lock and Tillard, *per* Croke and Jones, *cont.* the opinion of Brampſton. * But the court, on motion, will ſtay proceedings againſt the bail.

If *A.* recovers in debt or damages againſt *B.* and ſues out a *capias ad ſatisfaciendum* againſt *B.* which is returned *non eſt inventus*, upon which a *ſcire facias* is awarded againſt the bail and returned, and after a ſecond *ſcire facias* awarded, but not returned; *B.* brings a writ of error on the principal judgment; this is no *ſuperſedeas* as to the proceedings againſt the bail, but the ſecond *ſcire facias* may well be returned, and the plaintiff may proceed thereon, notwithſtanding the writ of error, which, affecting only the principal judgment, is diſtinct from the proceedings againſt the bail *.

2 Roll. Abr. 491.

So, if a man recovers againſt *J. S.*, and on a *ſcire facias* hath judgment againſt the bail, and the bail bring a writ of error of the judgment on the *ſcire facias*; this ſhall be no *ſuperſedeas* as to the principal judgment, and therefore the plaintiff may take out execution againſt the principal.

Smith v. Nicholſon, 2 Str. 1186.

[Where a plaintiff, in order to proceed againſt bail, took out a *capias ad ſatisfaciendum*, and on the following day a writ of error was allowed, notwithſtanding which he called for a return of *non eſt inventus*, and then waiting till the writ of error was at an end, proceeded by *ſcire facias* againſt the bail; the court, on motion, ſet aſide the proceedings; for the ground of them, *viz.* the return of *non eſt inventus*, was obtained after notice of the writ of error, which in its nature ſtopped all ſort of proceedings, and the ſheriff could not ſo much as look after the defendant, in order to found ſuch a return. Beſides, it is an invariable rule, that the *capias ad ſatisfaciendum* ſhall in no caſe operate as againſt the bail until it has lain four days in the office; and though it have lain that time in the office, a writ of error afterwards allowed and ſerved before the day on which the *capias* is returnable, ſhall have the effect of a *ſuperſedeas* to any proceedings againſt the bail.]

Perry v. Campbell, 3 Term Rep. 390.

2 Roll. Abr. 491. Marſh and Whiteſtone, adjudged *per cur.*

If a man brings a writ of error on a judgment, but does not remove the record within ſix days, this ſhall be no *ſuperſedeas*, but execution may well be taken out, for it appears that the writ of error is merely for delay †.

† *Qu.* If execution can be taken out, whilſt the writ of error is in force, and if the defendant in error ought not firſt to *non-pros* plaintiff in error. See *poſt*.

2 Roll. Abr. 491. Sare and Shelton,

If upon a *fieri facias* on a judgment againſt *B.*, the ſheriff takes the goods of *B.* into his hands; but before any ſale of them, *B.* delivers to the ſheriff a *ſuperſedeas* on a writ of error,

B. ſhall have the goods again, for by this ſeizure no property is altered. *per cur.*— If the ſheriff makes a warrant to his bailiff, and after comes a *ſuperſedeas* to the ſheriff, and the bailiff, before notice of it, makes execution, it is not good; for the *ſuperſedeas* to the ſheriff determines the warrant of his bailiff. —If execution iſſues, and the ſheriff executes it, and after a *ſuperſedeas* comes to him *quia executio erronicè emanavit*, the ſheriff ſhall have his fees for the execution; *vide* tit. Sheriff.

If a writ of error is brought returnable into the Exchequer-chamber, which is allowed by the clerk of the errors, and a *ſuperſedeas* granted thereupon; but the record is not marked by the clerk of the errors, as the uſage is, nor notice thereof given to the attorney of the other ſide; but theſe matters are omitted, becauſe the attorney was not known, nor the number-roll of the record; yet this is a good *ſuperſedeas* in law, ſo that if execution be awarded and executed, it is erroneous, and a *ſuperſedeas* ſhall be awarded *quia erronicè emanavit:* but it is no contempt in the attorney in taking out execution, he having no notice of the writ of error, and the roll not being marked. Roll. Abr. 492. Mich. 1649. Methwold and Bawd. [See Burr. Rep. 340.] *Supra acc.*

It ſeems clearly agreed, that an action of debt may be brought upon a judgment in *B. R.*, notwithſtanding a writ of error brought in the Exchequer-chamber; for though ſuch a writ of error be a *ſuperſedeas* to the execution, yet the duty remains upon record; and it is but reaſonable the party ſhould have this remedy for his damages for forbearance. [But execution cannot be ſued out upon the ſecond judgment until the writ of error be determined.] 10 H. 6. 6. 2 Roll. Abr. 490. Dyer, 32. pl. 5. Adams and Tomlinſon, Sid. 236. Lev. 153. Keb. 127. Raym. 100.

S. P. adjudged, Draper and Brightwell. Mod. 121. 3 Keb. 129. 239. 316. Vent. 372. S. P. 4 Mod. 247. Dighton and Granvil, S. P. To a *ſcire facias quare executionem habere non debet*, a writ of error pending may be pleaded in bar of the execution. Skin. 591. [Benwell v. Black, 3 Term Rep. 643.] *——* Where a writ of error is depending, the court, on motion, will ſtay proceedings in an action on the judgment, upon terms. The ſame, if proceedings are againſt the bail, where error of the principal judgment is depending. [Such a motion, however, cannot be made until the defendant has put in bail to the ſecond action. Smith v. Shepherd, 5 Term Rep. 9. Nor is it merely of courſe; and therefore the court will not interpoſe, where the writ of error is obviouſly for the purpoſe of delay. Intwiſtle v. Shepherd, 2 Term Rep. 78. In that caſe indeed the allowance of the writ of error will not operate as a *ſuperſedeas* to any proceedings. Box v. Bennett, 1 H. Bl. 432. Kempland v. Macauley, 4 Term Rep. 436. Maſterman v. Grant, 5 Term Rep. 714.]

(I) To what Court a Writ of Error lies: And herein,

1. Of Writs of Error into Parliament.

THE court of parliament is the ſupreme court, where anciently cauſes of great conſequence, as between the *magnates regni*, were heard and determined. Hence the Houſe of Lords is the *dernier* reſort, to which a writ of error lies; and therefore (*a*) if a writ of error is brought of a judgment in the King's Bench into the Exchequer-chamber, and there the judgment is reverſed; yet a writ of error lies of ſuch judgment into (*b*) parliament, and the lords may reverſe ſuch ſecond judgment. (*a*) Show. Parl. Caſes, 24. 110. Vent. 334. Raym. 330. 2 Jon. 99. 2 Lev. 232. (*b*) When a record comes into parliament upon a writ of error, the king may aſſign certain earls and barons, and with them the juſtices, to determine the matter. 22 E. 3. 3. Roll. Abr. 789. 2 Built 164. For the form of the writ, *vide* Show. pl. 12. and for the manner of proceeding thereon. *Vide* Moor, 834. Cro. Jac. 342. Godb. 250. Roll. Rep. 14, 15. Noy, 76. Raym. 5. 383.

So,

37 H. 6. 13. 11 E. 4. 9. Roll. Abr. 745. for the manner of obtaining and proceeding upon ſuch writ of error, *vide* 4 Inſt. 21. Godb. 247. Bulſt. 162. 166. Moor, 834. p. 1122.——That a writ of error may be returnable *ad proximam ſeſſionem parliament.* Dyer, 375. Raſt. Ent. 805.——But no *ſuperſedeas* ought to be granted upon a writ of error returnable *ad proximum parliamentum.* Vent. 31. Sid. 413.——If the parliament is diſſolved, the writ of error is abated; the court of King's Bench may proceed to execution afterwards without any *remittitur*, Carth. 237. but this is altered by a late order in the Lords houſe. See *ante* 133. *——* Writ of error in parliament is no *ſuperſedeas*, if it be not tranſcribed in fourteen days, and the parliament be diſſolved. Bunb. 64.——If error is brought in parliament, though the houſe is prorogued, and the record has not been tranſcribed, the court will not on motion grant leave to take out execution. Bunb. 131.—— If error in parliament is not tranſcribed in fourteen days, the defendant in error, on motion, ſhall be at liberty to take out execution if it is not tranſcribed and certified in eight days. Bunb. 69.

So, a writ of error lies into parliament upon a judgment given in *B. R.*, either in a cauſe brought there by writ of error, or originally commenced there.

(*a*) Saund. 346. Carth. 180. S. P. † But he may on the affirmance of the judgment, *vide* next caſe, and the ſtat. *infra*.

And though upon a judgment in the King's Bench, ſince the 27 *Eliz. c.* 8. the party may elect either to bring a writ of error in the Exchequer-chamber, or in parliament; yet if the cauſe commenced in the King's Bench by (*a*) original writ, there lies no writ of error but into parliament. Alſo, if he elects to bring error into the Exchequer-chamber, regularly, he cannot after bring error into parliament upon the firſt judgment †.

Vide 2 Roll. Abr. 492. 2 Lev. 232.

And therefore it ſeems, that if a writ of error is brought upon a judgment in the Exchequer-chamber, where the judgment is affirmed, and after error is brought upon the ſame judgment in the parliament; this writ of error is no *ſuperſedeas*; but if the writ of error is brought upon the judgment in the Exchequer-chamber, it is a *ſuperſedeas*.

[By § 12 of the ſtatute of 6 *Ann. c.* 26., which eſtabliſhed a court of Exchequer in *Scotland*, a writ of error is given from that court to parliament.]

2. Of Writs of Error into the Exchequer-chamber.

As no writ of error lay of a judgment in the King's Bench, but in parliament, and as the ſubjects were often diſappointed of their writ of error by the not ſitting of parliament, or by their being employed in publick buſineſs when they did ſit; therefore,

(*b*) Therefore this act extends only to ſuch caſes in which there is no remedy but in parliament, but not to errors in fact, for theſe might before have been examined in B. R. 2 Lev. 38. adjudged, Vent. 207, 208. adjudged, Cro. Jac. 5.

By the 27 *Eliz. c.* 8., reciting, that erroneous judgments in *B. R.* were (*b*) only to be reformed in parliament, it was enacted, "That where judgment ſhould thereafter be given in *B. R.* in "(*c*) (*d*) debt (*e*), detinue, covenant, account, caſe, ejectment, or "(*f*) treſpaſs (*g*) firſt commenced there, (*h*) other than ſuch "where the queen ſhall be party (*i*), the plaintiff or defendant, "againſt whom ſuch judgment ſhall be given, may at his election ſue out a writ of error directed to the chief juſtice, commanding him to cauſe the record, and all things concerning "the ſaid judgment to be brought before the judges of the Common Pleas and barons of the Exchequer, which being of the "degree of the coif, or ſix of them, ſhall examine the errors "aſſigned or found, and thereupon reverſe or affirm the judgment, other than for errors concerning the juriſdiction of the "court of King's Bench, or for want of (*k*) form in any writ, &c. "or proceeding, and (*l*) after the ſame (*m*) ſhall be brought back "in

" in *B. R.*, that (*n*) further proceedings may be had thereupon, " as well for execution as otherways."

so adjudged in B. R. contrary to

the opinion of the judges in the Exchequer-chamber.—But that errors in fact may be aſſigned in the Exchequer-chamber, and if denied, tried by *niſi prius*, and how, *vide* Cro. Eliz. 731. Hob. 5. Cro. Car. 514. 1 Jon. 410, 411. (*c*) Not replevin, 2 Roll. Rep. 434. agreed *per cur.* (*d*) Extends to their heirs, executors, and adminiſtrators. Cro. Eliz. 294, 295. 6 Co. 80. a. (*e*) Error lies not upon a judgment in a *ſcire facias* againſt bail. Yelv. 157. Cro. Jac. 171. Lancaſter and Keyleigh. Cro. Car. 300. adjudged. Jon. 325. adjudged.——Yet Cro. Eliz. 730. it was adjudged contrary by all the judges and barons except two, for that it was within the intent of the ſtatute, and in nature of an action of debt.——That error lies upon a judgment in a *ſcire facias* againſt executors, upon a judgment in debt, within the equity of the ſtatute. Cro. Car. 286. *per curiam dubitatur.*——The *ſcire facias* is but to have execution of the former judgment. Cro. Car. 464. [A judgment on a *ſcire facias* grounded upon one of thoſe actions mentioned in the ſtatute, is in effect a part of the firſt ſuit, and the Exchequer-chamber, having cognizance of the original action, hath alſo cognizance of all its dependencies; *per* Hale, 1 Mod. 79. See Cro. Jac. 384. Cro. Car. 143. Hob. 72. 1 Mod. 297. 5 Mod. 200. 3 Atk. 297. Error will clearly not lie in the Exchequer-chamber upon an award of execution in a *ſcire facias* only, without including the judgment in the former action. Bertie v. Clutterbuck, 2 Str. 1102. Andr. 287. Marquis of Powis' caſe, 3 Atk. 297.]——But *vide* Cro. Jac. 384. Cro. Car. 143. Hob. 72. Mod. 297. (*f*) Not reſcous, becauſe more than treſpaſs, and treſpaſs would not have lain becauſe the cattle reſcued were the cattle of the defendant himſelf; and there is a writ of reſcous in the regiſter diſtinct from treſpaſs. Ody and Yates, Moor, 694. pl. 963. by all the juſtices held clearly. Cro. Jac. 171. cited. (*g*) It lies not upon any judgment affirmed upon error brought in B. R. 2 Bulſt. 162., nor upon a judgment in a *ſcire facias* upon ſuch judgment affirmed in B. R. Roll. Rep. 264. Salk. 263. pl. 4. S. P. adjudged.—Nor upon a ſuit by original. Saund. 346. Carth. 180. S. P. admitted. [*Vide* Dougl. 352. note.] (*h*) It lies in debt upon the ſtatute of tithes. Sid. 240. ſaid to have been adjudged.——But whether it lies in debt upon the ſtatute of uſury, Sid. 240. *dubitatur*, and *vide* Vent. 49. [It is now ſettled that it does. Lloyd v. Skutt, Dougl. 350.] It lies in debt *qui tam*, upon the ſtatute for abſenting from church, for the king is not properly party, though to have part of the penalty. Raym. 275. adjudged. (*i*) Not in an action of *ſcandalum magnatum*, Lord Say and Seal v. Stephens. Jon. 194. adjudged by three judges againſt one. Ley, 82. adjudged. Cro. Car. 142. Earl of Stamford and Needham. Sid. 143. Vent. 49. (*k*) Sid. 253. (*l*) So, if the plaintiff in error be nonſuit, or the ſuit be diſcontinued. And. 144. 2 And. 123. (*m*) So that no execution can be granted out of the Exchequer-chamber. Style, 238. (*n*) Where after reverſal and judgment *quod recuperet*, and the record remanded, a writ of inquiry may be awarded, &c. Foldoe and Ridge, Cro. Jac. 206. Noy, 129. Yelv. 74.

And by the ſaid act it is further enacted, " That ſuch reverſal " or affirmation ſhall not be final, but the party grieved may " bring error in parliament."

3. Of reverſing Judgments in the Court of Exchequer.

Before the ſtatute of 31 *E.* 3. *c.* 12. (*a*) errors in the Exchequer were ſometimes examined in (*b*) parliament, and ſometimes before commiſſioners, by force of the king's writ under the great ſeal.

4 Inſt. 72. Moor, 566. (*a*) Writs of error upon judgments were there ſeldom brought. Sav. 31. (*b*) Roll. Rep. 14, 15.

By that ſtatute, in all caſes touching the (*c*) king, or other perſon, upon complaint of error in proceſs in the Exchequer, the (*d*) chancellor and (*e*) treaſurer ſhall (*f*) cauſe the record to be brought before them, and taking to them the judges* and other ſage perſons, ſhall call before them the barons to hear the cauſe of their judgment; and, if upon examination, error be found, ſhall amend the rolls, and ſend them into the Exchequer to have execution.

(*c*) The king may have error here. *Vide* Co. 42. a. 3 Co. 1. (*d*) By 31 Eliz. c. 1. the not coming of the lord chancellor or lord treaſurer, or either of them, at any day of adjournment, ſhall be no diſcontinuance, ſo as one of them, or both chief juſtices come, and are preſent.—But this ſtatute not providing remedy where they came not at the return of the writ of error, *vide* 2 Leon. 59. it was enacted by 16 Car. 1. c. 2. that if the chief juſtices, or either of them, or the chancellor or treaſurer ſhall not come at the return of the writ of error, it ſhall be no abatement or diſcontinuance; but no judgment ſhall be given, unleſs both chancellor and treaſurer ſhall be preſent. (*e*) Intended of the treaſurer of England; and at the time of making

making this ſtatute, the offices of treaſurer of England and of the Exchequer were in ſeveral hands. (*f*) Though the barons only are judges, yet the treaſurer together with them hath the cuſtody of the records, and therefore the writ of error is to be directed to him and the barons, and it is, though the lord treaſurer and treaſurer of the Exchequer are the ſame perſon. 4 Inſt. 105. Sav. 35, 36. —* If the chancellor and treaſurer do not call in the other juſtices it ſeems to be error. 8 H. 7. 13.

Carth. 388. *Vide* the Banker's caſe.

In the *banker's caſe* adjudged in the Exchequer, which came before the lord keeper, *&c.* purſuant to the above ſtatute, the lord chancellor and three of the judges were of opinion, that the judgment of the Exchequer ſhould be reverſed; and then the queſtion was, whether the judgment of the court ſhould purſue the opinion of the majority of the judges, or that of the lord keeper and the three judges? and three of the judges were of opinion, that the majority of the judges ſhould govern this judgment; but the others being of a contrary opinion, the judgment was reverſed, which was pronounced by my Lord Keeper *Somers*.

Rex v. Cotton, 2 Vez. 298. Parker, 142.

[A writ of error from a judgment in the court of Exchequer iſſued returnable in the Exchequer-chamber, pending which the plaintiff in error died; whereby the writ abated. Lord Chancellor *Hardwicke*, and the two Chief Juſtices *Lee* and *Willes*, were of opinion, that the new writ could not be properly to the Exchequer-chamber, becauſe the record did not reſide with them, and the words of the writ are *record. quod coram vobis reſidet*; for only a tranſcript of the record is ſent into the Exchequer-chamber, and the record itſelf remains in the court of Exchequer. But the court made a rule for a *remittitur* to be entered on the record, together with a ſuggeſtion of the death.]

4. Of Writs of Error into the King's Bench.

(*a*) 34 Aſſ. 7. 37 Aſſ. 5. Roll. Abr. 745. F. N. B. 22. but for this *vide* 4 Inſt. 356.

The court of King's Bench ſuperintends the proceedings of all other inferior courts, and being the king's own court in which he formerly ſat in perſon, by the plenitude of its power corrects the errors of thoſe courts. Hence it is, that (*a*) a writ of error lies in this court of a judgment given in the (*b*) King's Bench in (*c*) *Ireland*.

Keilw. 202. 5 Co. 18. a. Calvin's caſe, Leon. 55. Yelv. 118. Style, 386. Vaugh. 290. 402. and *per* Roll. Rep. 17. it is ſaid, *per* Coke, that Ireland was annexed to the crown of England by conqueſt, and therefore, &c.; but *Q.* 2 Bulſt. 163.—It lies not in the parliament of Ireland. Roll. Rep. 17. *per* Coke. (*b*) Upon a judgment *in Banco* there, it muſt be brought *in Banco Regis* here, &c. F. N. B. 22. Yelv. 118. [But now by ſtat. 23 Geo. 3. c. 28. § 2. no writ of error or appeal from the courts in Ireland ſhall be received or adjudged in any court in this kingdom.] (*c*) Upon a judgment in Calais, when under the ſubjection of the king of England, a writ of error lay in B. R. 4 Inſt. 282. Raym. 174. S. P. cited. Vaugh. 290. 402. S. P. cited; but yet *vide* Keilw. 202. S. P. *cont.*——But it lies not upon any judgment in Scotland, becauſe a diſtinct kingdom, and governed by diſtinct laws. Show. Par. Caſes, 33.

Roll. Abr. 744-5. Roll. Rep. 287. 29 Aſſ. 47. 4 Inſt. 80.

So, a writ of error will lie of a judgment given in Chancery on the common law ſide, called the *petty-bag*, as upon a *ſcire facias* upon a recognizance, although both courts were before the king himſelf, and to (*d*) ſome purpoſes are the ſame.

Dyer, 315. *& vide* Moor, 570. pl. 778. (*d*) As if iſſue be joined in Chancery, it muſt be tried in the King's Bench, and the record delivered over *per proprias manus* of the chancellor. 2 Saund. 23. 2 Keb. 621. Lev. 283. Sid. 436. Mod. 29. Jefferſon and Dawſon. [No traces of any writ of error being actually brought from the common law ſide of the court of Chancery into B. R. are to be met with later than the fourteenth year of Queen Elizabeth, A. D. 1572. Dy. 315. And Lord Keeper North

North in 1682 declared, that no ſuch writ of error lay, that the books were founded only on the ſingle opinion of Lord Dyer in the above caſe, and that he would grant injunctions againſt them. 1 Vern. 131. 1 Eq. Caſ. Abr. 129. This opinion of the Lord Keeper, Sir W. Blackſtone ſays, ſeems not to have been well conſidered. However, there are reſpectable authorities in confirmation of it. Lamb. Archion. 69. The opinion of Mr. Juſtice Choke, Yearl. 37 H. 6. 13. b. and 11 E. 4. 9. a. Bro. tit. Error, pl. 95. At the ſame time it muſt be acknowledged, that the learned commentator cites authorities equally reſpectable in oppoſition to it. 18 E. 3. 25. 27 Aſſ. 24. 29 Aſſ. 47.]

If a peer be attainted before the lord high ſteward, a writ of error lies in the King's Bench of ſuch attainder, and the party has no other remedy*. Sid. 208. Lev. 149. *per* Twiſden.

* Error lies in parliament, upon an attainder for treaſon; for though the ſtat. 33 H. 8. 20. ſays, that judgment of attainder by common law, ſhall be of as good force, as if done by authority of parliament, this ſhall be intended of a lawful attainder. Hale's Hiſt. Pow. and Juriſd. of Parliament, 19. 4 Inſt. 21.

A writ of error lies of a judgment in the Common Pleas into the King's Bench, which only can correct the errors of that court, and from thence into parliament. 4 Inſt. 22.

A writ of error lies into the King's Bench of a judgment in a county palatine, for though theſe are ſuperior courts and have *jura regalia*, yet their juriſdiction is derived from the crown. 4 Inſt. 214. 223. Roll. Abr. 745.

If an erroneous judgment be given in *Durham* in the Chancery, upon proceedings according to the common law, or before the juſtices of the biſhop, a writ of error lies before the biſhop himſelf, and if he gives an erroneous judgment, error lies in *B. R.* 4 Inſt. 218.

If the juſtice in eyre gives an erroneous judgment at a juſtice-ſeat in a foreſt, a writ of error lies thereupon in *B. R.* 4 Inſt. 297.

By the 34 & 35 *H.* 8. *c.* 26. § 113. Errors in judgment in pleas real and (*a*) mixt, before the juſtices in their great ſeſſions in *Wales*, ſhall be redreſſed by error in *B. R.* in *England*; but errors in pleas perſonal ſhall be reformed before the (*b*) preſident and council.

(*a*) In ejectment, Griffith's caſe, Moor, 248. pl. 391. adjudged. Cro. Eliz. 104. adjudged. (*b*) This court is diſſolved by the ſtatute of 1 W. & M. ſtat. 1. c. 27., and by the ſame act, errors in pleas perſonal are to be redreſſed as errors in pleas real and mixed were by 34 & 35 H. 8. c. 26.

5. Of Writs of Error into the Common Pleas and Inferior Courts.

If an erroneous judgment be given in (*c*) *London*, or other place, which is a court of record, the party grieved ſhall have a writ of error, and this writ may be returned into the Common Pleas, or into the *King's Bench*, at the pleaſure of him who ſueth the ſame. F. N. B. 44.

(*c*) Though error lies not in B. R. upon a judgment given in London, yet it lies upon a judgment given at Newgate, which is upon commiſſion in their ſeſſions. 2 Leon. 107. ſo held, and *vide* 2 Roll. Rep. 97. 2 Lev. 223. † ——— † If error be of a judgment in the ſheriff's court in London, it ſhall be, before the mayor and ſheriffs in the huſtings. 4 Inſt. 248. F. N. B. 22. (H) *Vide* Priv. Lond. 164. 168.

No writ of error lies *in Banco* or *Banco Regis*, upon a judgment given within the five ports; but by cuſtom ſuch judgment is examinable by bill in nature of a writ of error *coram domino cuſtode ſeu guardiano quinque portuum apud curiam ſuam de Shepway*. 4 Inſt. 224. See the courts of Cinque Ports.

If a judgment be given in the court of Stannaries of the duchy *Cornwall*, (*d*) no writ of error lies upon this *in Banco* or *Banco Regis*, becauſe it hath not been uſed; but of this there may be an appeal Roll. Abr. 745. l. 20. (*d*) That is, for any mat-

ters touching the Stannaries, to the guardian of the Stannaries, and from him to the prince; and when there is no prince, to the king's council.

otherways, upon a judgment there given upon collateral matters. 3 Bulſt. 183. *per* Coke, Chief Juſtice, ſaid to have been ſo reſolved upon a conference by all the judges, as is ſeen recorded in Chancery in the petty-bag office. Q. Owen, 8. Sid. 233.

Roll. Abr. 745. but *vide* A writ of error lies in the *Common Pleas* upon a judgment given before the judges of aſſiſe.

Leon. 55. 3 Leon. 159. Dyer, 250. Moor, 78. And. 12. N. Bendl. 153. Cro. Eliz. 26. Carter, 221.

18 E. 3. 14. Roll. Abr. 745. Upon a judgment given in the *Huſtings* in *London*, a writ of error lies at *St. Martin's* before certain juſtices.

Lev. 309. 2 Saund. 253. S. P. and that upon a judgment of the ſaid juſtices, a writ of error lies in parliament, *vide* 2 Leon. 107. It lies not from the courts of the city of London to B. R. though it does lie thither, from all other corporation courts. 2 Burr. Rep. 777. ——— An appeal lies to the houſe of peers from a decree in the mayor's court. See the caſe of Littlebury and Buckley, *poſt*, tit. Evidence (G). [In the caſe of Harriſon v. Evans, 6 Br. P. C. 181. on a judgment in the ſheriff's court in London, a writ of error was returnable in the court of Huſtings there, and on the judgment of that court, a ſpecial commiſſion of errors was directed to five of the twelve judges, or any two of them, upon whoſe judgment a writ of error was brought returnable in parliament.]

6. Where a Writ of Error lies in the ſame Court in which the Record is.

F. N. B. 21. Poph. 181. Roll. Abr. 746. If upon a judgment in *B. R.* there be error in (*a*) the proceſs, or through the default of the clerks, it ſhall be reverſed in the ſame court by writ of error ſued there before the ſame juſtices.

(*a*) And therefore the 27 Eliz. c. 8. which gives a wirt of error into the Exchequer-chamber, extends not to errors in fact, for theſe might have been examined in B. R. 2 Lev. 38. Vent. 207. Cro. Jac. 5. S. P. adjudged.

3 Inſt. 214. So, if one is indicted of treaſon or felony in *B. R.* or, being indicted elſewhere, the indictment is removed in *B. R.* and by proceſs of that court he is erroneouſly outlawed, and ſo returned; a writ of error may be brought in *B. R.* for the reverſal thereof.

Sid. 208. Cornhill's caſe, adjudged. Lev. 149. S. C. adjudged, and Alſo, if an erroneous judgment in point of law be given in *B. R.*, upon an indictment in *London*, a writ of error may be brought in the ſame court; for though in civil caſes error does not lie in the ſame court, unleſs for a matter of fact; yet in criminal caſes it lies as well for an error in law as fact.

ſaid, though it may be brought in parliament, that does not prove but it may be brought here alſo.—But according to 1 Sid. 208. it ſeems that this was only for error in fact. And Q. If it could be for error in law? And ſee *infra*.

(*b*) Fitz. N. B. 21. (*c*) Moor, 186. pl. 332. Yelv. 157. Poph. 181. But when the term is paſt, the roll is the record, and admits of no alteration. Co. Lit. 260. a. *vide* tit. Amendment, 108.—* As erroneous judgment may be ſtayed, by moving in arreſt of judgment, within four days. In (*b*) *Fitz. N. B.* it is ſaid, that a judgment cannot the ſame term it is given be reverſed in *B. R.*, without a writ of error, though ſuch judgment may in the Common Pleas. But it does not ſeem that there is any foundation for this diſtinction, (*c*) for during the term, in which any judicial act is done, the record remains in the breaſt of the judges of the court; and therefore the roll is alterable during the term, as they ſhall direct*.

But

But if an erroneous judgment be given, and the error lies in the judgment itſelf, and not in the (*a*) proceſs, a writ of error does not lie in *B. R.* of ſuch judgment. Roll. Abr. 749. 7 H. 6. 30.

(*a*) As if the court awards an exigent where they ought to award a *pluries capias*. Roll. Abr. 746.—They may reverſe their own judgment for falſe *Latin*, becauſe this is not the default of the court, but of the clerks. 7 H. 6. 30. Roll. Abr. 746.——Where by reaſon of fraud, &c. a judgment may be vacated after the term in which entered, *vide* 2 Roll. Abr. 724.——If judgment be given in an action in B. R. and there alſo execution be awarded, a writ of error *quod coram vobis reſidet* does not lie in B. R. *in adjudicatione executionis*. Roll. Abr. 746-7. Roll. Rep. 65. S. C.

If two bring a writ of error in *B. R.*, upon a judgment in an aſſiſe, and pending the writ one of the plaintiffs dies, and after, the court, not knowing of the death of one of them, reverſes the judgment; and after he, againſt whom the judgment was reverſed, brings a writ of error in the ſame court of *B. R.*, and aſſigns the death of one of the plaintiffs in the firſt writ of error, which was the act of God, not the error of the court, it ſeems the writ well lies. Roll. Abr. 747. Cro. Eliz. 105. Like point adjudged. 4 Leon. 60. S. P.

If a record is removed by writ of error out of the Common Pleas into the King's Bench, and the writ of error for inſufficiency is quaſhed in the King's Bench, the plaintiff in error may have a new writ *coram vobis reſiden.* but ſuch new writ is not a *ſuperſedeas* in itſelf as the firſt writ was, and therefore he muſt move the court for a *ſuperſedeas*, and put in bail thereon. Carth. 368-9. [In all caſes where the record is actually removed, and the writ of error is quaſhed, error *coram vobis* lies: *ſecùs*, where the record is never removed, as is the caſe where the writ is quaſhed for variance between the writ and the record. Ginger v. Cooper, 1 Str. 607. 2 Ld. Raym. 1403.]

So, if ſuch ſecond writ be quaſhed for inſufficiency, yet the court will grant a new or ſecond writ of error *coram vobis reſiden.* as alſo a *ſuperſedeas* on putting in bail; for ſuch ſecond writ being void is as if there had been none before. Carth. 369, 370.

[Error *coram vobis* does not lie in the King's Bench after error brought in the Exchequer-chamber, and the judgment affirmed; for before the ſtatute of *Eliz.* the King's Bench could not examine its own errors in fact after an affirmance in parliament; and the Exchequer-chamber is now in the ſame degree with regard to the King's Bench in thoſe caſes within the ſtatute, as the parliament was before. Lambell v. Pretty John, 2 Str. 690.

Error *coram vobis* lies not in the Exchequer-chamber.] 2 Cr. Pr. 337.

(K) Of aſſigning Errors: And herein,

1. Of the Manner of aſſigning Errors.

UPON a writ of error for want of (*b*) aſſigning errors, judgment is not affirmed, (*c*) but execution goes upon the firſt judgment, ſo that the party can have no coſts; but his remedy muſt be upon the recognizance, by which he is bound to proſecute with effect. Sid. 294. Cowper and Price. 2 Keb. 52. 71. 75. S.C.

(*b*) Error cannot be aſſigned in a record which is not in the court where the writ of error is brought. 11 H. 4. 47. b. Roll. Abr. 760. 769.—Aſſignment of error is in the place of a declaration. 9 E. 4. 32.—Error may be aſſigned in every part of the record. Roll. Abr. 760.——May be moved to the court, though not particularly

particularly assigned. 5 Co. 37. b. Error in fact or in law may be assigned on a judgment by default, Roll. Abr. 756. Style, 122. (c) If a record be removed out of the Common Pleas into the King's Bench by writ of error, and the plaintiff will not assign his error, then a *scire facias* shall issue forth *quare executionem habere non debet*; and, upon summons and two *nihils* returned, the plaintiff shall have execution. 2 Leon. 107. [But a *scire facias*, it seems, cannot issue till the transcript of the record below is removed; and therefore the defendant in error, if the plaintiff is dilatory, must give a rule to transcribe; and if the plaintiff will not do it, he may then *non pros* the writ of error. Ca. temp. Hardw. 351.]

Carth. 40, 41. *per* Holt, C. J. where the errors were assigned in a private manner without giving notice to the defendant in error.

The parties, upon the removal of the record by the writ of error, have no day in court given to either of them; wherefore if the plaintiff in error delay to sue forth his *scire facias ad audiendum errores*, the defendant hath no other way to compel him, but by suing out a *scire facias quare executionem non*, &c. and if, upon such *scire facias*, the plaintiff in error doth not plead, that his errors are assigned, but suffers judgment to pass upon two *nihils*, no errors afterwards assigned shall prevent execution.

And by a rule of the court of *King's Bench*, if the plaintiff in error doth not assign his errors, and give a copy of them to the defendant's attorney in error, by or before the time given by the rule on the *scire facias* is out, the defendant's attorney in error may enter judgment on the *scire facias*, and take out execution thereon, but can have no costs, unless he gives a rule for the plaintiff to assign error on record; which if he doth not do, he may be nonprossed, and then the defendant in error shall have his costs.

Also, by another rule of the same court, when the plaintiff in error hath assigned the general errors, he must give a copy of them to the defendant's attorney, who may plead *in nullo est erratum* to it immediately, and enter both on the roll, paying the plaintiff's attorney 2*s*. 4*d*. for the same.

Yelv. 6, 7. If the defendant in error sues out a *scire facias quare executionem non debet*; this is merely collateral to the record removed, and yet by matter *ex post facto* may become a record; as, if the plaintiff upon the return of the *scire facias* appears, and pleads a release, or other matter, as he well may, then this is a record annexed to the first record removed; but if upon the return of the *scire facias*, the plaintiff appears, and assigns errors, or hath a day given him to assign them, and upon this record assigns his errors insufficiently; this *scire facias* is but a piece of paper filed to the record, no proceedings being thereupon.

6 E. 4. 6. Roll. Abr. 761. Bro. Attaint, 86. In a writ of error it is no good assignment of error, *quod in omnibus erratum est*; for the court is not bound to inquire of the errors, if the party does not shew them.

2 Leon. 82. Cro. Eliz. 611. S. P. In a writ of error to reverse an (*a*) outlawry, errors cannot be assigned by attorney, but the party must appear in person.

Wade & Ux v. Smith, where the husband and wife being outlawed, and the wife refusing to appear, the outlawry could not be reversed, & *vide* Carth. 7. S. P. where a difference was taken, that where the error appears on the face of the record it may be assigned *per attornatum*, but no opinion given thereon. (*a*) A person attainted of treason or felony, before he can have a writ of error to reverse the attainder, must assign his errors, and thereupon have leave from the court to prosecute his writ of error. 2 Hawk. P. C. c. 50. § 11.——And no such writ of error is to be allowed without an express warrant from the king, or the consent of the attorney-general. Sid. 69. Bulst. 71. 3 Mod. 42. Roll. Rep. 175.

[A de-

[A defendant convicted for a miſdemeſnour, and in execution for the fine, may, with leave of the court, aſſign errors by attorney.] Rex v. Stapleton, 1 Str. 443.

If two bring ſeveral writs of error, and ſeveral *ſcire facias*'s to reverſe a judgment in an aſſiſe againſt them, they may aſſign errors jointly. 11 H. 4. 92. b. Bro. Error, 50. Roll. Abr. 761. S. C.

If a writ of error upon a judgment in an aſſiſe be brought by four, and only one appear, and the others make default, he cannot aſſign errors alone, till the others are ſummoned and ſevered. Yelv. 3, 4. Cromwell and Andrews. Cro. Eliz. 891. S. C. adjudged. [In ſuch caſe, he muſt move the court for time to aſſign his errors, till the others can be ſummoned and ſevered. Freſcobaldi v. Kinaſton, Str. 783.]

So, if upon a judgment in a *quare impedit*, a writ of error be brought by the biſhop and incumbent, the incumbent only without ſummons and ſeverance, cannot aſſign errors. Cro. Jac. 94. Lancaſter and Law, adjudged.

If two are outlawed in an appeal of murder, and they bring a writ of error to reverſe it, and one appears, but the other does not, he ſhall not aſſign errors till the other does; becauſe he hath joined with him in the writ of error. Sid. 316. The King and Tothill, adjudged; but *vide* 2 Roll. Rep. 490.

Two brought a writ of error, and made two attornies; upon the *ſcire facias*, the one attorney aſſigned error, to which the defendant took iſſue, and then the other would plead in abatement of the writ: it was held *per Cur.*, if one of the plaintiffs had made default, he ſhould be ſevered; but if they go on, they muſt proceed jointly; and if one attorney will aſſign error, *&c.* without authority from both, we cannot help him, let him take his remedy againſt the attorney. 6 Mod. 40. Shepherd and Baily v. Orchard. Lev. 146.

[A writ of error cannot be nonproſſed without a rule to aſſign errors. But where neither plaintiff in error nor his attorney could be found ſo as to be ſerved with the rule, the court of *K. B.* ordered, that fixing the rule up in the King's Bench office ſhall be good notice.] Leith v. M'Farlan, 3 Burr. 1772. Thomſon v. Baker, Ca. temp. Hardw. 130.

2. Of aſſigning Errors in Fact and in Law.

The plaintiff in error cannot aſſign error in (*a*) fact and error in law together; for theſe are diſtinct things, and require (*b*) different trials. Roll. Abr. 761. Sid. 147. Leon. 105.

(*a*) As that he was under age when he levied a fine. Raym. 231. Vent. 252.——That the plaintiff was a feme covert. Roll. Abr. 761. (*b*) *Viz.* Matters of fact to be tried by a jury, thoſe of law, *i. e.* thoſe appearing on the face of the record, by the judge before whom the record is removed. Yelv. 58.

[And as error in fact and error in law cannot be aſſigned on one writ; ſo, after affirmance on error in law aſſigned, error *coram vobis*, and error in fact aſſigned, ſhall not be allowed.] Burleigh v. Harris, 2 Str. 975.

If the plaintiff in error aſſigns error in fact and error in law, which are not aſſignable together, and the defendant in error pleads *in nullo eſt erratum*; this is a confeſſion of the error in fact, and the judgment muſt be reverſed; for he ſhould have (*c*) demurred for the duplicity. Style, 69. Lev. 6. Salk. 268. pl. 15. 270. pl. 18. 3 Salk. 399. pl. 3. 6 Mod. 113. 206. 2 Ld. Raym. 1005.

(*c*) Where the errors aſſigned were, 1. That the declaration was *minus ſufficiens in lege*. 2. That judgment was given for the plaintiff, when it ſhould have been for the

the defendant. 3. That the plaintiff in the action died before the verdict given; and though it was agreed, that this aſſignment of matter of fact and matter of law was double, and would have been ill on a general demurrer; yet the court held, that the advantage thereof was now loſt by pleading *in nullo eſt erratum*. Carth. 338, 339. Edmonds and Probert.

Sid. 93. Raym. 59.

Alſo, if an error in fact be well aſſigned, *in nullo eſt erratum* is a confeſſion of it, for the defendant ought to have joined iſſue upon it, ſo as to have it tried by the country.

Cro. Jac. 12. 29. 529. Raym. 231. (*a*) Cro. Car. 421. Roll. Abr. 758.

But if an error in fact be ill aſſigned, *in nullo eſt erratum* is no confeſſion of it; as (*a*) if it be aſſigned, that ſuch an one at the time of the return of the *venire* was not ſheriff, and the record be removed into *B. R.* by *certiorari*, there, *in nullo eſt erratum* is no confeſſion of that error, becauſe the record is not in court, that being no part of the record, for the plea is *in nullo eſt erratum in recordo*.

Yelv. 58. King v. Goſper and Shire. [This caſe is not law; where error in fact is aſſigned, the plaintiff muſt conclude with an *averment*, in order to give an opportunity of trying the fact by the country, if the defendant in error chooſes it. Sheepſhanks v. Lucas, 1 Burr. 412. Carth. 367.

So, if the plaintiff in error aſſigns an error in fact, *viz.* that the defendant, who was an infant, did not appear by guardian, but by attorney, and concludes with *hoc paratus eſt verificare*, inſtead of concluding to the country, as he ought to do, though the defendant in error pleads *in nullo eſt erratum*, yet it ſhall not amount to a confeſſion, but ſhall be taken only for a demurrer.

Cro. Car. 12. 29. 52. Yelv. 58. Raym. 231. Vent. 252. 3 Keb. 259. Lev. 76. (*b*) if a man appear and plead as a priſoner *in cuſtodia mareſch.* he cannot after aſſign for error, that he was not *in cuſtodia mareſch.* Cro. Jac. 568. Hob. 264. Roll. Abr. 762.

Alſo, if an error in fact that is not aſſignable be aſſigned, and *in nullo eſt erratum* be pleaded, it is no confeſſion; as if it be aſſigned, that at ſuch a day there was no court of Common Pleas ſitting; becauſe that is againſt the record; and in ſuch caſe *in nullo eſt erratum* is only a demurrer. So, if a man ſay he did not appear, and the record ſay, he did, *in nullo eſt erratum* is no confeſſion, but a demurrer, becauſe it is (*b*) againſt the record.

Cro. Eliz. 155. 281. Yates and Windham. 2 Leon. 2. S. C.

After errors aſſigned, and a releaſe pleaded by the defendant, the plaintiff diſcontinued; and becauſe there was manifeſt error in part of the record remaining in *B.* he obtained a writ out of Chancery to the chief juſtice to remove the reſidue of the record, which being removed in *B. R.*, he would aſſign errors upon a new part removed: it was ruled *per Cur.*, that inaſmuch as the firſt writ was diſcontinued, and this a new writ, the plaintiff is not tied to the former errors, but may ſhew others at his pleaſure; for it is now as if none were aſſigned before, and he may aſſign other errors out of the record; and the removing of the record in this manner was held allowable. But this being entered upon another roll, it was held a miſ-entry, and the plaintiff was put to a new writ of error.

3. Of aſſigning that for Error which appears contrary to the Record.

Roll. Abr. 757.

It ſeems a general rule, that nothing can be aſſigned for error that contradicts the record; for the records of the courts of juſtice,

juſtice, being things of the greateſt credit, cannot be queſtioned but by matters of equal notoriety with themſelves; wherefore, though the matter aſſigned for error ſhould be proved by witneſſes of the beſt credit, yet the judges would not admit of it.

Hence it is, that in a writ of error to reverſe a fine, the plaintiff cannot aſſign, that the conuſor died before the teſte of the *dedimus*, becauſe that (*a*) contradicts the record of the conuſance taken by the commiſſioners, which evidently ſhews that the conuſor was then alive, becauſe they took his conuſance after they were armed with the commiſſion, and the *dedimus* iſſued. Dyer, 89. Roll. Abr. 757. Cro. Eliz. 469. (*a*) But the plaintiff in error may ſay, that after the conuſance taken, and before the certificate thereof returned, the conuſor died, becauſe this is conſiſtent with the record. Roll. Abr. 757. *Vide* head of Fines and Recoveries.

A conuſance of a fine was taken before *R. M.*, one of the juſtices of the Common Pleas, and after, in the proſecution of the fine, the *dedimus* was directed to Sir *R. M.*, he being after the conuſance made a knight, who returned the *dedimus* with his name and title; and this was aſſigned for error, that the perſon who took the conuſance was not the ſame who was impowered to take it; but it was not allowed, becauſe it contradicts the record, which is, that the *dedimus* was directed to Sir *R. M.*, and that Sir *R. M.* by virtue thereof took the conuſance. Yelv. 33. Arundel and Arundel. Cro. Eliz. 677. S. C. Roll. Abr. 757. Cro. Jac. 11, 12. 3 Mod. 141. S. C. cited.

If a writ of error be brought upon a judgment in an inferior court, and the record certified of a court held before the mayor, bailiffs, and burgeſſes of *A.* by cuſtom, it cannot be aſſigned for error, that there is no ſuch cuſtom, for this is contrary to the record, and even what the writ of error itſelf ſuppoſes, *viz.* that they have a court. 2 Bulſt. 243. Whiſtler and Lee, adjudged. Roll. Rep. 53. S. C. Cro. Jac. 359. S. C. and *per totam curiam*, this aſſignment being againſt the record, it is not receivable; wherefore the judgment was affirmed.

If, upon diminution alleged, the plaintiff in error procures an original to be certified, and the defendant ſurmiſes there is a good original; and upon a new *certiorari* granted that is certified, the plaintiff in error cannot aſſign that the proceedings were upon the firſt writ, for that is contrary to the record; for when there is a good writ to warrant the proceedings, a man ſhall never be admitted to ſay the proceedings were upon the bad writ. Cro. Jac. 597. Johns and Bowen. Palm. 428.

If the defendant appears by *John Green*, his attorney, it cannot be aſſigned for error, that the ſaid *John Green* was dead before the day of appearance, becauſe that is againſt the record. Cro. Car. 53. Morris and Fletcher, adjudged upon a writ of error in the Exchequer-chamber. [Nor can it be alleged that the defendant died before the day of *niſi prius*, if the record mentions that he appeared on that day. Plummer v. Webb, 2 Ld. Raym. 1415.]

In a writ of error upon a judgment in the Palace Court held *coram Jacobo Duce Ormond*, it cannot be aſſigned for error, that the duke was not there, becauſe that is contrary to the record, though in fact the court was held before his deputy, according to the patent. Lev. 76. Molins and Wheatly. Sid. 94. Keb. 355. S. C. adjudged.

In a writ of error upon a judgment in an inferior court, it may be aſſigned for error, that the mayor, who was the judge, had not received the ſacrament, and taken the oaths, according to the 2 Lev. 184. Kipply and Tuck. 2 Jon. 81.

S. C. adjudged *per Cur. præter* Wild. 3 Keb. 606. 665. 721. S. C. adjudged *nisi*; but *vide* 2 Lev. 242. 2 Jon. 137. S. P. adjudged *cont.*

25 *Car. c.* 2., becauſe his office is made void, and ſo the proceedings *coram non judice.*

Baker v. Thompſon, Ca. temp. Hardw. 166.

[Where in the deſcription of the juſtices of aſſiſe, *A. & B. juſt., &c. ad capiend. juxta formam, &c.* the word *aſſiſes* was omitted; yet, as it appeared from other parts of the record, that they were juſtices of aſſiſe, the court held, that this could not be aſſigned for error, inaſmuch as it would be contradictory to the record.

1 Roll. Abr. 758. pl. 8.

If *A. B.* is ſworn upon the principal panel, and another of the ſame name is ſworn upon the *tales;* it ſhall not be aſſigned for error that the *A. B.* firſt ſworn, and *A. B.* the tales-man were one and the ſame perſon, ſo as to make it a trial by eleven jurors only; for this is contrary to the record, which ſays, that they who were ſworn on the *tales* were *alii de circumſtantibus;* he could not be *idem* conſiſtently with the record, which ſays, that he was *alius;* and therefore ſuch an averment, contrary to the record, ſhall not be admitted.

Helbut v. Held, 2 Str. 684. 2 Ld. Raym. 1414.

So, it ſhall not be aſſigned for error, that *A. B.*, who was ſworn as a juror, returned upon the principal pannel, was never returned by the ſheriff: for after the joinder in iſſue, the record goes on to the award of a *venire facias* returnable at ſuch a day, *ad quem diem*, it ſays, *jurata inter partes præd. ponitur in reſpectu* till the next term, *niſi prius* the juſtices come, *&c.;* at which time they come, *et juratores unde infra fit mentio exacti unus eorum*, (that is, one of thoſe returned by the ſheriff,) *viz. A. B. venit et in juratam illam juratus exiſtit;* ſo that the record expreſsly ſays, that the *A. B.* who was ſworn, was one of them who was returned by the ſheriff, and therefore the error aſſigned is contrary to the record.

Bradburn v. Taylor, 1 Wilſ. 85.

So, as being contrary to the record, it ſhall not be aſſigned for error, that the defendant filed his warrant to defend by *A. B.* his attorney, and that it appears on the judgment that he appeared and defended by *C. D.* his attorney.

Goodright v. Wright, 1 Str. 25.

A defendant in ejectment cannot aſſign for error, that being an infant, he appeared by attorney.]

4. Of aſſigning that for Error which is for the Party's Advantage.

5 Co. 39. 8 Co. 39.

It ſeems agreed, as a general rule, that a man cannot reverſe a judgment for error, unleſs he can ſhew that the error was to his (*a*) diſadvantage.

(*a*) And therefore a man cannot aſſign error in proceſs, or delay, which is for his own advantage. F. N. B. 21. 8 Co. 59.—But a man may aſſign the want of a warrant of attorney of his own attorney, though it be his own default. 11 H. 4. 44. Roll. Abr. 760.

5 Co. 39. b.

Hence it is, that no man can have a writ of error to reverſe a fine that took any eſtate by it; for it would be trifling with the courts of juſtice, and unreaſonable to defeat the eſtate which he accepted by the fine.

5 Co. 39. b. Moor, 74.

For the ſame reaſon, the conuſor cannot aſſign any error in the grant and render; becauſe by that the eſtate which paſſed from him by his conuſance is reſtored to him, and therefore he ſhall not be admitted

admitted to defeat the eſtate which by his own agreement he accepted.

But if the error be the default of the court, though it be for the advantage of the party, yet the party that hath the benefit by it may aſſign it for error, for the courſe of the court ought to be obſerved. 8 Co. 59. Roll. Rep. 759.

As, if in action of debt it is found, that the defendant owes the plaintiff 5 *l.*, and the jury aſſeſs damages to 2 *d.* and coſts 2 *d.*, and after judgment is given, that the plaintiff ſhall recover *debitum & damna prædict.* to 2 *d.*, and no judgment is given for the coſts, though this is for the advantage of the defendant, yet he may aſſign it for error, becauſe this is the error of the court to alter the manner of judgments. Roll. Abr. 759. Holmes and Twiſte, adjudged, and the judgment reverſed accordingly.

So, if the plaintiff in a ſuit retracts, by which judgment is given againſt him, but he is not amerced as he ought; though this is for his own advantage, yet for that the amercement ought to be parcel of the judgment, and ſo the judgment is not perfect without it, he may aſſign it for error. 8 Co. 59. Beecher's caſe. Cro. Jac. 211. S. C. adjudged.

So, in every caſe, where a judgment is given againſt a man, in which he ought to be amerced, if he be not amerced, he may aſſign it for error, though it be for his own advantage. 8 Co. 59. Roll. Abr. 759, 760. But where this will be aided by the ſtatute of jeofails, *vide* tit. Amendment and Jeofail.

So, if a man be amerced by the judgment, where he ought to be fined; though this be for his advanrage, yet be may aſſign it for error; for the form of the judgment, which is the act of the court, is altered by it. Roll. Abr. 760. 5 Co. 59. Cro. Eliz. 84. S. P. adjudged,

but for this *vide* Cro. Eliz. 65. 107. Poph. 203. 2 Saund. 47. and tit. Amendment and Jeofail.

[So, if one defendant only be charged with the whole of the damages and coſts, this may be alleged for error by the other defendant not charged; for this is an error in the final judgment, it is the fault of the court.] Kent v. Kent, Ca. temp. Hardw. 50. 2 Str. 971. 2 Barnard. 357. 386. 441.

But if in a writ of annuity, the iſſue be found for the plaintiff, and no damages found for him, and judgment be given according to the verdict; the defendant cannot aſſign it for error, that no damages were taxed againſt him, becauſe this is for his advantage; and here the defect is not in the judgment, as it is where it is a *capiatur* for a *miſericordia*, but in the verdict. Roll. Abr. 769. Bent and March, *per Cur.* Roll. Rep. 88. S. C. adjudged. 2 Bulſt. 279, 280. S. C. adjudged.

11 Co. 56. a. S. C. adjudged; by which books it appears, that the plaintiff before judgment releaſed his damages, and had judgment for the annuity only, which made it more clear; and ſo it is in Roll. Abr. 784. S. C.

Upon an iſſue between a peer of the realm and another, if the *venire facias* be *quod ſummoneat* 12 *liberos & legales homines*, and do not ſay, *tam milites, quam alios*, as the regiſter is, (*a*) though the peer of the realm may aſſign it for error, yet the other cannot, becauſe it does not concern him. Roll. Abr. 37. between the Earl of Worceſter and Trade. (*a*) Yet this being the error of the court may be aſſigned for error. *Vide* 2 Saund. 258.

In

2 Saund. 45. Williams Gwyn, adjudged. 3 Keb. 450. 551. 605. S. C.

In a writ of error brought by the tenant, it cannot be aſſigned for error, that the court awarded a *grand cape*, where they ought to have given judgment for the defendant to recover, becauſe the award of the *grand cape* was only in delay of the demandant, and not to the prejudice of the tenant, and therefore not by him to be alleged for error, becauſe not *ad grave damnum tenentis*.

5. Where the Matter aſſigned for Error is aided by the Appearance of the Party, and not being taken Advantage of in proper Time.

Carth. 124. laid down by Holt as a general rule. Salk. 2. S. P.

A man ſhall never aſſign that for error which he might have pleaded in abatement, for it ſhall be accounted his folly to neglect the time of taking that exception.

Carth. 124.

As, if a feme covert bring an action in her own name, *per attornatum*, and the defendant plead in bar to the action, he ſhall never afterwards aſſign the coverture for error.

Roll. Abr. 781. Smith and Odyham.

So, if a feme ſole brings treſpaſs and recovers, and a writ of inquiry of damages is awarded; and before the return thereof, the plaintiff takes huſband; and after the writ is returned, and judgment given thereupon, without any exceptions taken by the defendant; he ſhall not have advantage of this in a writ of error, becauſe the writ was only abateable by plea.

3 H. 6. 9. Roll. Abr. 779, 780. (*a*) Where an error in proceſs is helped by appearance, *vide* Latch. 118.

Alſo, if there be an (*a*) omiſſion of any writ or proceſs, or one writ awarded in lieu of another; yet if the judgment is not given thereupon, but after the party appears and pleads to iſſue, and judgment is given upon the verdict; this is not erroneous, becauſe he had not taken advantage of this before pleading to iſſue. *vide* Cro. Eliz. 83. 167. Style, 237. Vent. 220. 249. Cro. Jac. 424. Bulſt. 143. Cro. Car. 351.

Roll. Abr. 780. Havert and Gibbons. Roll. Abr. 205. S. C. adjudged. 3 Bulſt. 61. S. C.

If a man in *B.* brings a bill upon his privilege, but hath no writ of attachment of privilege; yet if the defendant after appears and pleads, this ſhall be helped by the appearance.

Roll. Abr. 780. Johnſon's caſe. Cro. Jac. 609. 2 Roll. Rep. 225. S. C. adjudged.

If a man be indicted, and no addition be given to him as there ought, yet if the defendant appear and plead to iſſue, and this be found againſt him, it is helped, for the addition is ordained by the ſtatute, that the party who may happen to be outlawed ought to have notice of it; and here he hath notice, and *conſtat de perſonâ* by the appearance.

Cro. Eliz. 582. Thorowgood and Sewys, adjudged.

A *capias* was directed to the ſheriff of *B.*, and it was returned by one who was not ſheriff, and this was held a manifeſt error: but becauſe the defendant had appeared after and pleaded, it was held not material.

Roll. Abr. 781. Lord Powis and Kirtman.

If upon a trial between a peer and a common perſon, the ſheriff does not return a knight, as he ought, yet if the array is not challenged for this, the peer cannot take advantage of it afterwards;

wards; for this is a privilege only which the law gives him, and which he may waive if he pleaſe. [This challenge is taken away by 24 Geo. 2. c. 18. § 4.]

So, if the ſheriff who returns the panel in an aſſiſe was brother to him for whom the aſſiſe paſſed; yet if the party does not challenge the array, it is no error. 3 H. 4. 6. Roll. Abr. 782.

If a verdict be quaſhable for the miſbehaviour of the jury, as for the receiving evidence of one part, after departure from the bar, which was not given in evidence at the bar; if this be not ſhewn in arreſt of judgment, no advantage can be taken thereof in a writ of error, for this ſhall not be examined after judgment. Roll. Abr. 783-4. Cro. Eliz. 616.

The writ was in debt for 40 *l.*, and the *capias* and all the proceſs to the return of the *pluries capias* accordingly, and then the entry was, that *querens obtulit ſe in placito* 40 *s.*, and upon the default of the defendant an exigent was awarded; and the defendant after appeared and pleaded, and confeſſed the action; and this was held no error, being helped by the appearance; for as an appearance ſaves defaults in meſne proceſs, ſo it ſaves the fault of the (*a*) continuance by an *obtulit ſe*. Cro. Jac. 311. Lovelace and Juniper. (*a*) Style, 209. Swift and Nott. Keb. 641. Sid. 173. *& vide* Cro. Eliz. 367.

If a writ be brought to the damage of 40 *l.*, and the plaintiff declares *ad damnum* 200 *l.*, and the verdict gives 30 *l.*, this is no error after verdict, for the writ is (*b*) not abated *de facto*, but only abateable by plea. Palm. 270. (*b*) Here the general rule to be obſerved is, that where the writ is *de facto* a nullity and deſtroyed, ſo that judgment thereupon would be erroneous, there the writ is *de facto* abated; as if an action be brought againſt a feme covert as ſole, this makes another man's property liable, without giving him an opportunity of defending himſelf, which would be contrary to common juſtice; and therefore the writ is *de facto* abated, for which *vide* Cro. Eliz. 121. 185. 193. 330. Coulſ. 106. 2 Leon. 162. 3 Leon. 93. Roll. Rep. 176. Palm. 311. Hob. 37. 162. 279. 281. Godd. 11. Style, 477. Yelv. 56. 3 Co. 85. a. Vaugh. 95.——So, if the return of a *pluries* is laid to be after the beginning of a term, and the *memorandum* of the bill is entered generally of that term; this makes the writ a perfect nullity, for, by the plaintiff's own ſhewing, he had no cauſe of action at the time when the action was brought. Carth. 172.——And in theſe caſes, which are more than matters in form, the party may move in arreſt of judgment, or have advantage of them by writ of error. Jon. 304. Cro. Jac. 654. Cro. Eliz. 722.

If upon an *audita querela* a *ſcire facias* be brought bearing date before the *audita querela*, and the defendant appear, and for this cauſe demur; this fault is cured by the appearance, for the *audita querela* is more of the nature of a commiſſion than a writ; and if the party be in court, the matter ought to be inquired into, without inquiring into the nature of the proceſs by which he was brought in. Sid. 406. Vaughan and Lloyd. Vent. 7. S. C. adjudged, the *ſcire facias* being only in the nature of meſne proceſs, to bring in the party to anſwer. 2 Keb. 461.

But a *ſcire facias* upon a judgment differs, and a fault therein will not be cured by appearance. Sid. 406. Vent. 7. S. P. For this is the foundation, and *quaſi* an original; and if an original ſhould bear date on a Sunday, or other like defect be therein, it would not be helped by appearance.

If a *quare impedit* be brought againſt the biſhop and incumbent only, without naming the patron, though this might have been pleaded in abatement; yet if the defendant plead in bar, *&c.* it cannot after, upon a writ of error, be aſſigned for error; for though the want of the patron's being made a defendant might make Cro. Jac. 651. Sir George Savil and Thornton. Palm. 306. 311. S. C.

adjudged. 2 Roll. Rep. 239. S. C. adjudged. Salk. 4. pl. 10. See too tit. Abatement (K), vol. 1. 19.

make the writ abateable, yet it was not thereby actually abated; and nothing ſhall be aſſigned for error concerning the writ, but what actually abates it.

So, though it be a good plea for a defendant to ſay, that a ſtranger is tenant in common with the plaintiff; yet if he does not plead it in abatement, he ſhall not have advantage of it in arreſt of judgment.

Roll. Abr. 781. 791. Markham and Sir Francis Fortefcue. Roll. Rep. 450. S. C. adjudged. Roll. Abr. 782.

If an action be brought againſt Sir *Francis Forteſcue*, knight and baronet, and he appear, and plead to iſſue, and a verdict and judgment be given for the plaintiff, the defendant in a writ of errer ſhall not aſſign for error, that he was a knight of the *Bath*, and ought to be ſo named, for he has loſt this advantage by appearing to the other name, and thereby concluded himſelf.

If an alien brings a real action as heir to *J. S.* againſt another, and recovers, the defendant cannot aſſign for error, that he was an alien born, inaſmuch as he did not take this exception at firſt, as he ſhould have done.

For this *vide* 2 Hawk. P. C. c. 27. § 107, 8, 9, 10. c. 35. § 8.

Although a perſon acquitted on an erroneous indictment or appeal may be tried again, and cannot plead, that he was acquitted, becauſe his life was never in danger on ſuch erroneous indictment or appeal; yet if the error were in the proceſs only, the acquittal may be pleaded to a ſecond indictment or appeal, becauſe ſuch error is ſaved by the appearance.

Leon. 189. 302. Knight and Savage. (*a*) Yelv. 158. Roll. Rep. 338. and Salk. 266. pl. 11.

If a judgment be given in an inferior court and no (*a*) plaint entered, this is error, and not aided by the appearance of the party; and therefore, where by the record it appeared, that the defendant (*b*) *ſummonitus fuit*, where the firſt entry ought to be *A. B. queritur* verſus *C. D. &c.*, judgment was reverſed for this reaſon.

that the want of a plaint is the ſame as the want of an original in the Common Pleas, which may be certified on alleging diminution; but in records out of inferior courts no diminution can be alleged, but the court muſt take them as they find them. (*b*) Cro. Jac. 108.——And that the court of King's Bench is to take notice of the particular laws and cuſtoms of the place where judgment was given. Salk. 269. pl. 17.

6. Where Matters which might have been aſſigned for Error are aided by a Releaſe, and the Conſent of Parties.

10 Co. 115. Pilfrid's caſe. Where the plaintiff may releaſe damages for

If the plaintiff recovers more damages than he has declared for, as if he declares for 40*l.* and the jury give him 49*l.*, though (*c*) this be error, yet if before judgment he releaſes the overplus, he may take judgment for the 40*l.*

part, and take judgment for the reſt, *vide* F. N. B. 107. Moor, 281. Leon. 92. 2 Bulſt. 280. Brownl. 235. Style, 364. Hard. 58. (*c*) If a man brings a plaint in an inferior court, and in the declaration ſets forth particular demands, which over-run the ſum mentioned in ſuch plaint, though never ſo little, and the jury give a verdict according to the ſums mentioned in the declaration, this is erroneous; for the plaint is in nature of a writ, and is the original and foundation of the whole proceedings; and if the declaration, verdict, or judgment are for more than is contained in the writ or plaint, though beyond it never ſo little, by the ſame reaſon they may go to larger ſums *in infinitum*, and then the plaint or writ would be no direction for the future proceedings of the court; but in ſuch caſe the plaintiff may remit the overplus. Yelv. 5. Noy, 44. 2 Saund. 286.

Alſo, where the jury find greater damages than the party declared of, the court may, to prevent error, give judgment for ſo much as the party declared for, *nullo habito reſpectu* to the reſt, as well as the party may releaſe the overplus, and take judgment for the reſt. Yelv. 45. [And where for this cauſe, a writ of error was brought, the court permitted the plaintiff to enter a *remittur* of the exceſs above the ſum laid in the declaration, on payment of the coſts of the writ of error. Pickwood v. Wright, 1 H. Bl. 643.]

In an *ejectione firmæ*, if part of the things declared for be well demanded, and others not, and the plaintiff have a verdict for the whole, and entire damages given, he may releaſe all the damages in that which is not well demanded, and pray judgment for the reſidue; and this helps the error, if judgment be given accordingly. Roll. Abr. 786. Clive and Vere. Cro. Car. 458.

As in an *ejectione cuſtodiæ terræ & hæredis*, if a verdict be given for the plaintiff, the iſſue being upon the tenure, and entire damages given and coſts, the plaintiff may relinquiſh the damages and coſts, and have judgment of the ejectment of the land only, for that ſuch writ does not lie for the body. Roll. Abr. 784. 786. Clifford's caſe. Dyer, 369. Cro. Jac. 104. 5 Co. 108. and 10 Co. 130. S. C. cited.

So, in an *ejectione firmæ de uno tenemento*, and ſeveral acres of land, upon not guilty pleaded, if a verdict be given for the plaintiff, and entire damages found where the action does not lie for the tenement, for the uncertainty the plaintiff may relinquiſh his damages and have judgment for the lands only, without error. Roll. Abr. 784. 786. Rhetorick and Chappel. 2 Bulſt. 28. S. C. Cro. Jac. 146. Cro. Eliz. 119. 3 Leon. 128. Style, 30. S. P. adjudged.

In a writ of debt for 100*l.* againſt an executor, if the plaintiff counts upon an obligation for 99*l.*, and upon a *mutuatus* by the teſtator for 20*s.*, and upon the iſſue, the jury find for the plaintiff in the whole, and aſſeſs damages entire, where it appeared no action lay againſt the executor upon the *mutuatus* of the teſtator; yet if the plaintiff releaſes the 20*s.* and all the damages, and hath judgment for the reſidue, this judgment is not erroneous. Roll. Abr. 764. Aſhford's caſe. 2 Saund. 286. Like point debated.

In a *quare impedit*, if the jury give damages and coſts, where no coſts ought to be given, for that the ſtatute did not give them, and after judgment is entered *quod nullo habito reſpectu* of the coſts, the court awards that he ſhall recover the damages, this ſpecial entry, without any releaſe of the coſts, ſhall help the error. 2 Roll. Abr. 784. Grange and Denny. Roll. Abr. 363. 3 Bulſt. 174. S. C. adjudged.

If a bill of debt be brought againſt an attorney upon three ſeveral obligations, and upon demand of *oyer*, it appear by the condition of one of the obligations, that the day of payment thereof is not yet come; after a verdict for the plaintiff, upon conditions performed pleaded, and coſts and damages given, though the plaintiff cannot have judgment for this obligation, of which the day of payment is not yet come, yet, upon his releaſe of coſts and damages, he ſhall have judgment for the other obligations. Hob. 178. Roll. Abr. 785. S. C. Saund. 286. S. C. cited.

If in debt upon the ſtatute of uſury it is laid in the writ, that he *corruptivè* let 40*l.* &c. and that he lent 20*l.* &c. but it is not ſaid *corruptivè*, and the defendant pleads *nihil debet*, and it is found againſt Cro. Jac. 104. Woody's caſe.

againſt him, the plaintiff ſhall have judgment as to the 40 *l.*: and in this caſe it was ſaid, that if the defendant had demurred, the plaintiff ſhould have had judgment for this part.

Raym. 395. Cutforthy and Taylor.

If in treſpaſs the plaintiff declares for taking the mare of the plaintiff and ſeveral goods, but does not ſay of the plaintiff, and thereupon the defendant demurs, the plaintiff may have judgment for the mare, and releaſe the action for the reſt.

Roll. Abr. 785. Barber and Pomrey, adjudged; *cont.* Juſtice Jermin. Style, 175. S. C. 2 Saund. 286. Like point upon demurrer debated, but no judgment given, & *vide* All. 29.

In an action of debt for 10 *l.*, if the plaintiff declares upon a leaſe for years, rendering rent at certain feaſts, and concludes & *quia* 10 *l.* of the ſaid rent, for ſuch a time ending at ſuch a feaſt, &c. he brought this action, where it appears by the declaration, that there was 4 *s.* wanting of the 10 *l.*, ſo that the rent in arrear amounted but to 9 *l.* 16 *s.* and thereupon the defendant pleads *nihil debet*, and upon this there is a verdict for the plaintiff, and damages and coſts given; though the demand be entire, *ſcilicet* of 10 *l.*, and it appear by the plaintiff's own ſhewing, that he had no cauſe of action for the whole; yet the plaintiff may releaſe the 4 *s.* and damages, and take judgment for the reſt.

Roll. Abr. 785. Waſhman and Rowe.

If in treſpaſs for an aſſault, battery, and taking his corn, the defendant juſtifies as to the battery in defence of his corn, upon which there is a demurrer, and pleads not guilty as to the corn, upon which iſſue is joined, and found for the plaintiff, and damages taxed thereupon; the plaintiff may relinquiſh the demurrer, and pray judgment on the verdict, and this will not be error.

Roll. Abr. 785. Starr and Cuckow. (*a*) For this *vide* 2 Roll. Abr. 100.

In treſpaſs for a battery againſt two, if one pleads not guilty, and the other pleads a ſpecial plea; and upon this a demurrer by the plaintiff, and it is adjudged for the plaintiff, (*a*) he may relinquiſh his action againſt the other, and have his writ to inquire of the damages againſt him.

Roll. Abr. 785. Brown and Stephens.

In an action of treſpaſs, if there be three iſſues joined, *ſcilicet*, one, not guilty to part; the ſecond, upon a preſcription for common; the third, whether the beaſts *raptim momorderunt* in going to take the common; and the jury find the firſt iſſue for the plaintiff, and the ſecond iſſue for the defendant; but did not inquire of the third iſſue; the plaintiff relinquiſhing the third iſſue may pray judgment for the firſt iſſue, and this ſhall prevent any error.

Co. Lit. 125. a. (*b*) If by conſent the defendant on a *capi corpus* appears by attorney, this is no error. 21 E. 4. 77. b. Roll. Abr. 787.——So, if the defendant appears by attorney upon the exigent by conſent, this is not error. 7 H. 6. 21. Roll. Abr. 787. for the rule therein is *conſenſus tollit errorem*, for which *vide* ſeveral caſes in 5 Co. 40. 2 Roll. Rep. 21. Godb. 428. Noy, 107.

If a *venire facias* be awarded to the coroners, where it ought to be to the ſheriff, or the *viſne* come out of a wrong place, if it be *per* (*b*) *aſſenſum partium*, and ſo entered of record, it will ſtand good.

(*c*) 44 E. 3. 6. 44 Aſſ. 4. Roll. Abr. 787. Roll. Rep. 166.

Upon the rule of *conſenſus tollet errorem*, it hath been (*c*) adjudged, that an action in its own nature local may, by the (*d*) conſent of parties, be tried in a different county: ſo, (*e*) if it be doubtful in which of two counties the action did ariſe, it may be tried

tried by a jury from both counties; and this being done by assent can be no error. Palm. 100. Raym. 372. 2 Jon. 199.

(*d*) But the consent must be entered on record, otherwise it is error; for which *vide* Hob. 5. Roll. Abr. 787. Bulst. 216. Cro. Eliz. 664. Hob. 266. 5 Co. 40. Dyer, 284. Sid. 339. (*e*) 7 H. 6. 21. Roll. Abr. 787. S. C.

[A party who has agreed under a consolidation-rule not to bring a writ of error, is precluded from bringing one, though there be manifest error on the record. Camden v. Edie, 1 H. Bl. 21.

Executors against whom a *scire facias* is sued out to recover damages assessed on an interlocutory judgment against their testator in his lifetime, cannot bring error, if the testator's attorney agreed for him, that no writ of error should be brought *in that action*.] Executors of Wright, Bart. v. Nutt, 1 Term Rep. 388.

(L) What Defence the Defendant in Error may make: And herein of pleading a Release.

THE defendant in error may plead (*a*) a release of all errors, or a release of all (*b*) suits; and these pleas, if found for him, will for ever bar the plaintiff in error. (*a*) 9 H. 6. 48. Roll. Abr. 788. [And a release of errors in the same instrument with the warrant of attorney, and dated the term in which judgment was entered, is good. London v. Pickering, 2 Str. 1215.]——The defendant in pleading a release must lay a *venue*.——But though it be ill pleaded, yet if there are not errors, the judgment will be affirmed. Salk. 268. pl. 15. 270. pl. 18. 3 Salk. 399. pl. 3. 6 Mod. 113. 206. 2 Ld. Raym. 1005. (*b*) Latch. 110. Cole's case resolved *per cur.*

So, where by a writ of error the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar; but where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions real or personal is no bar. Co. Lit. 228. b. 8 Co. 152. Roll. Abr. 788. 2 Roll. Abr. 405.

Also, if a man loses in a real action, and he releases all his right to the land, this shall bar him of his writ of error, for no person that is not entitled to the land, *&c.* can bring a writ of error to reverse a judgment; for the courts of law will not turn out the present tenant, unless the demandant can make out a clear title, possession always carrying with it the presumption of a good title till the right owner appears. 9 H. 6. 46. Roll. Abr. 747. 788. Dyer, 90. a. 3 Lev. 36. Hutchinson's case.

Hence it is, that if a man releases all his right to the land of which a fine was levied, he has thereby barred himself of his writ of error; for his release having for ever excluded him from the land, he can have no writ of error, because no body is entitled who cannot have the land of which the fine was erroneously levied. Cro. Eliz. 469. Roll. Abr. 789.

So it is, if a fine be levied of 120 acres of land, and he that has right to a writ of error make a (*c*) feoffment of the whole, he shall never reverse the fine: but if the feoffment had been made, or a release had been given of twenty acres only, he might yet have a writ of error to reverse the fine as to 100 acres, because Roll. Abr. 788. Cro. Eliz. 46. Moor, 413. Owen, 22. S. C. Wright and

the Mayor of Wickham.

cauſe he has not transferred his right as to thoſe, and therefore may be reinſtated if the fine be erroneous.

(c) A leaſe for years of the land is a ſuſpenſion of the writ of error for the time. Lev. 72. *per cur.* Keb. 350. Bridgm. 57.——But a feoffment is an extinguiſhment thereof. Lev. 72. *per cur.* & *vide* Godb. 26. 4 Leon. 135. 221. Palm. 247. Co. 112. Bridg. 57.

Roll. Abr. 788. Hart's caſe. Noy, 59. S. C. and there ſaid the fine was not pleaded, becauſe not engroſſed, and the engroſſing was ſtaid on purpoſe by the conuſee.

If an infant brings a writ of error to reverſe a fine for his nonage, and his nonage after inſpection is recorded by the court, but, before the fine reverſed, he levies another fine to another; this ſecond fine ſhall hinder him from reverſing the firſt, becauſe the ſecond having entirely debarred him of any right to the land, muſt alſo deprive him of all remedies which would reſtore him to the land.

Roll. Abr. 788. Carrington's caſe. Cro. Eliz. 151. 2 Leon. 211. Moor, 366. Roll. Rep. 306. Bridg. 77.

But if tenant in tail levies an erroneous fine with proclamations, and then levies a ſecond fine, which is alſo erroneous, and dies; if the iſſue in tail brings a writ of error to reverſe the firſt fine, the defendant may plead in bar the ſecond fine; for though there be error in the ſecond, yet till that appears judicially to the court, it muſt be looked upon as a fine duly levied, and conſequently a bar to the plaintiff, becauſe while the ſecond ſtands in force, he cannot have the land. But if in this caſe the plaintiff brings another writ of error to reverſe the ſecond, and the defendant pleads in bar the firſt fine, the plaintiff may reply upon the firſt writ of error that the ſecond fine was erroneous, and upon the ſecond writ that the firſt fine was erroneous, and ſo be relieved againſt both, for here the examination of both fines comes judicially before the court; and if there appears any error, the court will ſet them aſide, and not ſuffer them to ſtand in the way of the plaintiff's right.

2 Jon. 181. Cockman and Farrer. Raym. 461. Vent. 353. 2 Sid. 92.

But in a writ of error to reverſe a fine, the defendant cannot plead the ſame fine now endeavoured to be reverſed, and five years in bar of the writ of error, any more than in a writ of error to reverſe an outlawry can that outlawry be pleaded in bar of the writ of error, *quia non valet exceptio iſtius rei cujus petitur diſſolutio.*

2 Inſt. 518. 2 Bulſt. 244. Cro. Jac. 333. Roll. Rep. 36. Raym. 462. Jon. 181.

So, if a fine be levied of land in ancient demeſne, the lord may reverſe it after five years expired; but if a ſecond fine had been levied, the lord ſhould be barred of his writ of diſceit after five years from the ſecond fine; for a fine of ancient demeſne is not originally within the courts of *Weſtminſter*, and the ſtatute in relation to the bar does not extend their juriſdiction; but when a fine is levied of ancient demeſne, it comes within the conuſance of the king's courts till the fine be reverſed, and by conſequence, they have a juriſdiction of it, and ſo the fine becomes a bar.

11 H. 4. 6. 94. Roll. Abr. 788. (a) Where a man is outlawed in a perſonal action by proceſs upon the original, and brings error; a releaſe of actions perſonal is no bar, becauſe he is

If a man (a) outlawed upon a *rediſſeiſin* releaſes all actions to the recoverer, yet he may have a writ of error of the outlawry, becauſe that this does not belong to the party, but to the king in intereſt, and he may aſſign error in the judgment of the rediſſeiſin to reverſe the outlawry.

is to be reſtored to nothing againſt the plaintiff, though when by the outlawry he forfeited all his goods to the king, he ſhall be reſtored to them and to the law, ſo as to be of ability to ſue. Co. Lit. 288. b. 8 Co. 152. a.

If the tenant, pending a *præcipe* againſt him, aliens in fee, and (*a*) after, judgment is given againſt him, and he brings a writ of error; this feoffment is not any bar to the writ, becauſe he was privy to the judgment after. Roll. Abr. 788. Bridg. 77. Roll. Rep. 306.

(*a*) So, if the tenant, pending a *præcipe* againſt him, aliens in fee, and repurchaſes for life, and after judgment is given againſt him, he ſhall have a writ of error, and his feoffment is no bar. Roll. Abr. 748. 788.——So, after his death his heir ſhall have a writ of error, becauſe of the privity. Roll. Abr. 788.

In a writ of error to reverſe a common recovery, it is no good plea, that the plaintiff pending the writ of error hath entered into part, for before the poſſeſſion was taken from him, he might have error to reverſe the judgment, though not to have reſtitution. Lev. 72. Winn and Lloyd.

In a *ſcire facias* againſt a tertenant, he may plead a releaſe of error, though he be not privy to the judgment. 9 H. 6. 48. Bro. 9. S.C.

But the tertenants cannot plead (*b*) in abatement of the writ of error, but only in bar as a releaſe, *&c.* in maintenance of their title. Lev. 72. [1 Burr. 362.]

(*b*) Where a *ſcire facias* is awarded generally againſt the tertenants, without naming them, and ſeveral are returned warned, and appear, one may plead non-tenure to diſcharge himſelf, though not to abate the writ as to the reſt; as might be done, if all were named in the writ, for which *vide* Holland and Jackſon. Bridg. 72. Roll. Rep. 301, &c. Cro. Eliz. 739. Palm. 123. 227.

In a writ of error againſt the heir of the recoverer within age, and a *ſcire facias* againſt the tertenants; if the parol demurs for the heir, and the judgment is reverſed againſt the tertenant; yet at full age the heir may plead the releaſe of the demandant of the right, or of the errors, and bar him. 9 H. 6. 48. Roll. Abr. 766.

[By ſtat. 10 & 11 *W.* 3. *c.* 14. a writ of error for the reverſing of any fine, recovery, or judgment, muſt be commenced, or brought and proſecuted within twenty years after ſuch fine levied, recovery ſuffered, or judgment ſigned or entered of record.

Although it ſhould appear on the record that the judgment is above twenty years ſtanding, yet cannot the defendant have the benefit of this ſtatute without pleading it, becauſe there is a ſaving of rights of the perſons mentioned in the act, as infancy, *&c.* which may be replied to take off the effect of the plea; and therefore the court cannot take notice of it merely as it appears upon the record itſelf. And this plea, as well as the plea of a releaſe of errors, muſt conclude with praying that the plaintiff may be barred of his writ of error, not that the judgment be affirmed, for they admit the judgment to be erroneous.] Street v. Hopkinſon, Ca. temp. Hardw. 345. 2 Str. 1055. S. C. *Ibid.* 1 Str. 127. 2 Str. 683. 1 Sho. Rep. 50.

(M) Of the Judgment to be given on the Writ of Error: And herein,

1. Where, on the Writ of Error, Part only, or the whole Judgment, ſhall be reverſed.

A Judgment being an entire thing (*a*), cannot regularly be reverſed for part, and affirmed for part; as (*b*) in a *formedon de uno crofto*, meſſuage, *&c.* if the demandant recovers, and in a writ of error it is adjudged, that a *formedon* does not lie of a *croft*, the judgment for the reſidue ſhall be reverſed alſo, becauſe the writ is not good, in as much as there cannot be a good judgment upon a bad writ.

(*a*) For this *vide* Moor, 366. Noy, 117. 2 Leon. 178. Cro. Eliz. 425. 2 Sid. 57. 94. 2 Roll. Rep. 136. Sid. 357. 2 Jon. 374. Carth. 235. (*b*) Ellis and Wallis, Roll. Rep. 2. 2 Bulſt. 214. Allen, 74. Roll. Abr. 774. S. C.

Roll. Abr. 775. & *vide* Allen, 43. Yelv. 209. So, in an action of treſpaſs againſt three, if one dies (*c*) pending the writ, and yet judgment is given againſt all three, in a writ of error upon this judgment, the whole judgment ſhall be reverſed, becauſe it is entire, though the writ by the death abates but againſt one.

(*c*) But *vide* 17 Car. 2. c. 8. by which it is enacted, that in all actions real, perſonal, or mixed, the death of either party between the verdict and judgment ſhall not be alleged for error, ſo as ſuch judgment be entered within two terms after the verdict, & *vide* Sid. 385.——* And the ſtat. 8 & 9 W. 3. c. 11. § 7. the death of one plaintiff or defendant, where there is another ſurviving, ſhall not abate the ſuit, and ſuggeſting the death, it cannot be alleged for error.*

Roll. Abr. 775-6. Eltonhead and Deerman. Allen, 74. S. C. cited. Vent. 27. 2 Keb. 506. 545. Like point; but for this *vide* 16 & 17 Car. 2. c. 8. In an action of debt upon a bill, and upon a contract upon an *emiſſet*, if the defendant pleads *non eſt factum* as to the bill, and *nil debet* as to the contract, and both are found by verdict againſt the defendant, and judgment againſt the defendant *quod capiatur*† for denying his deed; and it is not alſo *quod ſit in miſericordia* as to the contract, as it ought to be, and entire damages given, and a writ of error is brought; for this the whole judgment ſhall be reverſed, *ſcilicet*, as well the judgment upon the bill as for the contract.

where this is aided, tit. Amendment and Jeofail.——† *Capiatur pro fine*, taken away, and other proviſions in lieu thereof. 5 W. & M. c. 12.

Roll. Abr. 776. Bird and Orms. Cro. Jac. 289. S. C. and S. P. adjudged. In a writ of error upon a judgment in treſpaſs againſt ſeveral, if the judgment be erroneous, becauſe one of the defendants was within age, and appeared by attorney, the judgment ſhall be reverſed *in toto* againſt all.

Allen, 74, 75. S. C. cited, and S. P. adjudged. Style, 121. 125. 406. S. P. adjudged.

Roll. Abr. 776. Hayward and Williams, adjudged. If an action be brought againſt *A.* as a feme ſole, where ſhe is covert, and againſt *B.* and *C.*, and they all plead to iſſue, and *A.* as a feme ſole, and judgment is given againſt them all accordingly; in this caſe the baron of *A.* with *A. B.* and *C.* may join in error, and aſſign for error the coverture of *A.*, and thereupon the judgment ſhall be reverſed for all, becauſe it is entire.

If

If there is debt for rent on two ſeveral demiſes, and on the firſt the demiſe and reſervation are laid right; but as to the ſecond, the demiſe is with a reſervation of rent *ſecundum ratam* 18 *l. per ann.* which is a void reſervation, becauſe no certain time or day being appointed of payment, it would ſubject the leſſee to an action of debt every hour (*a*); though the error be only in the ſecond demiſe; yet the judgment being entire muſt be reverſed *in toto*. Carth. 234. 5. Parker and Harris, adjudged in B. R. and the judgment given on demurrer in C. B. reverſed accordingly.

4 Mod. 76. Salk. 262. pl. 2. 2 Vent. 249. 270. S. C. (*a*) So, where *A.* brought an action on the caſe againſt *B.* for words ſpoken of him, and for cauſing him to be indicted, &c. and the jury found for the plaintiff as to both, and entire damages given; yet, it being afterwards held that the words were not actionable, the judgment was reverſed *in toto*; but for this *vide* Cro. Jac. 424. Hob. 6. Roll. Rep. 24. Cro. Jac. 343. Allen, 75. Roll. Abr. 775. Vent. 27. 40.

But in a writ of dower, if the plaintiff recovers by default, and upon this a writ is awarded to the ſheriff or bailiff, where the recovery is to deliver to the plaintiff *tertiam partem per metas*, and to inquire of the value by the year; and how much time is paſt after the firſt demand of dower, and what damages ſhe hath ſuſtained; and upon this the ſheriff or bailiff returns, that he had delivered the third part of the lands, and the value found by the jury to 30 *l. per annum*, and that two years are paſt after the firſt demand and damages 50 *l.* and thereupon judgment is given accordingly to hold in ſeveralty the ſaid third part, and to recover the ſaid damages: in this caſe, though the judgment is not good as to the damages, in as much as it is not averred, that the huſband of the plaintiff died ſeiſed (as the uſe is), nor is it ſo found by the jury; nor was it ſo commanded by the writ to be inquired, by which the judgment as to this is erroneous; yet it ſhall be reverſed only as to this, and ſhall ſtand as to the recovery of the third part of the land. Roll. Abr. 776. Tie and Atkins.

So, in an action of account, if judgment is given *quod computet*, and after, auditors are aſſigned, and upon the account, judgment is given againſt the defendant, and damages and coſts, and after a writ of error is brought upon both judgments, and thereupon the laſt judgment only is found to be erroneous; in this caſe, the laſt judgment only ſhall be reverſed, and not the firſt judgment; but this ſhall ſtand in force, for theſe are two diſtinct judgments, and perfect; for the firſt judgment is *ideo conſideratum eſt quod computet & defendens in miſericordia.* Cro. Eliz. 776. Williams and White. Cro. Eliz. 806. S. C. adjudged.

If a judgment is given againſt executors in an action of debt, and after a *ſcire facias* judgment is given againſt them, to have execution of their proper goods, and a writ of error is brought upon both judgments; in this caſe, if the firſt judgment be good, and the laſt erroneous, the laſt judgment only ſhall be reverſed, and the firſt judgment ſhall ſtand. 5 Co. 32. Pettifer's caſe, & *vide* Roll. Abr. 776.

But if a man recovers in debt upon a judgment, if the firſt judgment be reverſed, the ſecond judgment ſhall alſo. 43 E. 3. 1 Roll. Abr. 777.

Sid. 253. S. P. and the court took time to adviſe, whether, by the reverſal of the firſt judgment, the other was not *ipſo facto* void. Palm. 187. *per* Dodderidge. The reverſal of the firſt judgment does not reverſe the ſecond, but defeats it, ſo that the plaintiff ſhall have no fruit thereof. Palm. 303. S. P. *per* Chamberlain, J.

8 Co. 143. Roll. Abr. 777. After a recovery in a rediſſeiſin, if the firſt judgment be reverſed, the judgment on the rediſſeiſin ſhall be reverſed alſo.

Roll. Abr. 777. But by the reverſal of the outlawry, the original judgment ſhall not be reverſed. Roll. Abr. 777. 2 Brownl. 39. S. P. By the reverſal of the original judgment, the outlawry depending thereupon ſhall alſo be reverſed.

11 H. 4. 48. Roll. Abr. 777. If a man recovers in an annuity, and has a *ſcire facias* thereupon afterwards, and the judgment upon the *ſcire facias* is after affirmed in a writ of error; yet if the firſt judgment of the annuity be reverſed, the other ſhall be alſo.

8 Co. 143. Roll. Abr. 777. If a man recovers upon an original, and hath another judgment in a *ſcire facias*, if the firſt judgment be reverſed, the other ſhall be alſo reverſed.

26 E. 3. 75. Roll. Abr. 777. If a man recovers in a *quare impedit*, and hath a writ to the biſhop, and after recovers againſt the biſhop in a *quare non admiſit*, and after the judgment in the *quare impedit* is reverſed, the judgment in the *quare non admiſit* ſhall be alſo reverſed by this, though this was for the contempt to the king.

Roll. Abr. 777. If the demandant recovers againſt the tenant, and the tenant againſt the vouchee, if the heir of the vouchee reverſes the judgment of the value, becauſe the vouchee was dead at the judgment rendered; this ſhall reverſe the judgment againſt the tenant alſo.

9 Co. 119. Roll. Abr. 777. If the principal is outlawed of felony, and the acceſſary attainted and executed, and after the principal reverſes the outlawry, and is indicted, and found not guilty of the felony; by this reverſal and acquittal, the attainder againſt the acceſſary is annihilated, for his heir may have a *mort d'anceſtor*, it ſeems, becauſe he hath no remedy by writ of error, or otherwiſe, to reverſe it, for this depends upon the principal.

8 Co. 142, 143. 5 Co. 90. b. Roll. Abr. 777. If the conuſee of a ſtatute recovers in detinue by erroneous judgment againſt the garniſhee, and ſues execution; if the garniſhee in a writ of error reverſes the judgment given in the detinue, yet the execution is not reverſed by this, becauſe it is a collateral thing executed.

Leon. 317. Co. 76. b. Hob. 278. Cro. Eliz. 115. 124. 2 Leon. 108. Moor, 565. 2 Jon. 182. If an infant and one of full age join in a fine, and the infant after brings error for the reverſal thereof, it ſhall be reverſed *quoad* the infant only.

F. N. B. 21. Leon. 115. (*a*) By the opinion of ſome books, the fine ſhall be reverſed *in toto*, both againſt the huſband and wife; as Cro. Eliz. 129. Leon. 115. Owen, 21.—But by others, the writ of error ſhall reverſe the fine as to the wife, but no execution ſhall be awarded during the life of the huſband. Bro. tit. Fines, 29. tit. Error, 28. Leon. 116.—And accordingly in 3 Lev. 36. Hutchinſon's caſe, a *vacat* was entered *quoad* the wife only. If huſband and wife join in a fine when they are of full age, it ſhall bind them both; but if the feme be within age, they may join in a writ of error to reverſe it (*a*) during the minority of the wife.

Roll. Abr. 775. F. N. B. 98. Cro. Eliz. 469. If a fine be levied of land, of which part is guildable, and part ancient demeſne, and as to that which is ancient demeſne, the fine be reverſed by writ of diſceit, yet the fine ſhall ſtand for the reſidue;

ſidue; for a mark ſhall be made on the fine, in the nature of a cancelling of that which is ancient demeſne only. Jon. 374. 2 Jon. 182.

[Where a judgment is partly by the common law, and partly by ſtatute, it may be reverſed in part; for that which was a judgment at common law will remain a judgment, and be complete without the other. *Per* Holt, C. J. 1 Salk. 24. Ca. temp. Hardw. 50.

A judgment in an information *qui tam*, &c. may be reverſed as to the informer, and ſtand for the king. Moor, 565.

And wherever the judgments are diſtinct, part may be affirmed, and the other part reverſed. Hence, if a judgment for a common informer give damages for detention, and coſts *de incremento*, the judgment for the penalty may be affirmed, and for the damages and coſts reverſed. But (*a*) where coſts are merely acceſſary to the principal judgment, there, if they are erroneouſly given, the judgment cannot be reverſed as to them only, but muſt be reverſed *in toto*.] Frederick v. Lookup, 4 Burr. 2021. Bellew v. Aylmer, 1 Str. 189. S. P. Kent v. Kent, 2 Str. 673. Ca. temp. Hardw. 50. S. P. Green v. Waller, 2 Ld. Raym. 893. S. P. (*a*) Lampen v. Hatch, 2 Str. 934. Rous v. Etherington, 2 Ld. Raym. 870. 1 Salk. 312.

2. What Judgment ſhall be given on the Reverſal of the firſt.

If judgment be given againſt the defendant, and he bring a writ of error, upon which the judgment is reverſed, the judgment ſhall only (*b*) be *quod judicium reverſetur*; for the writ of error is brought only to be eaſed and diſcharged from that judgment. Cro. Car. 442. Roll. Abr. 774. 2 Saund. 256. Carth. 253, 254. Salk. 262. pl. 2. 263. pl. 4. [Pugh v. Goodtitle on the demiſe of Bailey, Houſe of Lords, 15th May 1787.] (*b*) If the error be error in fact, and not in the record, as for infancy, the judgment ſhall be *quod pro errore prædicto judicium prædictum revocetur*, without ſaying, *& aliis in recordo*. Roll. Abr. 805.—If judgment be affirmed in B. R. upon a writ of error, the judgment ſhall be *quod judicium reditum remanebit ſtabile in perpetuum*. 21 E. 4. 44. Roll. Abr. 805. [If defendant demur for duplicity, and have judgment, the entry ſhall be *quod judicium affirmetur*. Jeffry v. Wood, 1 Str. 439. If a releaſe of errors, or the ſtatute of limitations be pleaded, and found for the defendant, the judgment muſt be, *quod querens nil capiat per breve*, not, *quod judicium affirmetur*. Kirle v. Clifton, 1 Show. 50. Cunningham v. Houſton, 1 Str. 127. Dent v. Lingwood, 2 Str. 683. Street v. Hopkinſon, *id.* 1055. Ca. temp. Hardw. 345. In the Houſe of Lords, if judgment below be given for the plaintiff, and deemed right, it is ſimply affirmed. Counteſs Dowager of Cavan v. Doe on the demiſe of Pulteney, 7 May 1795. So, if judgment be given in the Exchequer or King's Bench for the plaintiff, reverſed in the King's Bench, or Exchequer-chamber, and that reverſal approved by the Lords, their judgment is, that ſuch ſecond judgment be affirmed. Sutton v. Johnſtone, 22 May 1787. Home v. Earl of Camden, 22 June 1795. So, if two former judgments concur, and are deemed right, they need only be affirmed. Foley v. Burnell, Houſe of Lords, 27 April 1789.]

But if judgment be given againſt the plaintiff, and he bring a writ of error, the judgment ſhall not only be reverſed, but the court ſhall alſo give ſuch judgment as the court below ſhould have given; for the writ of error is to revive the firſt cauſe of action, and to recover what he ought to have recovered by the firſt ſuit, wherein erroneous judgment was given. Roll. Abr. 774. 805. S. P. Cro. Car. 442. Yelv. 47. 2 Saund. 256. 317. Show. Parl. Caſes, 57. Salk. 262. pl. 2. Carth. 243. 254. S. P. Ld. Raym. 5. 4 Mod. 106. Skin. 447. pl. 5. Salk. 403. pl. 15.

As in an action upon the caſe for words, if judgment be given againſt the plaintiff, that the words are not actionable, upon which the plaintiff brings a writ of error, and thereupon the firſt judgment is reverſed, becauſe the words are actionable; the court, after reverſal of the firſt judgment, ought to give judgment, that Roll. Abr. 774. Hopkins and Chele. Cro. Car. 509. S. P. and judgment

given accordingly.

the plaintiff ſhall recover; for this court ought to give the ſame judgment which the firſt court might have done.

Roll. Abr. 774. Omulcunrie and Ayres. Cro. Car. 512. adjudged upon a writ of error out of Ireland.

So, in an *ejectione firmæ*, upon not guilty pleaded, iſſue is joined, and a ſpecial verdict found, and upon this verdict judgment given againſt the plaintiff, and after the plaintiff brings a writ of error, in which the judgment is reverſed, the plaintiff ſhall have judgment, and recover his term, his declaration being good, and the law being for him upon the ſpecial verdict; for the court that reverſes the firſt judgment ought to give the ſame judgment which ought to have been given in the firſt ſuit.

Lev. 310. Cole and Green. 2 Saund. 256. S. C. adjudged, and afterwards affirmed in parliament.

If in an action of waſte in the *huſtings* in *London*, judgment is given for the defendant, and after upon a writ of error brought before commiſſioners in *St. Martin's*, according to the cuſtom of the city, that judgment is reverſed, the commiſſioners ſhall give the ſame judgment as before ought to have been given; for the cuſtom of proceeding in *London* ſhall be intended according to the common law, if no precedent appear to the contrary.

2 Lev. 11, 12. Holbeach and Bennet. 2 Saund. 317. 319. S. C. and S. P. as to the repleader agreed, but Hale *contra*. Twiſden held the iſſue was aided by the ſtatute of jeofails, and ſaid, the judgment could not be reverſed for the faults in the avowry; and the judgment was affirmed.

In replevin *in banco*, the defendant pleaded a leaſe made 1 *Octob. &c.* and avowed for rent reſerved thereupon; and the plaintiff, in bar thereof, pleaded *non dimiſit* 1 *Octob. &c. modo & forma*; upon which iſſue being joined, it was found for the plaintiff, and judgment for him, and the defendant brought error in *B. R.* and it was agreed to be an immaterial iſſue, and the judgment erroneous, and yet that the court could not award a repleader, as the Common Pleas might have done (and as the ancient uſage was, but diſuſed for one hundred years); and there being groſs faults in the avowry, it was ſaid, that if they reverſed the judgment, perhaps they muſt give judgment upon the declaration for the faults in the avowry.

Cro. Jac. 206. Faldowe and Ridge, adjudged. Yelv. 74. 76. Noy, 129. S. C. adjudged.

In treſpaſs brought in *B. R.* judgment was given for the defendant upon his demurrer to the plaintiff's replication, and he brought error in the Exchequer-chamber; and this judgment was reverſed, and judgment given *quod recuperet;* and after the record being remanded, a writ of inquiry of damages was awarded, and upon the return thereof, judgment given, that the plaintiff ſhould recover the damages found for him, though the ſtatute 27 *Eliz. c.* 8. mentions only the returning of the record, and that execution ſhall be intended, therefore that all ſhall be done that is neceſſary in order thereto.

(*a*) Carth. 319. Skin. 514.

But in the caſe of (*a*) *Phillips* and *Bury*, where the Houſe of Lords reverſed the judgment that was given in *B. R.* on a ſpecial verdict, there the Houſe of Lords gave a new judgment, which was executed accordingly, on refuſal of the *B. R.* to give a contrary judgment to what they had given before, although it was objected that they could not, having a tranſcript only, and not the record itſelf, before them.

4 Inſt. 270. F. N. B. 19. Skin. 515. S. C. cited.

If in a writ of right cloſe in ancient demeſne, the demandant makes his proteſtation to ſue in nature of a *mort d'anceſtor*, and the

the tenant pleads in abatement, and judgment is given for him; and after, upon falſe judgment brought, the writ is affirmed good, the court of Common Pleas ſhall proceed as the inferior court ſhould have done.

[If the Exchequer-chamber reverſe a judgment in *B. R.* for defendant upon demurrer, they cannot award a writ of inquiry of damages, their power being confined by the ſtat. 27 *Eliz. c.* 8. merely to the affirming or reverſal of the judgment, but they muſt remit the record to *B. R.* with an order to that court to award a writ of inquiry and execution on the return of it. Kent, Ca. temp. Hardw. 51.

Faldowe v. Ridge, Cro. Jac. 206. Witherley v. Sarsfield, 1 Show. 127. Kent v.

It is now ſettled, though it was in one caſe (*a*) denied, that a court of error may award a *venire facias de novo*. And this it may do, after a bill of exceptions allowed, upon a demurrer, to evidence, and after a general verdict, when ſome of the counts are defective.]

Hardwood v. Goodright, Cowp. 89. Grant v. Aſtle, Dougl. 731. Bent v.

Baker, 3 Term Rep. 27.—In Kinaſton v. Mayor, &c. of Shrewſbury, 2 Str. 1051. 4 Br. P. C. 271. Haſwell *qui tam* v. Chaſie, 2 Str. 1124. Andr. 392. Parker v. Wells, 1 Term Rep. 783. Lickbarrow v. Maſon, 5 Term Rep. 367. the Houſe of Lords directed a *venire de novo* to be awarded by B. R. (*a*) Street v. Hopkinſon, 2 Str. 1055. Ca. temp. Hardw. 345.—In Trevor v. Wall, 1 Term Rep. 151. the court of B. R. refuſed to award ſuch a writ, on the ground that the proceedings upon which error was brought originated in an inferior court. But in Davis v. Pierce, 2 Term Rep. 125., where a bill of exceptions had been tendered in the court of Great Seſſions in Wales; and the proceedings were removed by writ of error into B. R., that court being of opinion, that the bill was properly tendered, awarded a *venire de novo* into the next Engliſh county.

3. To what the Parties ſhall be reſtored on the Reverſal of the firſt Judgment.

If a man recovers by erroneous judgment, and by virtue thereof preſents to a church, or enters into the perquiſite of his villein; and after the judgment is reverſed, theſe collateral things executed ſhall not be deveſted thereby; but collateral things executory are, after reverſal, as (*b*) if no judgment had ever been.

8 Co. 142. b. (*b*) In an aſſiſe, if the tenant loſes by verdict, he ſhall be reſtored to the lands, if it be reverſed in a writ of error. 8 H. 6. 2. Roll. Abr. 778.——So, he ſhall be reſtored to the meſne iſſues. 8 H. 6. 2. So, if the tenant loſes in a writ of entry *ſur diſſeiſin*, and after it is reverſed for error, he ſhall be reſtored to the meſne iſſues. Roll. Abr. 778.

If a man recovers damages, and hath execution by *fieri facias*, and upon the *fieri facias* the ſheriff ſells to a ſtranger a term for years, and after the judgment is reverſed, the party ſhall be reſtored only to the money for which the term was ſold, and not to the term itſelf; becauſe the ſheriff had ſold it by the command of the writ of *fieri facias*. 3 Leon. 89. Godb. 27. Goulſ. 103. Cro. Jac. 246.

8 Co. 19. 143. Roll. Abr. 778. Cro. Eliz. 278. Moor, 573. & *vide* Leon. 96.

But if the goods of an outlawed man are ſold by the ſheriff upon a *capias utlagatum*, and after the outlawry is reverſed by writ of error, he ſhall be reſtored (*c*) to the goods themſelves, becauſe the ſheriff was not compellable to ſell thoſe goods, but only to keep them to the uſe of the king.

5 Co. 90. Hoe's caſe. Roll. Abr. 778. S. C. cited. Cro. Eliz. 278. S. P. adjudged, where a termor being outlawed upon the ſtatute of recuſancy, the lord treaſurer and barons of the Exchequer ſold the term. (*c*) If the king grants over the land of a perſon outlawed for treaſon or felony, and afterwards the outlawry is reverſed, the party may enter on the patentee, and needs neither to ſue a petition to the king, nor a *ſcire facias* againſt the patentee. 2 Hawk. P. C. c. 50. § 19. cites 1 And. 188.

If

Roll. Abr. 778. Cro. Jac. 246. Yelv. 179. Brownl. 107, 108. S. P. adjudged. (a) That it would be otherwiſe if ſold to a ſtranger. Yelv. 108. Brownl. 107, 108.

If a man recovers damages in a writ of covenant, as the particular caſe was, againſt *B.*, and hath an *elegit* of his chattels, and of the moiety of his lands; and the ſheriff upon this writ delivers a leaſe for years of land which *B.* had, to the value of 50*l.* to him that recovered, *per rationabile pretium & extentum* (as the words were) to have as his own term, in full ſatisfaction of 50*l.* part of the ſum recovered; and after *B.* reverſes the ſaid judgment, he ſhall be reſtored to the ſame term, and not to the value; for though the ſheriff might have ſold the term upon this writ, yet (*a*) here is no ſale to a ſtranger, but a delivery of the term to the party that recovered, by way of extent, without any ſale; and therefore the owner ſhall be reſtored.

Roll. Abr. 778.

And for the ſame reaſon, if perſonal goods were delivered to the party *per rationabile pretium & extentum*, upon the reverſal of the judgment, he ſhall be reſtored to the goods themſelves.

8 Co. 142. b. 3 Mod. 325. S. C. cited. * This muſt mean of a priſoner in execution.

If in debt upon an eſcape * the plaintiff recovers, and hath execution, and after, the firſt judgment is reverſed; yet the judgment for the eſcape remains in force.

8 Co. 142. a.

But if an action of eſcape be brought againſt the ſheriff, and the judgment upon which it is founded be reverſed before ſuch time as the defendant is forced to plead, he may plead *nul tiel record*.

8 Co. 143. a.

But there is a diverſity between a recovery by prior title, and a reverſal of a judgment by writ of error; as, if a woman hath judgment and execution in dower in ancient demeſne, and it is after reverſed in a writ of falſe judgment; and becauſe ſhe had held the lands for two years between the firſt judgment and reverſal, the value of the land was inquired, and taxed at twenty marks; in a *ſcire facias* againſt her, it was adjudged, ſhe could not plead a recovery in a writ of right cloſe in nature of a *cui in vita*.

Moor, 269. Beverly and Cronwal.

If an advowſon comes to the king by forfeiture upon an outlawry, and the church becoming void, the king preſents, and then the outlawry is reverſed; yet the king ſhall enjoy that preſentment, becauſe the preſentment there came to the king as the profit of the advowſon.

Moor, 269. agreed *per curiam*.

But if a church is void at the time of the outlawry, and the preſentation is thereby forfeited, as a chattel principally and diſtinct of itſelf, there, upon the reverſal of the outlawry, the party ſhall be reſtored to the preſentation.

Cro. Eliz. 170. Ognel's caſe, adjudged. (*b*) *Vide* 13 Co. 20. 22.

If a termor, being outlawed for felony, grants over his term, and after the outlawry is reverſed, the grantee may have treſpaſs for the profits taken between the reverſal of the outlawry and the aſſignment (*b*); for by the reverſal it is as if no outlawry had been, and there is no record of it.

Cro. Jac. 645. Appeſley and Sir John Key, agreed *per curiam*. Palm. 187. 301. S. C.

If after judgment in a *ſcire facias* againſt bail, the judgment againſt the principal is reverſed (*c*); this is no reverſal of the judgment againſt the bail, becauſe it is a collateral judgment by itſelf.

(*c*) But the bail may be relieved by *audita querela*; for which ſee title *Audita Querela*.

Eſcape in Civil Caſes.

ESCAPE in general is underſtood, where any perſon, who is under lawful arreſt, and reſtrained of his liberty, either violently or privily evades ſuch arreſt and reſtraint, or is ſuffered to go at large before delivered by due courſe of law.

For the better underſtanding whereof I ſhall conſider,

(A) Where the Party ſhall be ſaid to be legally committed, ſo that the ſuffering him to go at large ſhall be judged an Eſcape: And herein,

1. Where the Authority by which he is committed ſhall be ſaid to be ſufficient for that Purpoſe.
2. Where the Form of the Commitment, or being in Cuſtody, ſhall be ſaid to be regular.

(B) What Degree of Liberty, or going at large, ſhall be deemed an Eſcape: And herein,

1. With what Strictneſs Priſoners are to be kept.
2. What on this Account ſhall excuſe the Sheriff, Gaoler, *&c.* when acting in Obedience to ſome Authority; as removing a Priſoner on a *Habeas Corpus*, &c.
3. What by Conſtruction of Law ſhall be deemed an Eſcape, though the Party be ſtill in Confinement.

(C) Of the Difference between voluntary and negligent Eſcapes.

(D) Of the Difference between an Eſcape on Meſne Proceſs and Execution.

(E) What Perſons are anſwerable for, and to be charged with an Eſcape: And herein,

1. Of the preceding or ſucceeding Sheriff, Warden, *&c.*
2. Where Sheriffs, Wardens, *&c.* their Superiors or Deputies, are liable at the Election of him who is injured by the Eſcape.
3. Where the Party injured may have his Remedy againſt the Perſon eſcaping; and herein of Eſcape Warrants.

(F) Of

(F) Of the proper Remedy and Nature of the Action to be brought for an Eſcape.

(G) Of the Manner of laying the Action.

(H) Of the Party's Defence who ſuffered the Eſcape; and herein of pleading freſh Suit.

(A) Where the Party ſhall be ſaid to be legally committed, ſo that the ſuffering him to go at large ſhall be adjudged an Eſcape: And herein,

1. Where the Authority by which he is committed ſhall be ſaid to be ſufficient for that Purpoſe.

IT ſeems agreed as a general rule (*a*), that wherever a ſheriff or other officer hath a perſon in cuſtody, by virtue of an authority from a court which hath juriſdiction over the matter, that the ſuffering ſuch perſon to go at large is an eſcape; for he cannot judge of the validity of the proceſs, or other proceedings of ſuch court, and therefore cannot take advantage of any errors in them. Hence the law allows him, in an action of falſe impriſonment, to plead ſuch authority, which will excuſe him, though it be erroneous. But if the court has no juriſdiction of the matter, then all is void, and conſequently, the officer not puniſhable for ſuffering a perſon taken up upon ſuch void authority to eſcape. Carth. 148. 234.

(*a*) This diſtinction is laid down in Moor, 274. Dyer, 175. Poph. 203. Leon. 30. 8 Co. 141. b. 5 Co. 64. Cro. Jac. 3. 280. 289. 2 Bulſt. 64. 256. 2 Saund. 100, 101. 3 Mod. 325.

Upon this diſtinction it hath been adjudged, that if *A.* obtains judgment againſt *B.*, and a year afterwards, without any *ſcire facias*, takes out a *capias ad ſatisfaciendum*, upon which *B.* is taken, and the ſheriff lets him go at large, that this is an eſcape; for though the award of the *capias* (*b*) after the year without a *ſcire facias*, was erroneous, yet the ſheriff could not take advantage thereof, for it was ſufficient authority for him to make the arreſt, and might have been pleaded by him in an action of falſe impriſonment.

Cro. Eliz. 188. Buſhe's caſe. (*b*) Salk. 273. Shirly and Wright, S. P. adjudged; but there ſaid that it would be otherwiſe, had it been on a *capias ad reſpondend.* bearing *teſte* in Trinity term, and returnable in Hilary, becauſe ſuch proceſs muſt be returnable from term to term, otherwiſe it is out of court.

So, where upon a recognizance in Chancery, the conuſee ſued out execution by a *capias ad ſatisfaciend.* by force whereof the conuſor was taken and eſcaped; the court held, that, though the *capias ad ſatisfaciend.* in this caſe was erroneouſly awarded, yet it was a good execution for the party as long as it continued unreverſed, and conſequently, the ſheriff liable for the eſcape.

Cro. Eliz. 576. Sheriff of Durham's caſe, adjudged. Cro. Jac. 3. Moor, 274. 2 Leon. 84. S. P. adjudged; but *vide* Roll. Abr. 709. Yelv. 46. which ſeem contrary.

So,

So, where in debt for an eſcape, it was found by ſpecial verdict, that the plaintiff had outlawed *J. S.* after judgment upon a *capias ad ſatisfaciend.* ſued out within the year, and that two years after the outlawry he was taken up upon a *capias utlagatum*, and the ſheriff ſuffered him to eſcape; it was admitted, that if a *capias utlagatum* had been ſued out within the year, no prayer to charge him in cuſtody had been neceſſary, becauſe the plaintiff might have had a *capias ad ſatisfaciend.* without a *ſcire facias*; but this being after the year, the queſtion was, Whether he could be ſaid to be in execution for the plaintiff in the original action without prayer? and the court held that he was, though no prayer was entered, becauſe he would have been (*a*) ſo, if he had been taken within the year; and here is no difference, for the plaintiff was at the end of his proceſs at the exigent, and no continuance or *ſcire facias* after a *capias utlagatum*, and the very *capias utlagatum*, which is ſued at his charge, imports an election of the body. Salk. 319. Wolf and Daviſon. 5 Mod. 200. S. C. adjudged. (*a*) 5 Co. 88. a. Garnon's caſe, adjudged. Bridgm. 6. Roll. Abr. 810. S. P. adjudged.

If at the petition of *A.* and the reſt of the creditors of *B.*, a commiſſion upon the ſtatute againſt bankrupts is iſſued out againſt *B.*, and thereupon the commiſſioners ſit and offer interrogatories to *C.* and he refuſes to be examined, and by them is thereupon committed to priſon, and the gaoler ſuffers him to eſcape; as the commiſſioners had ſufficient authority to commit, and *A.* was prejudiced by the eſcape, he may maintain an action againſt the gaoler. Roll. Rep. 47. Barnes and Cary, adjudged. Moor, 834. pl. 1123. S. C. adjudged; and note, according to Moor, the action was debt.

So, if there be a ſuit in the eccleſiaſtical court between *A.* and *B.*, in which *B.* is excommunicated, and afterwards taken upon an *excommunicato capiendo*, and ſuffered to eſcape, *A.* may bring an action on the caſe for the eſcape, though it was objected that this was a ſpiritual matter, and that *A.* had other remedy, as by writ of recaption. Lutw. 121 to 123. Slipper and Maſon, adjudged.

Alſo, upon this rule, that the ſheriff cannot take any advantage of the irregularity of the proceedings of a court which hath juriſdiction of the matter, it hath been holden (*b*), if a nobleman be taken in execution, and the ſheriff let him go, it will be an eſcape *. (*b*) 2 Bulſt. 65. * *Qu. de hoc*, the defendant not being liable to be taken in execution, and no court having power to award an execution againſt the perſon of a peer, in a civil ſuit?

Upon the ſecond part of the diſtinction, that an officer ſhall not be liable to an action for the eſcape of a perſon taken on a writ, which iſſued out of a court that had not juriſdiction of the matter; it hath been (*c*) holden, that if *A.* bring an action againſt an officer of an inferior court for an eſcape, and declare that he brought an action againſt *J. S.*, in the court of *Kingſton upon Hull*, upon an obligation made at *Halifax* in *Com. Ebor.* (but do not allege it to be within the juriſdiction of the court), and that he obtained judgment, upon which *J. S.* was in execution, and ſuffered to eſcape by the defendant; that this declaration for want of alleging *Halifax* to be within the juriſdiction of the inferior court, is inſufficient to maintain the action; for though the action be in its own nature tranſitory, yet (*d*) inferior courts being tied down to matters ariſing within their own limits, they muſt ſhew that (*c*) Roll. Abr. 809, 810. Richardſon and Barnard, adjudged. (*d*) So, though a writ iſſue out of a ſuperior court, yet, if ſuch ſuperior court had not juriſdiction of the matter, it will be void,

and the officer may take advantage

that they had conuſance of the matter, otherwiſe their proceedings will be void, as being *coram non judice*, of which the officer may well take advantage.

thereof, as if a *formedon* iſſue out of the King's Bench, or an appeal out of the Common Pleas. 2 Bulſt. 64. & *vide* 5 Mod. 413. Ld. Raym. 397. 5 Mod. 413. Carth. 234.

2 Mod. 29, 30. Squibb v. Hole, adjudged by three judges againſt Juſtice Ellis.

So, if *A.* declares that he proſecuted one *J. S.* in the court of *Ely*, upon a bond made *infra juriſdictionem*, upon which he was in execution, and that the defendant ſuffered him to eſcape; if the jury find that there was ſuch a proſecution, but that the bond was not made *infra juriſdictionem*, the action does not lie; for all that was done was *coram non judice*, and therefore no legal commitment; and though the defendant in the court below pleaded *non eſt factum*, yet that could not give the court any juriſdiction which it had not originally in the cauſe.

Bull v. Steward, 1 Wilſ. 255.

[In an action on the caſe againſt the defendant, bailiff of the borough court of *Southwark*, for an eſcape upon meſne proceſs, it was moved in arreſt of judgment, that the declaration was ill, becauſe it appeared that the plaint in the court below was levied againſt *two* perſons, but only *one* was proceeded againſt, ſo that the plaintiff, by proceſs againſt *one* only, could not have had the effect of his ſuit below. To this it was anſwered, and reſolved *per curiam*, that even ſuppoſing the plaint to be erroneous, yet the officer ſhall not take advantage thereof in a collateral action as this is; he may juſtify the arreſt under the proceſs, and ſhall not be ſuffered to ſay in this action, that the plaintiff could not have the effect of his ſuit below. It was then objected, that the declaration did not allege in what manner the defendant below was indebted to the plaintiff; but only in general that he was indebted: it might be on a judgment, or ſuch a debt as that court had no juriſdiction of: nor did it appear, that the cauſe of action aroſe within the juriſdiction. To this it was anſwered, and reſolved *per curiam* (*a*), that this being after a verdict, they would ſuppoſe every thing proved at the trial which was neceſſary to be proved; and that the cauſe of action aroſe within the juriſdiction, unleſs the contrary could be made to appear upon the face of the record.

[(*a*) But ſee Trevor v. Wall, 1 Term Rep. 151.]

See tit. "*Treſpaſs*" (D).]

2. Where the Form of the Commitment, or being in Cuſtody, ſhall be ſaid to be regular.

(*a*) Bro. Eſcape, 22. (*b*) And therefore it ſeems that an officer who arreſts a

The ſheriff cannot be charged with an eſcape (*a*) before he had the party in his actual cuſtody by (*b*) a legal authority; and therefore if an officer, having a warrant to arreſt a man, ſee him ſhut up in a houſe, and challenge him as his priſoner, but never actually have him in his cuſtody, and the party get free, the officer cannot be charged with an (*c*) eſcape.

perſon on a Sunday contrary to the 29 Car. 2. c. 7. cannot be charged with an eſcape for letting him go again, *vide* 6 Mod. 95. Salk. 78. (*c*) But if an officer refuſes to arreſt a perſon that he may, an action on the caſe lies againſt him; and hence it hath been adjudged, that if a *capias ad ſatisfaciend.* is directed to the coroners of a county, and one of them, when he may arreſt the party, refuſes ſo to do, the

the plaintiff muſt bring his action ſingly againſt the coroner ſo refuſing, for this is a perſonal tort. 2 Mod. 23, 24. See Ld. Raym. 331. 10 Mod. 251. 255.

But if *A.* is arreſted, and in the actual cuſtody of the ſheriff, and afterwards another writ is delivered to him at the ſuit of *J. S.*, upon the delivery of the writ, *A.* by conſtruction of law is (*a*) immediately in the ſheriff's cuſtody, without an actual arreſt; and if he eſcapes, the plaintiff may declare, that he was arreſted by virtue of the ſecond writ, which is the operation it hath by law, and not according to the fact. 5 Co. 89. Froſt's caſe.

(*a*) So, if the ſheriff of Northumberland has a man in cuſtody in Northumberland, and the ſheriff himſelf is in London, and a writ is delivered to him againſt that perſon, he is in his cuſtody immediately upon that writ: otherwiſe, if the man was out of the county at the delivery of the writ; as in caſe the ſheriff was bringing him to *Weſtminſter* on a *habeas corpus*. Salk. 273. pl. 6. *per* Holt, Ch. Juſt.

So, in eſcape againſt the ſheriffs of *London*, the plaintiff may declare, that he levied a plaint in the ſheriff's court againſt *J. S.* being then in the counter, in cuſtody on a former plaint levied againſt him by *J. S.*, and being ſo in cuſtody was ſuffered to eſcape; for the entering of the plaint is of the nature of a writ or precept in another court, upon which the *ſerjeant at mace* arreſts the party by his general authority; and therefore by entering the plaint, and charging the defendant in the counter, he is in actual cuſtody of the ſheriff. Salk. 273. pl. 6. Jackſon and Humphreys.

If *A.* declares againſt the marſhal of the King's Bench for the eſcape of a priſoner (*b*), formerly in the *Fleet*, that he *virtute brevis de habeas corpus*, directed to the warden of the *Fleet*, was *debito modo commiſſus* to the King's Bench; this will not be ſufficient, without alleging an actual commitment, for he cannot be committed on a *habeas corpus*, and the *debito modo* will not help it. 2 Show. 17. pl. 10. Bourne and Cooling, adjudged, and judgment arreſted accordingly.

(*b*) If *A.* obtains judgment againſt *B.* in B. R., and alſo another judgment in C. B., upon which he is taken in execution and committed to the Fleet, and afterwards he removes himſelf to the Marſhalſea by *habeas corpus cum cauſa*, if the marſhal ſuffer him to eſcape, he is liable to both debts. Dyer, 152.

If by *habeas corpus* the body of *J. S.* together with a plaint entered againſt him in the court of *Norwich*, be removed before the chief juſtice of *B. R.*, who upon the return of the writ accepts bail, the acceptance of bail, though before the filing thereof, is a diſcharge of the priſoner; and though afterwards a *procedendo* ſhould be awarded, yet the ſheriff cannot be charged with the eſcape. Cro. Jac. 203. Farneby and Baſſet.

If a perſon out upon bail renders himſelf in diſcharge of his bail, and a *redditit ſe* is entered in the judge's book, and a *committitur* filed in the office, and the priſoner afterwards eſcapes; yet if no notice was given the marſhal of ſuch render, nor any entry made of the commitment in his book, the priſoner ſhall not be deemed in cuſtody ſo as to charge the marſhal with an eſcape; but it ſeems this matter cannot be inſiſted upon after trial. Salk. 272. pl. 3. Watſon v. Sutton.

It hath been held, that entering a *committitur* upon the roll was not ſufficient evidence to charge the marſhal with an eſcape, without proving an actual impriſonment; but that proving the party to be actually in priſon, though there be no entry made in the Sid. 220. Keb. 775. Conny and Jacob.

marſhal's book (without which he pretends he knows not how to take charge of them) is ſufficient.

Wightman v. Mullens, 2 Str. 1226.

[In an action againſt the marſhal for an eſcape, it was laid, that the priſoner being brought before Sir *William Chapple*, one of the juſtices of our lord the king, at his chambers in *Serjeants Inn*, was there committed to the cuſtody of the marſhal at the ſuit of the plaintiff, as by the ſaid commitment may more at large appear. To this the defendant demurred, and ſhewed for cauſe, that it did not appear the commitment was of record. And on argument the court held it ill; for he is not in point of law in the marſhal's cuſtody, till the commitment is entered on record; nor can the court take notice that Sir *William Chapple* had any power to commit him, he being only ſtyled one of the juſtices of the king, which every common juſtice of the peace is.]

And now for the greater ſecurity of creditors, and the better to enable them to prove the actual cuſtody of the priſoner, by the 8 & 9 *W.* 3. *c.* 27. it is enacted, "That if any perſon, deſiring to "charge any perſon with any action or execution, ſhall deſire to "be informed by the marſhal or warden, or their reſpective de- "puty or deputies, or by any other keeper or keepers of any "other priſon or priſons, whether ſuch perſon be a priſoner in "his cuſtody, or not, the ſaid marſhal or warden, or ſuch other "keeper or keepers of any other priſon or priſons, ſhall give a "true note thereof in writing, to the perſon ſo requeſting the "ſame, or to his lawful attorney, upon demand, at his office for "that purpoſe, or, in default thereof, ſhall forfeit the ſum of 50*l.* "and if ſuch marſhal or warden, or their reſpective deputy or "deputies, exerciſing the ſaid office, or other keeper or keepers "of any other priſon or priſons, ſhall give a note in writing, that "ſuch perſon is an actual priſoner in his or their cuſtody, every "ſuch note ſhall be accepted and taken as a ſufficient evidence, "that ſuch perſon was at that time a priſoner in actual cuſtody."

(B) What Degree of Liberty, or going at large, ſhall be deemed an Eſcape: And herein,

1. With what Strictneſs Priſoners are to be kept.

Plow. 36. 3 Co. 44. 2 Inſt. 381. Roll. Abr. 806.

EVery perſon in priſon by proceſs of law is to be kept *in ſalva & (a) arcta cuſtodia*, in order to compel him the more ſpeedily to pay his debts, and make ſatisfaction to his creditors.

(*a*) And by Weſtm. 2. c. 11. *Carceri mancipentur in ferris*, which, my Lord Coke ſays, was enacted in order to oblige them to a more ſpeedy compliance with their duty. 3 Co. 44. a. and 2 Inſt. 381. in his comment on this ſtatute, he ſays, that though priſoners, if need require, may now be kept in irons, yet that it could not be done by the common law.—And Co. Lit. 260. a. he ſays, impriſonment muſt be *cuſtodia & non pœna*, for *carcer ad homines cuſtodiendos, non ad puniendos, dari debet.*

Roll. Abr. 806. 3 Co. 44.

Therefore, if the ſheriff or other officer who hath the cuſtody of a priſoner, either bail him when he is not bailable by law, or ſuffer him

him to go out of the (*a*) limits of the priſon, though with a keeper, and for ever ſo ſhort a time, it is an eſcape. Plow. 36. Dyer, 166. Hetly, 34.

(*a*) For the limits of the Fleet priſon, *vide* 2 Mod. 221, 222.

But the law and proviſion made by *Weſtm.* 2. *c.* 11. being eluded by the acts and contrivances of ſheriffs, and other keepers of priſons, by the 8 & 9 *W.* 3. *c.* 26. it is enacted, "That all priſoners, "either upon contempt or meſne proceſs, or in execution, who "are or ſhall be committed to the cuſtody of the marſhal of the "*King's Bench* priſon or warden of the *Fleet*, ſhall be actually de- "tained within the ſaid priſons of the *King's Bench* and *Fleet*, or "the reſpective rules (*b*) of the ſame, until they ſhall be from "thence diſcharged by due courſe of law; and if at any time the "ſaid marſhal or warden, or any other keeper or keepers of any "priſon, ſhall permit and ſuffer any priſoner committed to their "cuſtody, either on meſne proceſs, or in execution, to go or be at "large out of the rules of their reſpective priſons (except by vir- "tue of ſome writ of *habeas corpus*, or (*c*) rule of court, which rule "of court ſhall not be granted, but by motion made, or petition "read in open court), every ſuch going or being out of the ſaid "rules ſhall be adjudged and deemed, and is hereby declared to "be, an eſcape."

[(*b*) This ſtatute having made the rules to all intents the ſame as the walls of the priſon, it follows, that an eſcape from them, without the marſhal's knowledge, cannot be conſidered as a voluntary eſcape. Bonafous v. Walker, 2 Term Rep. 126.]

(*c*) The intent of a day-rule is, that the priſoners may be brought to Weſtminſter-hall, and by indulgence they have been allowed to go to any of the inns of court, to conſult with their counſel or attornies; but ſuffering them to go on their pleaſure, as to a playhouſe, &c. is an eſcape. 2 Show. 298. pl. 300.

2. What on this Account ſhall excuſe the Sheriff, Gaoler, &c. when acting in Obedience to ſome Authority, as removing a Priſoner on a *Habeas Corpus*, &c.

The writ of *habeas corpus* is an (*d*) ancient writ, and what the ſubject is by law entitled to; yet (*e*) if a ſheriff or other officer, who hath the cuſtody of a priſoner, by colour thereof, ſuffer the priſoner to go at large, it is an eſcape. 202. 3 Co. 44.

(*d*) Cro. Car. 14. Roll. Abr. 808.

(*e*) Hob. Cro. Car. 14.

As, if a *habeas corpus* be returnable the next term, and the ſheriff or gaoler in the meantime ſuffer the priſoner to go at large, it is an eſcape, though he appear at the return of the writ; for the writ only empowers the gaoler to bring him directly to the court, and if he gives him any liberty in the meantime, it is at his peril. Hard. 476. agreed by Hale, Chief Baron, and the whole court.

So, where a *habeas corpus ad* (*f*) *teſtificand.* was directed to the *marſhal* to carry one *Reynolds* to the aſſiſes at *Wells* in *Somerſetſhire*, who after the aſſiſes was ſuffered to go ſixty miles beyond *Wells*; though he returned again to the *marſhal*, yet it was held an eſcape. Mod. 116. Moſedel's caſe. So ruled upon evidence, and the plaintiff had a verdict for 6200*l.* 3 Keb. 305. S. C.

(*f*) If *J. S.* is in execution, and a *habeas corpus ad teſtificandum* is directed to the gaoler, who, according to the command of the writ, carries the priſoner to give his teſtimony; this is an eſcape. Sid. 13. ſaid by Twiſden to have been adjudged by all the judges.

Mod. 116. *per* Hale. [2 Bl. Rep. 1050.]

So, if the gaoler carry him round about (*a*) a great way for the accommodation of the priſoner, it is an eſcape; but he is not bound to bring him the direct way for fear of being reſcued.

(*a*) That he is to bring him in convenient time, and the moſt convenient way; and this is to be judged of by the judges. Cro. Car. 14. Dalt. Sheriff, 561.

3 Co. 44. Mitton's caſe.

Alſo, it hath been adjudged, that if the ſheriff hath one in execution, and a *habeas corpus* iſſues to have his body in court ſuch a day, and before the return of the writ the ſheriff brings the priſoner to an inn in *Smithfield* in his way to *Weſtminſter*, and the priſoner of his own head goes without any keeper to *Southwark*, and next morning returns again to the ſheriff, ſo that at the return of the *habeas corpus* the ſheriff delivers the priſoner into court, this is no eſcape.

Planck v. Anderſon, 5 Term Rep. 37.

[If a ſheriff, having arreſted a defendant on *meſne* proceſs, keep him in his cuſtody after the return of the writ, and then carry him to priſon, he is not liable to an action as for an eſcape, if the jury find, that the plaintiff has not been delayed or prejudiced in his ſuit.]

Dalton Sheriff, 486.

As the ſheriff muſt be careful that he does not give the priſoner more liberty than by law he ought to do, when he acts in obedience to a lawful authority; ſo he muſt take care that he does not let him go at large by colour of a void authority.

Dyer, 297. a. Roll. Abr. 808. S. C.

Therefore, if one in execution at the ſuit of the king and a private perſon be, by warrant from the lord chancellor or treaſurer, ſuffered to go at large with a keeper, in order to collect the money due to the king; this is an eſcape, as to the private perſon, although he return again to priſon; for the king himſelf cannot licenſe one in priſon to go at large with a keeper.

Cro. Eliz. 893. Colſon v. Roſs and Levet. *Vide* tit. Privilege.

So, where the ſheriffs of *York* pleaded, that they let the priſoner go at large by virtue of a writ of privilege directed to them from the council of *York*; and it not appearing to the court that the writ was a ſufficient warrant for that purpoſe, or that the council of *York* could in ſuch caſe diſcharge a priſoner, the plea was held ill.

Salk. 273. pl. 5. [(*b*) The contrary was adjudged in Sir Thomas Orby's caſe, 1 Ld. Raym. 3. 4 Mod. 353.; but Lord Raymond queſtions the law of the deciſion, becauſe, if the ſum exceeds that which the ſtatute allows a diſcharge for, the Juſtices have no juriſdiction, and the ſheriff is bound to take notice at his peril for what ſum his priſoner is charged in execution.]

If an act of parliament is made for the relief of confined debtors, and purſuant thereto the juſtices of the peace are enabled to diſcharge ſuch and ſuch priſoners, if they authorize the ſheriff to diſcharge a perſon that does not come within the deſcription of the act, and he lets the party go at large, it will be an eſcape (*b*).

Langton v. Wallis, 1 Ld. Raym. 399. 1 Lutw. 582. S. C.

[Debt was brought by the plaintiff, executor of *A.*, againſt the defendant as executor of *B.* formerly ſheriff of the county of *D.* Upon *nil debet* pleaded, the jury found a ſpecial verdict, *viz.* that *A.* recovered a judgment againſt *F.* and ſued a *capias ad ſatisfaciendum* directed to *B.* then ſheriff, *&c.*, which writ was executed by the under-ſheriff, and *F.* being in cuſtody, aſſigned a term for years to the under-ſheriff in ſatisfaction of the money recovered by the

the judgment, and to be diſcharged out of execution, which aſſignment was to be void upon payment of the money recovered by the judgment at a day, after *B.*'s office would determine. Upon this *B.* was diſcharged out of execution, and at the day, *&c.* he paid the money to the under-ſheriff; but the under-ſheriff did not pay the full money to *A.* *B.* died; and *A.* died; and the plaintiff as executor of *A.* brought this action.—It was adjudged, that it did not lie; becauſe the releaſe of *F.* out of cuſtody was an eſcape in the ſheriff, and the receipt of the money afterwards could not purge it.]

3. What by Conſtruction of Law ſhall be deemed an Eſcape, though the Party be ſtill in Confinement.

The marſhal of the King's Bench being ſued to judgment, if he be afterwards taken in execution, he can be admitted to no other priſon but the *Marſhalſea*; and if he is committed to that priſon whereof he is keeper, without ſecuring the priſoners there firſt, it will be an eſcape in law of all the priſoners. Style, 465. *per* Glyn, C. J. *& vide* Dalton Sheriff, 487.

If a woman warden of the *Fleet* priſon marries her priſoner, or if a ſheriff, *&c.* marries a woman in execution with him, in either caſe it will be deemed an eſcape in law. Plow. 17.

If a man hath judgment againſt two (*a*) perſons, and both are taken in execution, if the ſheriff ſuffer one of them to eſcape, he ſhall be anſwerable for the whole debt, though he hath one of them ſtill in cuſtody. Roll. Abr. 810. (*a*) So, if baron and feme are taken in execution, if the feme eſcapes, the ſheriff ſhall anſwer the whole debt, though the baron continues ſtill in execution. Roll. Abr. 810. Cro. Jac. 657. S. P.

By the 8 & 9 *W.* 3. *c.* 27. it is enacted, "That if the marſhal "or warden for the time being, or their reſpective deputy or de- "puties, or other keeper or keepers of any other priſon or priſons, "ſhall, after one day's notice in writing given for that purpoſe, refuſe "to ſhew any priſoner committed in execution to the creditor, at "whoſe ſuit ſuch priſoner was committed or charged, or to his "attorney, every ſuch refuſal ſhall be adjudged to be an eſcape "in law."

(C) Of the Difference between voluntary and negligent Eſcapes.

IT was formerly held, that where the ſheriff ſuffered a priſoner in execution to make a voluntary eſcape, the priſoner was in ſuch caſe abſolutely diſcharged from the creditor, and that the right of action was entirely transferred againſt the ſheriff, who by means of ſuch eſcape became *debitor ex delicto*. Leon. 73. Arundell and Wytham. Hob. 202. S. P. *per* Hobart, in the Sheriff of Eſſex's caſe.

But the latter reſolutions have been contrary; and it has been (*b*) adjudged, that where a ſheriff ſuffered a voluntary eſcape, the (*b*) Sid. 330. Allanſon and Butler.

Show. 174. Buxton and Home, plaintiff might have a new action of debt or *ſcire facias quare executionem non* againſt the priſoner.

2 Mod. 136. Baſſet and Salter, Vent. 269. 2 Jon. 21, 22. Mod. 194. Compton and Ireland. 2 Lutw. 1264. Sudal and Wytham.

Alſo, the ſtatute 8 & 9 *W.* 3. *c.* 26. hath taken away all diſtinction between voluntary and permiſſive eſcapes with regard to the plaintiff's remedy; for thereby it is enacted, "That if any priſoner, who is or ſhall be committed in execution to either or any of the ſaid reſpective priſons, ſhall eſcape from thence by any ways or means howſoever, the creditor or creditors, at whoſe ſuit ſuch priſoner was charged in execution at the time of his eſcape, ſhall or may retake ſuch priſoner by any new *capias* or *capias ſatisfaciend.* or ſue forth any other kind of execution on the judgment, as if the body of the priſoner had never been taken in execution."

Carter, 212. [2 Wilſ. 295. 5 Term Rep. 25. & *vide* the authorities *ſupra.*] But yet there remains a difference as to other purpoſes between permiſſive and negligent eſcapes; for if a ſheriff ſuffer a priſoner voluntarily to go at large, the ſheriff cannot retake him even upon freſh ſuit; and if he does, the priſoner may have an action of treſpaſs againſt him.

Ravenſcroft v. Eyles, 2 Wilſ. 295. [And where the eſcape is voluntary, nothing afterwards can purge it; for whenever a gaoler commits a voluntary eſcape, from that moment he commits a tort.]

3 Mod. 146. Carter, 212. If the marſhal of the *King's Bench* or warden of the *Fleet*, or any other who hath the keeping of priſons in fee, ſuffer a voluntary eſcape, it is a forfeiture of the office.

And now, by the 8 & 9 *W.* 3. *c.* 26. a further penalty is added, which enacts, "That if any marſhal or warden, or their reſpective deputy or deputies, or any keeper of any other priſon within this kingdom, ſhall take any ſum of money, reward or gratuity whatſoever, or ſecurity for the ſame, to procure, aſſiſt, connive at, or permit any ſuch eſcape, and ſhall be thereof lawfully convicted, the ſaid marſhal or warden, or their reſpective deputy or deputies, or ſuch other keeper of any priſons, as aforeſaid, ſhall for every ſuch offence forfeit the ſum of 500*l.* and his ſaid office, and be for ever after incapable of executing any ſuch office."

(D) Of the Difference between an Eſcape in Meſne Proceſs and Execution.

2 Roll. Abr. 99. 807. Froby and Lumley. IF the ſheriff ſuffer a perſon arreſted on meſne proceſs to eſcape, an action lies againſt him at (*a*) common law, from the delay and prejudice which the party ſuffers thereby.

Moor, 852. Cro. Eliz. 623. 652. 868. Cro. Jac. 280. (*a*) And by the expreſs words of 8 & 9 W. 3. c. 26. [2 El. Rep. 1049.]

2 Roll. Abr. 807. Jon. 297. But there is this difference between an eſcape on meſne proceſs, and execution, that if the ſheriff arreſts a perſon on meſne proceſs,

and

and he is reſcued by *J. S.*, he may return the reſcue, and ſuch return is good, and no action of eſcape lies againſt him after ſuch return; but the court will iſſue proceſs againſt ſuch reſcuer, or fine him; for in this caſe, though the ſheriff may, yet he is not obliged to raiſe the *poſſe comitatus*. Roll. Rep. 388. 3 Lev. 46.

But after an arreſt on a *capias ad ſatisfaciend.* the ſheriff cannot return a reſcue, for in ſuch caſe, the ſheriff is obliged to raiſe the *poſſe comitatus*, if needful; and therefore, if he return a reſcue, an action of eſcape lies, or a new *capias* (*a*), for the return of an ineffectual execution is as none. Roll. Abr. 807. *vide* the authorities *ſupra*. (*a*) Cro. Car. 240. 255. Roll. Abr. 904. 8 Co. 142. [Upon the ſame principle the gaoler will be liable for an eſcape upon the reſcue of one brought out of gaol by *habeas corpus* between judgment and execution. Crompton v. Ward, 1 Str. 429.]

Alſo, upon an arreſt on meſne proceſs, the ſheriff is obliged to take bail by the ſtatute 23 *H. 6. c.* 10. therefore, if the plaintiff declares, that the defendant being ſheriff of *Y.* did arreſt *J. S.* at the ſuit of the plaintiff, and afterwards did ſuffer him to go at large; and the defendant pleads the ſtatute, and that he took good and ſufficient bail, and the plaintiff replies and traverſes, that the defendant took good and ſufficient bail; this action does not lie; for *quoad* the plaintiff, the ſufficiency of the bail is altogether immaterial, it is for the ſecurity of the ſheriff; and if the party does not appear, the plaintiff need not take an aſſignment of the bail-bond, but proceed againſt the ſheriff by way of amercement, and leave the ſheriff to take his advantage againſt the bail. 2 Mod. 177. Ellis and Yarborough, adjudged. 1 Mod. 227. S. C. 1 Freem. 219. S. C. Gilb. C. P. 22. S. C. See 1 Ld. Raym. 425. 1 Salk. 99. 6 Mod. 122. Noy, 72. Semb. *contra*.

(E) What Perſons are anſwerable for, and to be charged with an Eſcape: And herein,

1. Of the preceding or ſucceeding Sheriff, Warden, &c.

WHERE a new ſheriff is appointed, his predeceſſor ought to deliver over by (*b*) indenture all the priſoners in his cuſtody, charged with their reſpective executions; for the priſoners, until they are turned over to the new ſheriff, remain in the cuſtody of the old ſheriff, and if he omits to deliver them over, every omiſſion will be deemed an eſcape, wherewith he will be chargeable. Hob. 266. 2 Roll. Abr. 457. Cro. Eliz. 365. Bulſt. 70. 2 Leon. 54. 4 Co. 72. (*b*) See the form thereof, Dalt. Sheriff, 18.

As, where one *Buſtard* was in execution in the cuſtody of the defendants, then ſheriffs of *London*, as well at the ſuit of *A.* as at the plaintiff's ſuit, and the defendants at the end of the year delivered over the body of *Buſtard* to the new ſheriffs by indenture, wherein the execution at the ſuit of *A.* was mentioned, but the execution at the plaintiff's ſuit was omitted, and afterwards *Buſtard*, in the time of the new ſheriffs, eſcaped; it was reſolved by the whole court, that the defendants being the old ſheriffs ſhould be charged with this eſcape, for that the old ſheriffs ought to have given (*c*) notice to the new ſheriffs of all the 3 Co. 71. Weſtley's caſe. (*c*) That ſuch notice may be by word only, or by ſome note in writing under the old ſheriff's hand, or under the

hand of his under-ſheriff, and need not be

the executions wherewith any perſon was charged in their cuſtody.

by indenture, unleſs the new ſheriff require it. Moor, 689. Dalt. Sheriff, 16. Cro. Jac. 588.

3 Co. 72. [By ſtat. 3 Geo. 1. c. 15. § 8. the duties of the office of ſheriff are, in this caſe,

But if the ſheriff dies during his ſhrievalty, the new ſheriff, as ſoon as he is appointed, muſt take notice of all perſons in cuſtody, and of the ſeveral executions with which they are charged; and this he muſt do out of neceſſity, for there being nobody to inform him, he muſt himſelf take notice hereof at his peril.

to be executed by the under-ſheriff, until a ſucceſſor is appointed. And it is not uſual to appoint a new ſheriff till the end of the year.]

2 Lev. 109. Lenthal and Lenthal, adjudged. 3 Keb. 487. S. C. Vent. 269. James and Pierce. S. P. adjudged, and the caſe of the ſheriff of Eſſex, in Hob. 202.

J. S. being in execution in the *Fleet*, was ſuffered to make a voluntary eſcape, after which he returned again to the *Fleet*; and the defendant being made warden in the place of the former warden, *J. S.* was turned over with the other priſoners, and afterwards ſuffered to eſcape; and the queſtion was, Whether the voluntary eſcape ſuffered by the former warden did not ſo entirely diſcharge the execution, that the priſoner could not be retaken, nor judged in execution, by law, even though he ſhould yield himſelf to it? And it was held, that it did not, and that the ſucceeding warden ſhould be chargeable with the eſcape ſuffered in his time.

(*ante* C) *cont.* denied to be law.

6 Mod. 183. Grant v. Southers. Stra. 423.

So, in the caſe of one *Grant*, who being in the cuſtody of the former marſhal was ſuffered by him voluntarily to eſcape, after which he returned voluntarily to priſon, and being found in priſon, the ſucceeding marſhal detained him; and in an action of falſe impriſonment brought by him, the court held that he might, and that if he had ſuffered him to go at large, it would have been an eſcape.

2. Where Sheriffs, Wardens, *&c.* their Superiors or Deputies, are liable, at the Election of him who is injured by the Eſcape.

(*a*) But in what caſes at common law, and upon the ſtatute of Weſtm. 2. c. 11. the rule of *reſpondeat ſuperior* will hold, *vide* 2 Inſt. 382. 466. 9 Co. 98. 2 Jon. 60. 2 Lev. 158. Vent. 314. 2 Mod. 119. Holt. pl. 11. 3 Keb. 591. 656. 701. 754. 758. 773. Noy, 69. Comb. 95.

Where one hath the cuſtody of a gaol of freehold or inheritance, and commits it to another perſon, who is inſufficient, the (*a*) ſuperior is anſwerable for all eſcapes ſuffered by his inferior; but if the inferior be ſufficient, the action muſt be brought againſt him, and not againſt the ſuperior.

Alſo, by the 8 & 9 *W.* 3. *c.* 26. it is enacted, "That the offices "of marſhal of the *King's Bench* priſon, and warden of the *Fleet*, "ſhall be executed by the ſeveral perſons to whom the inheritance "of the priſons, priſon-houſes, lands, tenements, and other here-"ditaments of the ſaid priſons of *King's Bench* and *Fleet*, or ei-"ther of them, ſhall then belong or appertain reſpectively, in his "or their reſpective proper perſon or perſons, or by his or their

"ſufficient

" ſufficient deputy or deputies, for which deputy or deputies, and " for all forfeitures, eſcapes, and other miſdemeanors in their " reſpective offices by ſuch deputy or deputies permitted, ſuffered, " or committed, the ſaid perſon or perſons in whom the aforeſaid " inheritances reſpectively are, or ſhall then be, ſhall be anſwer- " able, and the profits and aforeſaid inheritances of the ſaid ſeve- " ral offices ſhall be ſequeſtered, ſeiſed, or extended to make ſatiſ- " faction for ſuch forfeitures, eſcapes, or miſdemeanors reſpective- " ly, as if permitted, ſuffered, or committed by the perſon or " perſons themſelves, or either of them, in whom the reſpective " inheritances of the ſaid priſons ſhall then be *."

* Note: By 27 G. 2. c. 17. the power of appointing the marſhal of the King's Bench is veſted in the crown.

If the (*a*) bailiff of a franchiſe ſuffer an eſcape and be inſufficient, the lord of the franchiſe ſhall anſwer for him. 2 Brownl. 50. *per totam cur.*

2 Lev. 160. S. P. (*a*) If his deputy ſuffers an eſcape, he ſhall anſwer for it himſelf. Lit. Rep. 33. *per curiam.*

If a gaoler, who is the ſheriff's ſervant, ſuffers a priſoner to eſcape, the action muſt be brought againſt the ſheriff, not (*b*) againſt the gaoler; for an eſcape out of the gaoler's cuſtody is by intendment of law an eſcape out of the ſheriff's cuſtody, for by the 13 *E.* 3. *c.* 10. ſheriffs are to put in ſuch keepers of gaols as they ſhall anſwer for. 2 Lev. 159. 2 Jon. 62. 2 Mod. 124. (*b*) *Vide* 5 Mod. 414. 416. Ld. Raym. 424. Salk. 272.

pl. 2. where it is ſaid in general, that gaolers are liable for eſcapes; but the queſtion being there touching the eſcape of a perſon committed for a criminal offence, muſt be underſtood of eſcapes in thoſe caſes, for which whoever *de facto* occupies the office of gaoler is liable to anſwer; nor is it material, whether his title to the office be legal, or not. Hale P. C. 114. 2 Roll. Rep. 146. 2 Hawk. P. C. c. 19. § 28. & *vide* Hard. 29 to 35., that where actions for eſcapes are ſaid to lie againſt gaolers, ſuch abſolute gaolers are intended, as writs are directed to.

So, an arreſt by the ſheriff's officer is in judgment of law the (*c*) ſame as if the arreſt were by the ſheriff in perſon; and if ſuch officer ſuffer the party arreſted to eſcape, the action muſt be brought againſt the ſheriff. 5 Co. 89. Roll. Abr. 94. (*c*) Although in law the cuſtody of the

bailiff be the cuſtody of the ſheriff; yet the ſheriff cannot return, that ſuch a one was in his cuſtody, and reſcued out of the cuſtody of his bailiffs, becauſe of the repugnancy; but he may return, that he was reſcued out of his own cuſtody, although he was never in his actual cuſtody, or out of his bailiff's cuſtody. 3 Salk. 586. pl. 2. & *vide* Sid. 332. 2 Jon. 197.

But if the ſheriff directs his warrant to his bailiff, and afterwards *J. S.* puts in his own name as ſpecial bailiff, and thereupon arreſts the defendant, who eſcapes; here *J. S.* ſhall be only chargeable, and not the ſheriff, becauſe the defendant was never in the ſheriff's cuſtody, but only in the cuſtody of *J. S.* Cro. Eliz. 745. Dalt. Sheriff, 560. [It hath been repeatedly holden, that where

a ſpecial bailiff is appointed on the nomination of the plaintiff in the action, the ſheriff is not anſwerable for the acts of ſuch bailiff. De Moranda v. Dunkin, 4 Term Rep. 120.]

So, if a writ comes to the ſheriff, and he makes out his mandate to the bailiff of a liberty, who takes the party, and after ſuffers him to eſcape, (*d*) an action lies againſt the bailiff of the franchiſe, and not againſt the ſheriff. Roll. Abr. 98, 99. Bro. Eſcape, 40. Noy, 27. [(*d*) And if the bailiff

in ſuch caſe remove the party to the county gaol ſituate out of the liberty, and there deliver him into the cuſtody of the ſheriff, he will ſubject himſelf to an action for an eſcape. Boothman v. Earl of Surry, 2 Term Rep. 5.]

Cro. Eliz. 26. So, where a *capias ad ſatisfaciend.* was awarded to the ſheriff of *Berks* to arreſt *J. S.* who then was in cuſtody of the mayor and burgeſſes of *W.* and thereupon the ſheriff made a warrant to the mayor, *&c.* to take him, and afterwards they let him eſcape; it was clearly held, that the mayor, *&c.* and not the ſheriff, were chargeable with the eſcape.

Roll. Abr. 806. Dunn and Patie. Sid. 318. S. P. If a *capias* iſſues againſt *A.* out of the ſheriff of *London*'s court, directed to one of the ſerjeants, who arreſts *A.* and lets him eſcape before he is carried to the counter, the ſerjeant, in this caſe, and not the ſheriff, is chargeable with the eſcape; for the ſheriff is judge of the court, and not a miniſterial officer. But if *A.* had been carried to the counter, and eſcaped thereout, the ſheriff would then have been anſwerable, as gaoler or keeper of the counter.

Roll. Abr. 806. So, if a ſerjeant at mace arreſt a man by virtue of a warrant iſſuing out upon a *latitat*, and afterwards ſuffer him to eſcape before he brings him to the counter; in this caſe, an action lies againſt the ſheriff only for this eſcape, becauſe he was in the cuſtody of the ſheriff preſently upon this arreſt; and the ſheriff is the officer of the court of *King's Bench*, and not the ſerjeant.

Cro. Eliz. 743. Baldry v. Johnſon, adjudged. If upon a plaint levied in the court of *B.* before the bailiffs of *B.* according to the cuſtom there, a warrant is directed to the under-bailiffs, to take *J. S. ita quod habeant corpus ejus coram bollivis ad prox. curiam*, and the under-bailiffs take him and commit him to the priſon *ſub cuſtodiâ* of the gaoler of the priſon of *B.*; if they have him not at the day, *&c.* an action lies againſt them, and not againſt the gaoler; for there was no commitment to him by any lawful authority, and that cuſtody the gaoler had was only as a ſervant to the under-bailiffs.

Carth. 145. Ryding and Edwin. A priſoner in *Wood-ſtreet Counter*, upon a meſne proceſs on a plaint levied againſt him, *&c.* eſcaped, whereupon the plaintiff brought his action againſt both ſheriffs of *London*; and, upon a demurrer to the declaration, the plaintiff had judgment; and it was reſolved, that though the plaint was levied before one of the defendants only, and the priſoner eſcaped out of his counter, and by his negligence alone, yet that both ſheriffs had the cuſtody of the priſoners in both counters, and by conſequence, the action was well maintainable againſt both.

Cro. Eliz. 625. Benion v. the Sheriffs of the City of York. If there are two ſheriffs of the ſame place, and an action of eſcape is brought againſt them both, if one of them dies, yet the writ ſhall not abate; for it being in nature of a treſpaſs, and (*a*) merely perſonal, the party can only have remedy againſt the ſurvivor *.

(*a*) That no action lies againſt the executor or adminiſtrator of a perſon who ſuffers an eſcape, becauſe it is a perſonal tort, and comes within the rule *actio perſonalis moritur cum perſona*, *vide* Dyer, 271. 322. Jon. 178. Noy, 87. Latch. 167. Poph. 187. Vent. 31. 6 Mod. 125-6.——* By 8 & 9 W. 3. c. 11. §. the death of one plaintiff or defendant, where there is another ſurviving, not to abate the ſuit.

3. Where the Party injured may have his Remedy againſt the Perſon eſcaping, and therein of Eſcape Warrants.

It has been already obſerved, that if the ſheriff ſuffers the priſoner voluntarily to eſcape, the party at whoſe ſuit he was in cuſtody may, notwithſtanding, ſue out any new execution againſt the perſon eſcaping; for it would be unreaſonable that he ſhould be allowed to take advantage of his own act, or that the creditor ſhould be compelled, whether he will or no, to take his remedy againſt the ſheriff, who may die or become inſolvent *.

* It is put out of doubt by the ſtat. 8 & 9 W. 3. c. 26. which *vide ante.*

Therefore, where to a *ſcire facias quare executionem non* upon a judgment the defendant pleaded, that he was formerly taken in execution by a *capias ad ſatisfac.* upon the ſame judgment, and the ſheriff ſuffered him to eſcape, to which eſcape the plaintiff then and there conſented; this was held an ill plea; for the aſſent (*a*) ſubſequent will not make it an eſcape with the conſent of the plaintiff, and therefore he has either his remedy againſt the ſheriff, or may retake the party.

Salk. 271. pl. 1. Scott and Peacock. (*a*) Show. 174. S. P. adjudged on the like plea.

But if (*b*) a man in execution upon a judgment for debt or damages be delivered out of execution by the ſheriff or gaoler who hath him in execution, with the (*c*) aſſent of him at whoſe ſuit he is in execution; and after by colour of this judgment he take him again and put him in priſon, an *audita querela* lies upon this matter, and thereupon he ſhall be delivered.

Roll. Abr. 307. Welby and Andrews, adjudged. (*b*) So, if the plaintiff conſent that one defendant only ſhall be delivered out of execution. Style, 387.—So, if he conſent that one of the bail ſhall be delivered out of execution, he ſhall not take the other. 2 Leon. 260. (*c*) Where the conſent was only, that he ſhould come to a tavern out of the rules. Style, 117.——Where one was in execution in the King's Bench, and ſome propoſals were made to the plaintiff in behalf of the priſoner, who ſeeing there was ſome likelihood of an accommodation, conſented to a meeting in London, and deſired the priſoner might be there, who came accordingly; this was held to be an eſcape with the conſent of the plaintiff, and he could never after be in execution at his ſuit for the ſame matter.

[In an action againſt the warden of the *Fleet*, for an eſcape on meſne proceſs, a verdict was given for the plaintiff with 300 *l.* damages. The facts of the caſe were as follows:—The plaintiff had recovered againſt one *Fakeney* a debt of 11,000 *l.*, but at the time of the eſcape, a writ of error was pending, and final judgment not entered up. On *Friday* the 24th of *November* laſt, the deputy warden of the *Fleet* (the warden himſelf being not in town) received a notice in writing (which notice it was in proof was duly ſerved) from the plaintiff, to diſcharge *Fakeney*. The deputy warden having ſome doubts whether the notice were really the handwriting of the plaintiff in the ſuit, and thoſe doubts being increaſed by its having been brought by one *Knight*, a man of very bad character; he did not immediately obey it, but employed himſelf in inquiring into the matter, and endeavouring to diſcover whether this were actually the handwriting of the plaintiff, or not. On the *Saturday*, the next day, he met the plaintiff's attorney, who told him, he was not enough acquainted with plaintiff's handwriting to be able to give any opinion on it. On the following day, *Sunday*, in the afternoon, he met the plaintiff and his attorney; the plaintiff then acknow-

Holland v. Eyles, C. P. M. 28 G. 3. MSS.

acknowledged that the notice which defendant had received was written by him, but after ſome converſation, ſwore that he had been made a dupe of in giving it, and immediately ſerved the defendant with a countermand of it. The defendant diſregarded this countermand, and that evening diſcharged *Fakeney*. Lord *Loughborough*'s idea at the trial was, that this firſt notice could amount to nothing more than merely to entitle *Fakeney* to a *ſuperſedeas*, that it by no means warranted an immediate diſcharge, and therefore as the defendant had taken upon him to judge of the legal effect of it, he thought he ought to take the conſequences, and told the jury that they ſhould find for the plaintiff.

Bond, Serjeant, moved, that a nonſuit ſhould be entered upon the above evidence as it appeared on the judge's notes. He inſiſted, that by the letter of diſcharge all claims by the plaintiff on the defendant for the detention of *Fakeney* were put an end to, and that that letter of diſcharge could not be countermanded. For in the firſt place, this notice from the plaintiff was a legal diſcharge: a parol direction to the gaoler by the plaintiff in the ſuit, to let the priſoner go out of priſon, is a good diſcharge, *Brown Anal.* 29.; and ſuch direction is a good defence by the gaoler in an action for an eſcape. 2 *Inſt.* 382. Lord *Coke*, commenting on the words *ſine aſſenſu domini*, ſays, this aſſent may be by parol, and ſhall be a ſufficient bar in an action of debt for the eſcape. *Dy.* 275. *a.* *Cro. Car.* 329. *Vezey* v. *Harris* and wife, *Gouldſ.* 81. Theſe caſes prove, that where there is the conſent of the plaintiff, a diſcharge without writ is a ſufficient defence in an action againſt the gaoler for an eſcape. But this order of diſcharge having been thus properly given, could not in law be countermanded. To ſee whether it were countermandable or not, it will be neceſſary to ſee what was to be its operation on the priſoner. As with reſpect to him, it was a grant of liberty, a grant of an intereſt of the higheſt nature, and therefore not countermandable. For wherever a valuable intereſt is given by grant or manumiſſion, it cannot be countermanded. A villein enfranchiſed for an hour, is ſo for ever; an expreſs manumiſſion of a villein cannot be upon condition, for once free in that caſe, and ever free. *Co. Litt.* 274. *b.* *Finch.* 29. The law invariably makes the diſtinction between matters of profit or intereſt, and matters of pleaſure, eaſe, truſt, authority, and limitation; with reſpect to the former it allows of no countermand; with reſpect to the latter, they may be countermanded, though a power of revocation be taken away in the moſt poſitive terms, for a man cannot by his own act make that not countermandable, which by law and in its nature is countermandable. This was ſettled in *Viner*'s caſe, 8 *Co.* 82., where it was determined that a ſubmiſſion to an award is revocable, though the party have declared it to be irrevocable; but the grant of a valuable intereſt is in its nature irrevocable. *Sheph. Abr.* tit. *Countermand*, 464

See Fytche v. Biſhop of London, Houſe of Lords.

If I preſent *J. S.* to a church, I cannot after vary and preſent anew, for a kind of intereſt paſſeth out of me. *Finch.* 32. *Dyer*, 348. *a.* In *Plowd.* 36. *a.* it is ſtated *arguendo*, that if a perſonal thing

thing be once in ſuſpenſe, or the perſon of a man be once diſcharged for a perſonal thing, that is a diſcharge for ever. From all theſe authorities then it is clear, that where a valuable intereſt is derived to a party, it is not ſubject to a countermand. And further, by this order of 24th of *November*, *Fakeney* can never be deprived of his liberty again for this debt. It is ſaid in the caſe of *Alanſon* v. *Butler*, cited in *Show.* 177. that in an eſcape by conſent of plaintiff, neither the plaintiff nor the ſheriff can retake, though the debt be unſatisfied. And in *Freem.* 213. in the caſe of *Baſſet* v. *Salter*, *North*, C. J. ſays, Since the law is ſo ſtrict that matters of deed ſhall not be diſcharged but by deed, he wondered that the law ſhould permit an execution to be diſcharged by a miſtake of the plaintiff's; as he cited a caſe, where a creditor went over to the *King's Bench* to treat with a priſoner, and brought him over the water to a tavern to treat, it was held that he could never take him again, and ſo the law is clear when he is once diſcharged by the conſent of the plaintiff. S. C. in 2 *Mod.* 136. Theſe words ought to have the more weight, becauſe the C. J. ſeems to expreſs a diſſatisfaction in declaring the law to be ſo ſettled. But when this order was delivered to the warden, he was bound to obey it, otherwiſe he would have been guilty of a treſpaſs, and he actually was guilty of one, in detaining *Fakeney* till the *Sunday*. That the action of treſpaſs will lie in this caſe is determined in 3 *Bulſtr.* 96. *Withers* v. *Henly*. But if the defendant is chargeable in an action at the ſuit of *Fakeney* for detaining him, he cannot be chargeable in an action at the ſuit of *Holland* for diſcharging him.

Qu. A caſe cited from 2 Roll. 39.

On the other ſide it was anſwered by *Adair*, Serjeant, that as to the firſt ſet of caſes which were cited by the council for the defendant, and which went to prove that an intereſt once granted cannot be revoked; admitting that poſition to be true, yet liberty is not the intereſt meant in thoſe caſes; all thoſe caſes relate merely to property. That as to the caſe that was cited from *Freem.* 213. and 2 *Mod.* 136. in the ſecond ſet of caſes, which ſtruck the court as preſſing rather hard upon the plaintiff, where it was held, that if a creditor had once taken his debtor out of priſon, though for the expreſs purpoſe of a compromiſe, he could not afterwards detain him; in that caſe it ſhould be conſidered that there was an actual diſcharge, not as in this, a mere aſſent to a diſcharge. There is another diſtinction, which was exceedingly material; and that is, between a party in priſon under an execution, and under meſne proceſs; execution is much more like an intereſt than a detention under meſne proceſs; for the diſcharge of the party under meſne proceſs by no means annihilates the debt; for the creditor, though he cannot arreſt the debtor again, yet he may ſue him for the debt, and then take him in execution.

An authority to a gaoler to diſcharge a priſoner on meſne proceſs is merely a licence not coupled with an intereſt, therefore may be countermanded.

Lord

Lord *Loughborough*.—The point made at the trial was this, that a diſcharge once given, no matter by what means obtained, whether by fraud or fairly, was irrevocable? I did not leave it to the jury to inquire whether there had been any fraud uſed in obtaining the diſcharge, but ſummed up the evidence without adverting to that part of the caſe. I thought the counſel extremely judicious in not preſſing upon that ground, as I was ſtrongly of opinion that the plaintiff had been groſsly impoſed upon, and ſhould moſt certainly have ſummed up to the jury with very ſtrong obſervations. The queſtion therefore now comes before the court, bearing as an admitted fact upon the face of it, that the plaintiff had been duped, and therefore it is for the defendant's counſel to contend that the original order of diſcharge was effectual, notwithſtanding the diſcharge had been obtained on the ground that the plaintiff had been duped.

The defendant's counſel, after ſome heſitation, confeſſed that if the caſe were put upon that ground, they ſhould be unable to ſupport it, and not chooſing to let the whole go again to a jury, the rule was diſcharged.]

[(*a*) The eſcape warrant not grantable for any contempt but not performing an order. Hincheliffe v. Payne, 1 Str. 99.] (*b*) If a perſon charged in execution in the King's Bench be turned over to the Fleet, and he eſcape, either a judge of the King's Bench or Common Pleas may grant an eſcape warrant. Paſch. 10 Geo. 1. The King and Dunbar. [And by 5 Ann. c. 9. § 2. the warrant may be granted on an affidavit made in the country before a commiſ-

By the 1 *Ann. c.* 6. it is enacted, "That if any perſon committed [or rendered to, or charged in the cuſtody of the marſhal of the *Queen's Bench* for the time being, or to or in the priſon of the *Fleet*, either in execution, or upon meſne proceſs, or upon any contempt in not performing orders or decrees (*a*) made by any of her majeſty's courts at *Weſtminſter*, and ſuch perſon ſhall at any time after ſuch commitment, render, charge, or bring in execution, and before he ſhall have made payment or ſatisfaction to plaintiff or plaintiffs, creditor or creditors, or ſhall have cleared himſelf of ſuch contempt, as he ſhall be charged with at the time of ſuch commitment, &c., make any eſcape] from the cuſtody of the marſhal of the *Queen's Bench* for the time being, or from the priſon of the ſaid *Queen's Bench*, or from the priſon of the *Fleet*, or either of them, it ſhall and may be lawful, upon oath thereof in writing, to be made by one or more credible perſon or perſons, before any one of the judges of (*b*) that court where ſuch action was entered, or judgment and execution were obtained, or where the party was ſo committed or charged as aforeſaid, to and for ſuch judge before whom ſuch oath ſhall be made, as aboveſaid, and ſuch judge is hereby authorized and required from time to time to grant unto any perſon whatſoever, who ſhall demand the ſame, one or more warrant or warrants under his hand and ſeal, therein reciting the action or actions, execution or executions, contempt or contempts, with which ſuch perſon ſo eſcaping or going at large, ſtood charged, or was committed, at the ſuit of any perſon or perſons on whoſe behalf ſuch warrant or warrants ſhall be demanded, at the time of ſuch eſcape or going at large, (which warrant or warrants ſhall be in force in all places whatſoever within that part of *Great Britain* called *England*,) directed to (*c*) all ſheriffs, mayors, bailiffs, conſtables, headboroughs, and tithingmen, therein and thereby commanding them "and

" and every of them in their reſpective counties, cities, towns, and " precincts, to ſeize and (*d*) retake ſuch perſon or perſons (*e*) ſo " eſcaped or going at large; and ſuch perſon or perſons, ſo re- " taken upon ſuch warrant, forthwith to convey and commit to " the common gaol of ſuch county (*f*) where ſuch perſon or per- " ſons ſo eſcaped or going at large ſhall be retaken, there to re- " main without bail or mainprize, or being thence (*g*) upon any " account whatſoever delivered or removed until he, ſhe, or they " ſhall have made full payment or ſatisfaction to the reſpective " plaintiff or plaintiffs, creditor or creditors, in ſuch action or " actions, execution or executions, named, or until the judgment or " judgments on which ſuch execution or executions was or were " ſued out againſt ſuch perſon or perſons ſhall be reverſed or " diſcharged by due courſe of law, or until judgment in ſuch " action or actions be given for ſuch perſon or perſons ſo com- " mitted as aforeſaid, or until the contempt or contempts for " which ſuch perſon or perſons were or ſhall be committed be " cleared and diſcharged," *&c.*

ſioner, ſuch affidavit being firſt duly filed.] 8 Mod. 240. ruled on motion.

(*c*) If one who is no officer, by virtue of the warrant, ſeiſe a perſon eſcaping, and bring him before the ſheriff, he cannot detain him; for, being illegally executed, it is the ſame thing as if there had been no warrant at all. 6 Mod. 154. [(*d*) By 5 Ann. c. 9. § 3. eſcape warrants may be executed on a Sunday.] (*e*) If a perſon is taken upon an eſcape warrant at eight in the morning, and the ſame day obtains a day-rule, purſuant to a petition, which was not read in court till after eight, yet he ſhall be diſcharged; for as to this purpoſe there ſhall be no fraction of a day. Trin. 8 Geo. 1. Wilkinſon and Matthews. 8 Mod. 80. [(*f*) By ſtat. 5 Ann. c. 9. § 1. perſons taken by virtue of 1 Ann. c. 6. inſtead of being committed to the common gaol of the county where they are taken, are to be committed to the priſon where the ſheriff keeps priſoners for debt, from which, if they eſcape, the ſheriff ſhall be anſwerable as in other caſes of eſcape.] (*g*) Cannot be diſcharged upon bringing the money into court. 6 Mod. 21.——Cannot come out on a day-rule. 6 Mod. 63.——[The warrant ſhall be ſuperſeded, if the party was entitled to his diſcharge at the time he eſcaped. Webb v. Thompſon, 1 Str. 401.]

(F) Of the proper Remedy and Nature of the Action to be brought for an Eſcape.

AT common law the plaintiff had no remedy againſt the ſheriff for an eſcape, whether upon meſne proceſs, or in execution, but by ſpecial action upon the caſe. 2 Inſt. 382. Show. 176. 2 Saund. 34. Hard. 30.

But now, by an equitable conſtruction of *Weſtm.* 2. *c.* 11. (*b*) action of debt is given againſt ſheriffs, and by the 1 *Rich.* 2. *c.* 12. againſt the (*i*) warden of the *Fleet* for eſcapes of priſoners in *execution.*

(*b*) This action being founded *in maleficio*, and and alſo given by ſtatute, is not within the ſtatute of limitations of 21 Jac. 1. c. 16., which ſpeaks of debts ariſing by lending or contract. Saund. 34. Jones and Pope, adjudged. Sid. 305. and Lev. 191. S. C. adjudged. (*i*) Extends to all gaolers and keepers of priſons, though infants, or feme coverts. 2 Inſt. 382.

Alſo, the plaintiff, at his election, may maintain either an action upon the caſe, or debt, for an eſcape in execution. Cro. Jac. 288. 2 Bulſt. 221. Cro. Eliz. 767. [If he adopt the latter, the jury *muſt* give him the whole ſum, that is, the whole which he would have been entitled to have recovered againſt the priſoner, viz. the ſum indorſed on the writ, and the legal fees of execution. Bonafous v. Walker, 2 Term Rep. 126. Hawkins v. Plomer, 2 Bl. Rep. 1048. But ſee the words of Buller, J. in 5 Term Rep. 40. Debt lies as well where the eſcape is negligent, as where it is voluntary. Stonehouſe v. Mullins, 2 Str. 873.]

If there be judgment againſt baron and feme, and the feme only taken in execution, and ſuffered to eſcape, an action of debt lies againſt Cro. Jac. 657. Whiting v.

Sir George Reynel. againſt the marſhal; for as the plaintiff may elect to take either the huſband or wife in execution, ſo by his election he has made her a ſole debtor within the ſtatute of *R.* 2. although it was objected that it ſhould be caſe, becauſe the party is not totally deprived of his remedy, the huſband being ſtill liable.

Cro. Jac. 361. 533. 619. Cro. Eliz. 877. [1 P. Wms. 685.] S. P. adjudged. If a priſoner in cuſtody upon a (*a*) *capias utlagatum* is ſuffered to eſcape, the plaintiff may either maintain an action *qui tam* againſt the ſheriff, or bring an action of debt againſt him in his own right.

(*a*) So, an action on the caſe will lie for the eſcape of one taken upon a writ *de excommunicato capiendo.* Lut. 123.

(*b*) Dyer, 278. b. adjudged, & *vide* 2 Jon. 144. An action of eſcape is not a local action, and therefore (*b*) if one eſcapes out of the *Marſhalſea*, which is in *Surry*, the action againſt the marſhal may be laid in *Middleſex*. Sid. 364. S. C.

[By ſtat. 1 *Ann. c.* 6. § 2. "If any perſon ſo retaken by warrant "as aforeſaid, ſhall at any time make any eſcape out of the gaol "to which he ſhall be conveyed or committed as aforeſaid, the "ſheriff, in whoſe cuſtody he was, ſhall be liable to anſwer for "ſuch eſcape, as in the caſe of any other eſcape."

By § 3. "It ſhall be lawful for any perſon or perſons that ſhall "be bail in any of her Majeſty's courts of record at *Weſtminſter*, "for any ſuch perſon that ſhall be retaken and conveyed to ſuch "gaol, by virtue of ſuch warrant as aforeſaid, to have and proſe- "cute out of ſuch of her Majeſty's courts where he or they ſhall "be bail, a writ directed to the ſheriff of the county, to the gaol "whereof ſuch priſoner ſo retaken ſhall be committed and de- "tained, commanding him to detain and keep ſuch priſoner in "cuſtody in diſcharge of his bail; which writ, with an account "whether he hath the ſaid priſoner in his cuſtody, ſhall be returned "by the ſaid ſheriff into court, at a day therein to be mentioned; "and the delivery of every ſuch writ to the ſheriff, or his deputy, "ſhall be deemed and taken to be an effectual render of ſuch "priſoner to all intents in diſcharge of the ſaid bail; and in caſe "ſuch ſheriff, his deputy, or other his inferior officer, ſhall there- "after ſuffer the perſon ſo rendered in diſcharge of his bail to "eſcape, they and every of them ſo offending ſhall be liable to "action and actions as the marſhal of the Queen's Bench, or "warden of the Fleet priſon, is or are liable to, for permitting "any perſon to eſcape out of his or their cuſtody or priſon, who "was committed to ſuch cuſtody or priſon upon render in diſ- "charge of his bail."

It is enacted by ſtat. 5 *Ann. c.* 9. § 4. "That if any perſon "ſhall be in cuſtody of any ſheriff, or other officer, either by vir- "tue of the above ſtatute of 1 *Ann.* or of this preſent act, or "otherwiſe, for not performing any decree of the high court of "Chancery, or court of Exchequer, whereby any ſum of money "is ordered or decreed to be paid, and ſhall afterwards make any "eſcape from the ſaid ſheriff or other officer, then and in ſuch "caſe the perſon, his executors or adminiſtrators, to whom the

" money was to be paid by the ſaid decree (*a*), ſhall have the ſame " remedy againſt the ſaid ſheriff, as if ſuch perſon ſo eſcaping " had been in cuſtody upon an execution at law, and ſhall and " may recover the ſum of money decreed to be paid in and by " ſuch decree, againſt ſuch ſheriff or other officer, together with " his or their coſts of ſuit, in any action of debt, or upon the " caſe, to be brought or commenced againſt ſuch ſheriff or other " officer in any of her Majeſty's courts of record at *Weſtminſter*, " wherein no protection or wager of law ſhall be admitted, or " any more than one imparlance."

(*a*) If in a ſuit by huſband and wife, it appear by the decree that the wife is intereſted in the caſe, ſhe ought to join with her huſband in the action, notwithſtanding the order ſhould appoint the money to be paid only to the huſband. Huggins v. Durham, 2 Str. 726.

By 5 *G.* 2. *c.* 30. § 18. a penalty of 500 l. is inflicted on gaolers ſuffering bankrupts to eſcape.]

(G) Of the Manner of laying the Action.

IN this action it is not neceſſary to ſet forth all the (*b*) formalities required by law in other caſes. Cro. Eliz. 877.

(*b*) *Vide* 2 Show. 424. pl. 391.

Therefore if, upon a judgment obtained by the teſtator, the executor brings a *ſcire facias*, and has judgment, whereupon a *capias ad ſatisfac.* iſſues, and *B.* is arreſted, and ſuffered to eſcape, the plaintiff in an action againſt the ſheriff for this eſcape may declare briefly upon the judgment in the *ſcire facias*, without ſhewing the gradual proceedings at length, as is uſually done in an action of debt upon a judgment. Carth. 148. Gold and Strode. 3 Mod. 324. S. C. Cro. Eliz. 877. S. P. adjudged.

But if the plaintiff declares, that he ſued out a writ of execution againſt *J. S.* without ſetting forth any judgment, and that the defendant ſuffered him to eſcape; this is an incurable fault; for by this means he loſt the benefit of pleading *nul tiel record* (*c*), which he might do, if the plaintiff had ſet forth the judgment. Saund. 37. 38. Jones and Pope. Lev. 192. and 1 Sid. 306. S. C. but the plaintiff had leave to diſcontinue. (*c*) 8 Co. 142. Drury's caſe.

If *A.* recovers as executor againſt *B.* and has him in execution, and the ſheriff ſuffers him to eſcape, the action muſt be brought as executor in the (*d*) *detinet* only, and not in the *debet* and *detinet*. Lutw. 893. Glover and Kendal, adjudged, Comb. 114. S. C. adjudged. [But ſee Bonafous v. Walker, 2 Term Rep. 126. *contra.*] (*d*) For this *vide* 5 Co. 31. Hargrave's caſe. Cro. Jac. 545. Hob. 264. 3 Bulſt. 212. Lan. 79. Savil, 130.

If the plaintiff declares, that the priſoner was committed, and eſcaped, but does not ſay *prout patet per recordum*; yet upon a general demurrer this ſhall be good; for the giſt of the action was the eſcape, and the commitment only inducement. 2 Salk. 565. pl. 1. Waits and Briggs. 5 Mod. 8. S. C. & *vide* 3 Lev. 393.

If in eſcape the plaintiff declares, that he had *J. S.* and his wife in execution, and that the defendant ſuffered them to eſcape, and the jury find ſpecially, that the huſband only was taken in execution (it being for a debt due from the wife before coverture), and that Sid. 5. Roberts and Herbert, adjudged.

that he eſcaped; this is ſufficient, and the plaintiff ſhall have judgment; (a) for the ſubſtance of the iſſue is found, though not purſuant to the declaration.

(a) As where a man aſſigns, for breach of a condition, that he was turned out of his houſe by two, and the jury find that it was done by one only. Cro. Jac. 475. Hingen and Pain, adjudged.

Cro. Jac. 380. King v. Andrews, adjudged. Sid. 5. S. C. cited.

So, in an action on the caſe for the eſcape of *A.* where the jury found that *A.* was taken by *J. S.* the former ſheriff, and not by the defendant, the preſent ſheriff; but finding that he was legally in his cuſtody, and that he ſuffered him to eſcape, the plaintiff had judgment.

2 Lev. 85. Gunter and Cleyton. [4 Term Rep. 611. Alexander v. Macauley, S. P.]

The plaintiff declared, that whereas he had good cauſe of action againſt *A.* and ſued out a *latitat* againſt him; the defendant being ſheriff arreſted him, and ſuffered him to eſcape; upon trial at *niſi prius* the plaintiff was nonſuit, becauſe he could prove no cauſe of action againſt *A.*; but *Hale*, Ch. Juſt. ſaid, that if the plaintiff had declared of a debt of 40 *s.* and upon evidence could prove but 30 *s.* it had been ſufficient; but the book adds a *quære*, it being a ſpecial action upon the caſe.

Blatch v. Archer, Cowp. 63.

[In debt againſt the ſheriff for an eſcape, the indorſement of *non eſt inventus* upon the *capias ad ſatisfaciendum*, is ſufficient evidence of its having been delivered to him. So, the bailiff's name indorſed on the writ is ſufficient evidence, that he was authorized by the ſheriff to arreſt, without proving the warrant.]

By the 8 & 9 *W.* 3. *c.* 27. reciting, that the way of proceeding againſt the warden of the *Fleet* priſon, by bill in the courts of Common Pleas and Exchequer at *Weſtminſter*, is found to be very dilatory; it is enacted, "That it ſhall and may be lawful to and "for any perſon or perſons, having cauſe of action againſt the "warden of the *Fleet* priſon, upon bill filed in the ſaid courts of "Common Pleas or Exchequer againſt the ſaid warden, and a "rule being given to plead thereto, to be out eight days at moſt "after filing ſuch bill, to ſign judgment againſt the ſaid warden "of the *Fleet*, unleſs he plead to the ſaid bill within three days "after ſuch rule is out."

(H) Of the Party's Defence who ſuffered the Eſcape: And herein of pleading freſh Suit.

5 E. 6. 66. 15. Roll. Abr. 808.

IF the priſon takes fire, by means whereof the priſoners eſcape, this ſhall excuſe the ſheriff, and he may plead it.

4 Co. 84. Roll. Abr. 808.

So, if the priſon is broken by the king's enemies, this ſhall excuſe the ſheriff, for he can have no remedy over againſt them.

4 Co. 84. Roll. Abr. 808.

But if the priſon was broken by rebels and traitors, the king's ſubjects, this ſhall not excuſe him, for he may have his remedy over againſt them.

Cro. Jac. 657. Jon. 144. Roll. Abr. 808.

If a priſoner in execution eſcape without the aſſent of the ſheriff, &c. and he make freſh purſuit and retake him (b) before any action brought againſt him, this ſhall excuſe the ſheriff.

[And a voluntary return of the priſoner, before action brought, is equal to a retaking upon freſh

freſh purſuit. Bonafous v. Walker, 2 Term Rep. 126.] (*b*) But if he retake him after the action commenced againſt him, this ſhall not excuſe him; nor can it be pleaded to an action that was well attached before. Roll. Abr. 808, 809. Jon. 145. Cro. Jac. 657. Harvey and Reynell, adjudged. [2 Str. 873. Stonehouſe v. Mullins, S. P.]

So, the ſheriff may plead, that the priſoner eſcaped the ſixteenth day of *December*, and that he made freſh ſuit, and retook him the ſeventeenth day of *December*, and retained him in execution; for it is ſufficient, if he did all he could, though he loſt ſight of him in the night, or otherwiſe. Roll. Abr. 809. Dalt. Sheriff, 562.

So, if a priſoner eſcapes, and ſeveral days after, but as ſoon as the ſheriff has notice of it, he makes freſh ſuit, and retakes him before any action brought, this ſhall excuſe him. Roll. Abr. 809. See 3 Co. 52. *Vide* Ent. 195. 198.

If in debt upon an eſcape the plaintiff ſets forth in his declaration a voluntary eſcape, the defendant may plead that he took him upon freſh purſuit, without traverſing the voluntary eſcape; for it was impertinent for the plaintiff to allege it, and no ways neceſſary to his action. Vent. 211. 217. Sir Ralph Bovy's caſe. [2 Term Rep. 126. Bonafous v. Walker, S. P. Under a count for a *voluntary* eſcape, the plaintiff may give evidence of a *negligent* eſcape. *Ibid.*]

It was formerly held that the ſheriff, *&c.* might give freſh purſuit in evidence, and need not have pleaded it. *Vide* Mod. 116. Sid. 13.

But now by the 8 & 9 *W.* 3. *c.* 27. § 6. it is enacted, "That "no retaking on freſh purſuit ſhall be given in evidence on the "trial of any iſſue in any action of eſcape againſt the marſhal or "warden, or their reſpective deputy or deputies, or againſt any "other keeper or keepers of any other priſon or priſons, unleſs "the ſame be ſpecially pleaded; nor ſhall any ſpecial plea be "taken, received or allowed, unleſs oath be firſt made in writing "(*c*) by the marſhal or warden, or their reſpective deputy or de-"puties, or by ſuch other keeper or keepers of any other priſon "or priſons againſt whom ſuch action ſhall be brought, and filed "in the proper office of the reſpective courts, that the priſoner "for whoſe eſcape ſuch action is brought, did, without his con-"ſent, privity, or knowledge, make ſuch eſcape; and if ſuch affi-"davit ſhall at any time afterwards appear to be falſe, and the "marſhal or warden, or other keeper or keepers of any other pri-"ſon or priſons, ſhall be convicted thereof by due courſe of law, "ſuch marſhal or warden, or other keeper or keepers of any other "priſon or priſons, ſhall forfeit the ſum of 500 l." [(*c*) An affidavit that the eſcape mentioned in the declaration, (*if any ſuch eſcape there was,*) happened without the defendant's knowledge, was allowed to be ſufficient; for, if the defendant knows nothing of any eſcape, he is not to be bound to admit by his affidavit that an eſcape has actually happened. Weſt v. Eyles, 2 Bl. Rep. 1059.]

If an action of eſcape be brought againſt the ſheriff, and the judgment upon which it is found be reverſed, before ſuch time as the defendant is forced to plead, he may plead (*d*) *nul tiel record*, for (*e*) collateral things executory are as if no judgment had ever been, when reverſed. 8 Co. 142. Dalt. Sheriff, 563. (*d*) In debt for an eſcape of one committed on a *capias ultagatum*, the ſheriff may plead *nul tiel record*. Hob. 209. Brownl. 51. (*e*) But if, in debt, upon eſcape, the plaintiff recovers, and hath execution, and after the firſt judgment is reverſed, yet the judgment for the eſcape remains in force. 8 Co. 142. b. 3 Mod. 325. S. C. cited.

If a priſoner taken on a *capias ad ſatisfaciendum* pays the debt to the marſhal for the uſe of the plaintiff in the original action, and is thereupon diſcharged, yet he cannot plead it to an action brought againſt him for the eſcape; for the marſhal had no authority to receive the money, the words of the writ being *quod capias, &c. et eum ſalvo cuſtodias ita quod habeas corpus ejus coram juſticiar. tiel jour ad ſatisfaciendum* the plaintiff*.

For this *vide* Cro. Eliz. 404. Mod. 194. 2 Jon. 97. Lut. 587. Ld. Raym. 399.

* Yet, *qu.* If the court, on motion, would not ſtay proceedings on payment of debt and coſts, for what can the plaintiff require farther?

Eſtate in Fee-ſimple.

(a) (b) FEE-SIMPLE is an eſtate in (c) lands, tenements, &c. to one and his heirs for ever. Alſo, where a corporation ſole or aggregate are capable of holding in ſucceſſion, and lands are given to them and their ſucceſſors, they are ſaid to have a fee-ſimple.

(a) It was a common practice among the Northern nations that invaded the Roman empire, for the lords, who held great diſtricts, to give lands to ſuch perſons as had behaved themſelves well in the wars, ſometimes for life only; and when they married their daughters to any of thoſe ſoldiers who were uſually their vaſſals or tenants, they gave the lands to them and the iſſue of that marriage, which brought in the notion of ſucceſſion amongſt us. Dig. lib. 1. tit. 1. How from this notion of ſucceſſion a fee-ſimple aroſe, by letting in all heirs, whether lineal or collateral, of the excluſion of the aſcending line, baſtards and the half-blood, and why the male line was preferred, *vide* title Deſcents, *ante*. (b) My Lord Coke divides *fee*, which he ſays ſignifies the ſame with inheritance, into fee-ſimple or abſolute, conditional and qualified, or baſe. Co. Lit. 21. b.; and this, which is the moſt ample eſtate of inheritance, may be in things (c) *real*, *perſonal*, or *mixed*; real, as in lands or tenements; perſonal, as when an annuity is granted to one and his heirs; mixed, as when an earl is created of ſuch a county. Co. Lit. 1. b. 2. a.

In Fee-ſimple we ſhall conſider,

(A) Who may purchaſe or inherit ſuch Eſtate.

(B) The Import of the Word *Heir* that creates the Eſtate.

1. When it is a Word of Limitation.
2. When it is a Word of Purchaſe.

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(A) Who

(A) Who may purchaſe or inherit ſuch Eſtate.

AN alien cannot purchaſe any lands in *England*; the reaſon is, becauſe every perſon is preſumed to have a natural and neceſſary allegiance to that ſociety that firſt protected and preſerved him; and therefore he cannot pay any allegiance to any other ſociety, unleſs he be afterwards received into it. Vau. 227. 291. 7 Co. 16, 17, 18. Dyer, 2. pl. 8.; but for this *vide* head of Aliens.

All perſons attainted of treaſon or felony are incapable of purchaſing. Felony, by the ancient feudal law, was a (*a*) crime for which a vaſſal forfeited his feud to the lord, becauſe he broke his oath of fealty in the higheſt manner: his body with which he had engaged to ſerve the lord is forfeited to the king; and his blood is ſaid to be corrupted, becauſe no man can repreſent his perſon, that perſon itſelf being forfeited by the law, and the note of infamy reſting upon his family; ſo that no repreſentative of his can be received to do any feudal ſervice: ſuch tenant, therefore, dying without heirs, the land is in the lord by forfeiture. But if the tenant commits treaſon, the lands are forfeited to the king, becauſe there is an exception in the oath of fealty that ſaves his allegiance to the king; ſo that if he forfeits his allegiance, even thoſe lands held of another lord are forfeited to the king, for the lord himſelf cannot give out lands, but upon that condition, as appears by the reſervation in the oath. (*a*) Co. Lit. 8. a. of ſuch crimes there were many by the ancient feudal law, for which *vide* Digeſt. Feudorum, lib. 2. tit. 23, 24. Vigellius, 242. 350. Spelm. Gloſſ. 214, 215. Co. Lit. 64.

If a man be attainted of felony, and after purchaſe land, and die, the king ſhall have it by his prerogative, and not the lord of the fee; becauſe his perſon being forfeited to the king, he cannot purchaſe but for the king. Co. Lit. 2. b.

If there be grandfather, father, and ſon, and the father be attainted, the ſon cannot inherit the grandfather, becauſe the father cannot be repreſented; but if the father be attainted, two brothers may inherit each other, becauſe there is no diſability in the one to be repreſented, or in the other to repreſent; if the father be attainted, the ſon may inherit the mother; if the eldeſt ſon be attainted, and the father die in the lifetime of ſuch eldeſt ſon, the younger cannot inherit, becauſe there is the line of the elder brother in being before him; but if the eldeſt ſon die in the lifetime of his father, without iſſue, the younger brother ſhall inherit; but if he leave iſſue, neither the iſſue nor younger brother can inherit. Noy, 158 to 170. Co. Lit. 8. 4 Leon. pl. 21. Mo. pl. 775. Dyer, 48.

If the father be attainted and die during the life of the grandfather, yet the ſon ſhall not inherit the grandfather, becauſe he muſt repreſent his father, who cannot be repreſented: but if the grandfather be ſeiſed in tail, and the father be attainted of treaſon ſince the 26 *H.* 8. *c.* 13. and die in the lifetime of the grandfather, the ſon ſhall inherit the grandfather; for the ſon is heir *per formam doni* to the tail, which is originally not forfeitable, and by what ſtatute the father only forfeits the lands and right that he hath in him. Co. Lit. 8. 2 Co. 10. Dowtie's caſe.

Co. Lit. 8. But if a man be attainted, and after pardoned by charter, the children born before

If a man attainted be pardoned by act of parliament, he is totally reſtored and inheritable to all perſons; but if he be pardoned by charter, he may thenceforth purchaſe lands, but cannot inherit his former relations; for the king's charter cannot alter the law, or take away the right of others, or reſtore the relation that was loſt.

ſuch pardon ſhall not inherit; but if they fail, the children born after ſuch pardon may inherit him, for the pardon makes him capable of new relations as well as of new purchaſes, though all the old legal benefits and relations are loſt. Noy, 170.

Pollex. 617. 2 Keb. 451. 456. 2 Vent. 38-9. 2 Brown. 118. *vide* Co. Cop. § 58. *cont.*

All cuſtomary eſtates are within this rule, unleſs there be ſome particular cuſtom to the contrary, as in gavelkind, becauſe the perſon is *civiliter mortuus* by the attainder, and therefore is diſabled to have or hold any eſtate, or to have any property in any thing: and therefore if a perſon be ſeiſed in fee of a copyhold, and be attainted of treaſon or felony, the copyhold is in the lord without any preſentment of the homage, becauſe it is againſt the nature of a court-baron to inquire of criminal matters or offences againſt the king, and ſuch homage is at the will of the lord, and often influenced by him: but if a copyholder be convicted of felony, and preſented by the homage, by ſpecial cuſtom, the eſtate may be forfeited to the lord; but this is only by the ſpecial cuſtom, ſince the copyholder is not diſabled by the conviction to hold the eſtate, as he is if he were attainted; and therefore, ſince it is by the cuſtom only that ſuch forfeiture accrues, it muſt be in the manner in which the cuſtom ſettled it, which is by preſentment of the homage. But if a copyhold is granted for life, and by another copy the reverſion is granted to another, *habendum* after the death of the firſt copyholder, or ſurrender, forfeiture, or other determination of the firſt eſtate, the firſt copyholder commits murder, and is thereof attainted, and the king pardons the murder and the attainder, and all forfeitures thereby; in this caſe, he in the reverſion is entitled to the eſtate; for the king cannot have it for the baſeneſs of the tenure, ſince he cannot be tenant at will to any perſon; and the lord cannot have it, becauſe he cannot be tenant to himſelf; therefore the particular eſtate of tenant for life being extinguiſhed, the reverſion immediately commences.

Leon. 1. Pollex. 615 to 621.

Co. Lit. 3. b.; but for this *vide* head of Baſtardy, vol. 1. 510-11.

A baſtard cannot inherit, but if he hath got a name by reputation, he may purchaſe by it, for all ſurnames were originally acquired by reputation.

Notwithſtanding the charters and immunities granted to the Jews, yet their whole eſtates were taxable at the pleaſure of the king, and might at

As to *Jews*, they were tranſlated from *Roan*, by *William* the Conqueror, *ob numeratum pretium*, and were allowed by ſeveral kings following the Conqueror, becauſe they dealt with one another chiefly in money, and ſo drew a great deal of money into the kingdom, which they let out to Chriſtians on uſury, and were taxable to the king at his pleaſure. *Richard* the firſt erected a court where all their real and perſonal eſtates were regiſtered; which all, upon the death of any *Jew*, came to the king, but was redeemable by his children, paying their fine, and all the children equally inherited; the wives ſued for dower in this court, and could not

ſue at common law for it; and therefore if a *Jew* born in *England* took to wife a *Jew* alſo born in *England*, if the huſband was converted to the Chriſtian faith, and purchaſed lands and enfeoffed another and died, the wife could not demand dower at common law againſt a Chriſtian.

any time be ſeiſed by him. About the 18 E. 1. when their uſuries and extortions were very grievous to the people, they were baniſhed by proclamation, and their eſtates ſeiſed to the king, and a ſtatute made againſt their taking uſury in this land, for ever afterwards; but now all the records touching their courts, their immunities, and the power of the crown over them, are loſt and obſolete, ſo that thoſe that are born here ſeem inheritable at this day; but *quære* how far thoſe old laws, of which there are footſteps in hiſtory, may be revived upon them? Hollingſhead, vol. 3. p. 15. Co. Lit. 31, 32. 2 Inſt. 506, 507. *Vide* Molloy, 397 to 410. a good account of the Jews.—[Jews, it ſeems, were not incapacitated from taking gifts of land, unleſs there was an expreſs clauſe, uſual in former times, in the original charter, forbidding an alienation to them. Bract. 13.]

As to papiſts, there hath been an act made to prevent the dangerous growth of popery, when there was a pretended title in a popiſh prince, which diſables all, who after the 29th day of *September* 1700, attaining the age of eighteen years, do not within ſix months after take the oaths, *&c.* to inherit, or take by *deſcent*, *deviſe*, or limitation, *&c.* any lands, tenements, *&c.* and that during the life of ſuch papiſt, or until he or ſhe do conform, the next of his or her proteſtant kindred ſhall hold and enjoy the ſaid lands, without being accountable for the profits, ſubject to wilful waſtes, and that from the tenth day of *April* 1700, all papiſts ſhall be diſabled to purchaſe any manors, lands, *&c.* and that all eſtates, terms, intereſts, *&c. made*, *ſuffered*, *or done*, to or for their uſe, benefit, truſt, or behoof, mediately or immediately, ſhall be utterly void to all intents and purpoſes.

11 & 12 W. 3. c 4. For this *vide* tit. Papiſts and Popiſh Recuſants.

Religious perſons are prohibited to purchaſe in mortmain.

Vide tit. "Charitable Uſes and Mortmain."

Villeins and bondmen have power to purchaſe lands, but cannot retain them againſt their lords.

Co. Lit. 2.

As to perſons who are naturally incapable to purchaſe or inherit, a monſter not having human ſhape cannot purchaſe or inherit: but an hermaphrodite ſhall inherit or purchaſe *ſecundum prævalentiam ſexûs incaleſcentis*. One born deaf and dumb may inherit; ſo may any born deaf, dumb, and blind, becauſe it is for their advantage; but they cannot contract, becauſe they cannot underſtand the ſigns of contracting. An infant, an idiot, and a perſon of *non ſane memory* may inherit, becauſe the law, in compaſſion to their natural infirmities, preſumes them capable of property; ſo alſo an infant, or a perſon of *non ſane memory* may purchaſe, becauſe it is intended for his benefit; and the freehold is in him till he diſagree thereto, becauſe an agreement is preſumed, it being for his benefit, and becauſe the freehold cannot be in the grantor, contrary to his own act; nor can it be in abeyance, for then a ſtranger would not know againſt whom to demand his right: if at full age, or after recovery of his memory he agree thereto, he cannot avoid it; but if he die during minority or lunacy, the heir may avoid it; for the heir ſhall not be ſubject to the contracts of perſons who wanted capacity to contract. So,

Co. Lit. 2.

Inſt. 2. 2 Vent. 203, 204. *vide* tit. Infancy and Age, and Idiots, &c.

if after his memory recovered, the lunatic or perſon *non compos* die without agreement to the purchaſe, his heir may avoid it.

Inſt. 3. a. But the queen conſort, as ſhe is a woman of greater dignity than any other of her ſex in the kingdom, ſo ſhe hath greater privileges than any of them, for ſhe is conſidered by the law as a perſon exempt from the king, and hath ability to purchaſe and grant without him; which economy ſeems to be introduced as well for the greater ornament and grandeur of the monarchy, by enabling the queen to ſupport and keep a court of her own, as to encourage princes to court the alliance of our princes by marriages attended with ſo much eaſe and dignity.

A feme covert is capable of purchaſing; for ſuch an act does not make the property of the huſband liable to any diſadvantage, nor does it ſuppoſe a ſeparate will or power of contracting in the wife; but here the will of the wife is ſuppoſed the mind of the huſband, ſince no man is ſuppoſed not to aſſent to that which is for his benefit: but in this caſe the huſband may diſagree, and it ſhall avoid the purchaſe; for ſince huſband and wife, according to the inſtitution of marriage, are reckoned one perſon, they can have but one will, and that muſt be ſeated in the huſband, as fitteſt to govern; therefore the ſupreme direction of all affairs in his family muſt belong to him: but if he neither agrees nor diſagrees, the purchaſe is good, for his conduct ſhall be eſteemed a tacit conſent, ſince it is to turn to his advantage. But in this caſe, though the huſband ſhould agree to the purchaſe, yet after his death ſhe may waive it; for having no will of her own at the time of the purchaſe, ſhe is not indiſpenſably bound by the contract; therefore if ſhe does not, when under her own management and will, by ſome act expreſs her agreement to ſuch purchaſe, her heirs ſhall have the privilege of departing from it.

(B) The Import of the Word *Heir* that creates the Eſtate.

1. When it is a Word of Limitation.

Co. Lit. 9. IF land be given to *J. S.* and his heirs, *J. S.* can claim it, becauſe he is particularly named, and whoever can make himſelf heir to *J. S.*, that is, can ſupport the character of a legal repreſentative to *J. S.* may claim it alſo by the words of the giſt. But if land be *granted* to *J. S.* for ever, no perſon can ſtand in his place after his death, or claim any intereſt, becauſe the party that is next of kin by the law cannot bring himſelf within the words of the conveyance.

Co. Lit. 9. It is therefore a general rule, that nothing but the word *heir* will create a fee, for it ſignifies ſuch a neareſt of kin, with all other legal qualifications that are neceſſarily required in all perſons that repreſent or ſtand in the place of another, by the *Engliſh* law; but this general rule has theſe following exceptions:

For when the act of diſpoſal relates to another thing, that thing becomes in a manner part of the diſpoſition, for in ſuch caſes the mind is carried to the notion of an heir as truly and ſurely as if the word had been in the inſtrument itſelf; ſo that there is a great difference between this caſe and the caſe where other words are ſubſtituted inſtead of the word *heir*; for ſcarce any other word can expreſs all the notions that make up the *idea* of an heir; but where there is a relation to a legal heir, it is the ſame thing as if it were expreſſed in the conveyance itſelf,

If the father enfeoff the ſon, to hold to him and his heirs, and the ſon enfeoff the father as fully as the father enfeoffed him; this conveyance paſſeth a fee to the father.

itſelf, becauſe the word is but to put us in mind of the thing which is done already by the relation; for as we ſay not only that which is certain that is ſo in itſelf; but that, alſo, which by ſome other ſtandard is reducible to a certainty; ſo that not only that conveyance hath force, which hath words in it to anſwer the intent of the party, but that alſo which borrows ſtrength from any other thing to anſwer the ſame deſign; and this will appear plain by the following inſtances:

By a fine *come ceo*, &c. a fee-ſimple will paſs without the word *heirs*, becauſe it hath relation to a precedent feoffment, which is ſuppoſed to paſs the fee. Co. Lit. 9.

If the lord releaſes all his right to the tenant, the ſeigniory is extinct without the word *heirs*, for this inſtrument is to diſcharge the eſtate of the tenant, and therefore hath a neceſſary relation to the eſtate, which the lord at firſt created, and conſequently, it refers to thoſe words that in the original of the eſtate gave him a fee-ſimple. Co. Lit. 9.

If there be two coparceners, and one of them releaſe all her right to the other, without the word *heirs*, this paſſes a fee; for each coparcener till partition is ſeiſed of the whole eſtate in fee, though each of them hath right or legal demand to the fee of a moiety only: when, therefore, one releaſes all her right, it hath a neceſſary relation to the eſtate whereof the other is ſeiſed, and to which ſhe hath a right, which is the fee. Co. Lit. 9.

If there be two jointenants, and one releaſe to the other, this paſſeth a fee without the word *heirs*, becauſe it refers to the whole fee which they jointly took, and are poſſeſſed of by force of the firſt conveyance. But tenants in common cannot releaſe to each other, for a releaſe ſuppoſeth the party to have the thing in demand; but tenants in common have ſeveral diſtinct freeholds, which one cannot transfer to the other, without the ſolemnity of livery. Co. Lit. 9. 2co. b.

A common recovery is in nature of an action commenced, and judgment upon it, and therefore paſſeth a fee without the word *heirs*; for it hath relation to a precedent right in the recoveror, which muſt be ſuppoſed a right to the fee. Co. Lit. 9.

If one coparcener grants a rent to another for owelty of partition, the grant is good without the word *heirs*, for, coming in recompence of an inheritance, it has a plain relation to the inheritance departed with, as if the word *heirs* had been in the gift. Co. Lit. 9.

A reſtitution to a perſon attainted and pardoned will not paſs a fee without the word *heirs*, for, ſince the party forfeited the eſtate, the reſtitution is in nature of a *new* grant; and here are no words that create a neceſſary relation to that fee, which the perſon formerly attainted had, for he may be reſtored to his eſtate during his own life. It is a new grant in nature of a reſtitution.

Where a man is called to parliament by writ, the inheritance is in him without the word *heirs*, becauſe the writ is in nature of a citation to appear at the court of parliament, and the heir cannot be cited to appear, and therefore there is no mention made of him. Inſt. 9. b. [But the blood of the perſon ſummoned is not ennobled, till he takes his ſeat in parliament. *Id.* 160.]

There are ſome ſpecies of fees that are expreſſed without the word *heirs*, for the words whereby they are created ſignify inherit- Co. Lit. 9. b.

ance, as the word *frankmarriage* ſignifies an inheritance given in conſideration of marriage, which, being for the peopling of the country, had ſeveral privileges annexed to it: ſo, *frankalmoigne* ſignifies an inheritance devoted to God, which was mightily favoured by the ſuperſtition of ancient times: ſo, if a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many perſons capable to purchaſe, they have a fee-ſimple without the word *ſucceſſors*, becauſe in judgment of law they never die (*a*): for the ſame reaſon, if lands are given to the king by deed inrolled without the word *ſucceſſors* or *heirs*, a fee-ſimple paſſeth (*b*).

[(*a*) A fee will paſs to a ſole corporation without words of limitation or ſucceſſion, when the grant is made to the corporation by its corporate or collective name. Thus, a gift *eccleſiæ de A.* will paſs a fee, though the deed of gift contain no words of ſucceſſion. 11 H. 4. 84. b. 1 Atk. 437. (*b*) That is, if the king takes them in his royal politick capacity, *jure coronæ*.]

Co. Lit. 10. a.

There are likewiſe particular kinds of laws within the kingdom, that allow of the transferring of inheritances without the word *heirs*, as the law of the foreſt, which dependeth on the mere pleaſure of the king, and not on the ſolemnities and forms of a contract; and therefore, if the king granted an aſſart at a juſtice-ſeat, *habend. & tenend. ſibi in perpetuum*, the party had a fee without the word *heirs*, inaſmuch as the king had ſignified his pleaſure, that the party ſhould have the privilege of tillage for ever.

Co. Lit. 7.

Co. Lit. 9. But for this *vide* tit. Deviſes.

In wills and teſtaments, where the mind of the party appears to transfer a fee, for the mind of dying perſons delivered in haſte ought to receive a benign interpretation.

2. When it is a Word of Purchaſe.

Lit. § 578. 2 Roll. Abr. 415. 417. Co. 104.

The firſt rule to be obſerved is this, That where the anceſtor takes an eſtate for life, and a limitation is afterwards made to his right heirs, there, the anceſtor has the reverſion executed in himſelf, and the right heirs are not purchaſers; as if a leaſe for life be made to *A.*, remainder to *B.*, remainder to the right heirs of *A.*, ſuch remainder is executed in *A.* and he may grant it over; but if a leaſe for years be made to *A.*, remainder to the right heirs of *A.*, this is a contingent remainder to the right heirs of *A.*, and *A.* himſelf takes nothing by ſuch limitation; and the reaſon of the difference is this; in the firſt caſe *A.* having an eſtate for life is *feoffatus* within the ſtatute *quia emptores*, &c., and conſequently capable of performing the feudal ſervices; and then to make the right heir a purchaſer would be to ſuſpend the ſervices of the feud during the life of *A.* who is capable of performing them; which would apparently tend to the weakening of the tenure and ſtate of the kingdom; and therefore ſuch interpretation ought to be made as beſt ſupports the tenure, when the words will bear both ſenſes; for if, after ſuch limitation to the right heirs of tenant for life, he ſtill continued but barely tenant for life, he would not be in the homage of the lord, nor would he be obliged to venture his life in the wars for ſuch eſtate; and he in remainder would not be obliged to do the feudal ſervices, becauſe, during the

the life of the tenant for life, he has no intereſt in the land, for his remainder cannot execute during the particular eſtate, and conſequently, he is not obliged to do the ſervices of the feud; and if ſuch remainder was to veſt in the right heirs as purchaſers, it could not veſt during the life of tenant for life, *quia non eſt hæres viventis*; and then by ſuch conſtruction the ſervices of the feud would be neglected during the life of *A.*, for there would be no one to perform them. But in the laſt caſe you cannot veſt the remainder in the leſſee for years, for he is not *feoffatus* within the ſtatute; for the perſon that properly takes by the feoffment is the freeholder, and then conſequently, although you ſhould conſtrue a limitation to ſuch right heirs a remainder veſted in the leſſee for years; yet he, having not the immediate freehold in him, would not be obliged to do the feudal ſervices till the intermediate remainder was ſpent; and therefore the remainder to the right heirs is not immediately veſted in the leſſee for years, becauſe the heir is the firſt that can have the freehold as feudal tenant to the lord, and therefore by the words of the donation muſt be the firſt purchaſer of ſuch remainder. And though in the firſt caſe they admit ſuch limitation to be a remainder executed for public convenience, *viz.* that the feudal ſervices, if poſſible, may be anſwered; yet it would be ridiculous to admit ſuch conſtruction in the laſt caſe, ſince it would not make a feudal tenant to anſwer the ſervices; and to run counter to the tenor of a man's grant, without a benefit to any body, would be moſt abſurd, for ſuch conſtruction would not make a feudal tenant, becauſe the leſſee for years would not hold of the lord, nor could the lord avow upon him.

But if a feoffment be made to the uſe of *A.* and *B.* during their joint lives, and after the death of either of them, to the uſe of *C.* for life, and after to the heir of the body of *B.*, though *B.* hath an hath an eſtate of freehold, yet the remainder limited to the heirs of his body does not veſt, but is in abeyance, becauſe by this limitation the eſtate of freehold may determine in *B.* during the continuance of his life; and ſince *B.* is not let into the eſtate during his whole life, his heir cannot take as repreſentative of him, for ſuch repreſentative muſt be of an eſtate of which *B.* was ſeiſed; and ſince by the intention of this conveyance the feoffer hath not limited it in ſuch a manner, that *B.* in all events ſhould die ſeiſed of the eſtate, it is plain he deſigns only a contingent benefit to the heirs of the body of *B.* as original purchaſers, and not by derivation from him. 2 Roll. Abr. 418.

If a leaſe for life be made to *A.*, remainder to the right heirs of *B.*, this is a good contingent remainder if livery be made, becauſe ſuch act of notoriety delivers over the freehold to *A.* at the time it is made, and thereby creates a tenant, who is *feoffatus* within the ſtatute to hold of the lord, who is capable of doing the feudal ſervices, except homage, and on whom the lord may avow: and by this conſtruction there is no inconvenience, or ſuſpenſion of all the feudal ſervices; for if *A.* ſhould die during the life of *B.*, the contingent remainder would become void, becauſe there would be no feudal tenant to attend the ſervices; for the right heir could not Roll. Abr. 418.

not take it during the life of *B.*, and then the land would return to the donor, who would be again tenant to anſwer the ſervices.

And. 3. Co. Lit. 20. b. Dyer, 156. Roll. Abr. 827. 2 Roll. Abr. 415. Leon. 182. Fenwick v. Mitford. Moor, 284.

But if *A.* makes a leaſe for life, or a gift in tail, remainder to his right heirs; this is a void limitation in its original creation, for it cannot veſt immediately any more than in the former caſe, *quia non eſt hæres viventis;* and to conſtrue it a contingent remainder would be to ſuſpend the ſervices of the feud to no purpoſe; for it is not poſſible that it can veſt during the life of the grantor, for ſo long as he lives he can have no repreſentative or heirs, and therefore not like the former caſe, which may poſſibly veſt the minute after the grant is made, or at leaſt during the life of the grantor. Beſides, that in this caſe, where the feoffor has not parted with the whole eſtate out of him, the feoffee does not hold of the lord within the ſtatute *quia emptores, &c.** and to conſtrue this limitation to the right heirs a parting with the whole eſtate, would be an abſurd conſtruction, becauſe the anceſtor, in caſe he outlives the particular eſtate, muſt be in of his old reverſion, ſince he cannot have an heir during his life; and the anceſtor, cannot be ſuppoſed to deſign the heir ſhould take as a purchaſer, ſince it were an abſurd intention, that that eſtate, which would of courſe deſcend to him, ſhould veſt in him in the ſame manner as a purchaſer; and by conſequence, ſince there is no alteration by the conveyance from the courſe in which the eſtate would have deſcended, it muſt be a void limitation.

* See tit. Remainder and Reverſion.

Eſtate in Tail.

See this ſtatute expounded, 2 Inſt. 333. Fee-tail was originally termed the

BEFORE we enter into a diſquiſition of eſtates-tail, as they ſtand on the ſtatute *de donis conditionalibus*, it will be neceſſary to take a more particular view of the conditional fee at common law, becauſe the ſtatute *de donis* creates no eſtates-tail, but of ſuch eſtates as were anciently conditional fees.

feudom novum, in oppoſition to fee-ſimple abſolute, or the *feudum antiquum*, and went only to the deſcendants, either male or female, according to the words and limitation of the feudal donation, and thence came to be diſtinguiſhed into *feudum maſculinum* and *fœmininum*.

Co. Lit. 19. a.

If lands were given to a man and the heirs male of his body, the iſſue female were not inheritable, becauſe the feudal donation expreſſing particularly what heirs of the donee were to inherit, no heir, though of the body of ſuch feuditary, could inherit, that did not come under the words and limitation of the donation.

Co. Lit. 19. a. 7 Co. 35. a.

And if the donee had iſſue two ſons, and died, and the eldeſt died leaving a daughter, the youngeſt ſon came into the ſucceſſion of

of the feud, and excluded the daughter; and if there had been no ſon, the feud (*a*) reverted to the donor; for the expreſs words of the firſt donation, which regulated all ſubſequent deſcents, excluded all females from inheriting ſuch feud: ſo, *e contra*, if the feud had been given to a man and the heirs female of his body, the deſcent was to be conveyed to the females only, excluſive of all males, according to the words of the firſt donation.

(*a*) For the collateral heirs were excluded. Roll. Abr. 841.

But if the limitation of the feud had been to a man and his heirs male, ſuch donation did not exclude the females, but let them and (*b*) all collateral heirs in, becauſe ſuch donation, not limiting the feud to the deſcendants of any body, could not be good as a *feudum novum;* and if it were conſtrued a *feudum antiquum*, the courſe of deſcent cannot be altered by any man's private fancy; and ſince it appeared by the words of the donation, that the donor intended an eſtate of inheritance, his words were to be taken moſt ſtrongly againſt himſelf, and ſhould paſs the moſt abſolute eſtate of inheritance, which is a fee-ſimple to which not only his lineal heirs, but alſo his collateral heirs, are inheritable.

Co. Lit. 13. a.

(*b*) And therefore this at this day is a fee-ſimple. Jon. 105.

The power of alienation was not abſolute in the *feudum novum*, becauſe ſuch power might have been employed to diſappoint the lord of his reverter; and yet they did not abſolutely take away from ſuch feuditaries the power of alienation, becauſe that would have created a perpetuity, which was againſt the original policy of the *Engliſh* law. To come therefore to a temper between theſe extremes, the donee was not allowed to alien till iſſue had, becauſe till then he had not a deſcendible eſtate in him, and therefore could not transfer a deſcendible eſtate to others; and if he ſhould have been allowed to have aliened whether he had iſſue or not, ſuch alienations would have diſappointed the limitations and reſtrictions in the gift, which brought it back to the lord on failure of iſſue; and therefore they conſtrued the words of the feudal donation not only as a limitation but condition, which the feuditary was obliged to perform before he had an abſolute power over the eſtate; for ſuch donations were generally made for the propagation of families, and therefore it beſt anſwered the deſign of ſuch gifts, to ſuppoſe the power of alienation to ariſe on the begetting of iſſue, becauſe in ſuch caſes the feuditary had the contingencies of a family; for when iſſue was had, they looked upon the lord's poſſibility to be at a great diſtance, and they admitted of an abſolute power of alienation: therefore, if a man had aliened before iſſue had, the lord could not have entered for a forfeiture, becauſe that would have been contrary to his own donation, which carried it to the feuditary and his deſcendants; and therefore, if deſcendants were afterwards born, the lord was excluded during the continuance of ſuch iſſue, and the iſſue born after the alienation could not have entered, becauſe they only claim as repreſentatives to their anceſtor, and therefore his actual alienation barred them.

Co. Lit. 19. a. Plow. 246. b. 7 Co. 34. b. Roll. Abr. 840, 841. 2 Inſt. 333.

But if ſuch tenant had aliened before iſſue had, and afterwards had iſſue, and then the tenant and ſuch iſſue had died, ſuch alienation had not barred the donor of his right of reverter, becauſe the

Plow. 235. Co. Lit. 19.

the condition was not performed at the time of the alienation, ſo that the tenant had not an abſolute property veſted in him for the purpoſe; wherefore, ſince the alienation was before the tenant had ſuch power, it was ſubject to the lord's claim as if no ſuch alienation had been, and, by conſequence, the lord might have entered as in his reverter, as if the tenant had died without iſſue, and the ſubſequent birth of the iſſue is not a ſufficient performance of the condition to make the precedent alienation valid, ſince that were to allow of the alienation of a perſon who had no power to alien.

7 Co. 34, 35. Co. Lit. 19. a.

But if a gift was made to a man and the heirs of his body, and the donee had died leaving iſſue, ſuch iſſue, without having iſſue, might have aliened, becauſe, coming in by deſcent, he had the ſame power over it as he had over other eſtates deſcendible; and ſucceeding into his anceſtor's eſtate, who had an abſolute power of alienation, he took it in the ſame manner diſcharged of any reſtraint from the condition, and the rather, becauſe otherwiſe the iſſue could not have made the neceſſary proviſions on his own marriage by a family ſettlement: but if the iſſue had not aliened, it had followed the limitation of the firſt donation, becauſe the eſtate had continued in the ſame condition without alteration, and conſequently, on failure of iſſue according to the firſt donation, the lord had been in, in his feudal right of reverter.

Co. Lit. 19. a. Roll. Abr. 840.

And as the feuditary had power to alien the land after he had iſſue, ſo likewiſe might he have charged it with a rent, common, *&c.* for this power neceſſarily follows an abſolute and entire property; for if he might have aliened the feud from his iſſue, it is but part of that power to tranſmit it to his iſſue under any charge or incumbrance he thought fit.

Co. Lit. 19. a. Roll. Abr. 840.

So, the feuditary, by having iſſue, might have forfeited the feud for treaſon or felony.

Co. Lit. 19. except where a man made

If there was no expreſs reſervation of ſervices in the firſt feudal donation, the donee held of the donor as he held over.

a gift in frankmarriage, for in ſuch caſe the donee held free from all ſervices till the fourth degree was paſt; becauſe theſe gifts being made by the feuditary on the marriage of his daughter, or ſome other relation, ſuch promotion was thought a ſufficient conſideration for the gift, without an acknowledgment of an annual ſervice, or where the tenant in grand ſerjeanty made a gift in tail generally, without any ſpecial reſervation. Co. Lit. 23. a.

6 Co. 40. a. Sir Anthony Mildmay's caſe. Co. Lit. 21. 2 Inſt. 335. Mo. 155-6. Vent. 299. 2 Mod. 131. Co. Lit. 392.

Thus the law ſtood till the 13 *Ed.* 1. *c.* 1. when the ſtatute *de donis conditionalibus* was made, which deprived the feuditary of his ancient power of alienation, upon his having iſſue, or performing the condition. The pretence of making this ſtatute, as appears from the preamble, was to comply with the will of the donor, who in all ſuch grants intended that the feud ſhould be tranſmitted to the deſcendants of the feuditary in the ſame plight he received it; and upon failure of the deſcendants, that it ſhould revert to the donor himſelf: but the real deſign of making the ſtatute was to introduce a perpetuity to other purpoſes; for, towards the end of the baron's war, the crown took up a new method of politics to break the intereſt of the baronage; for when any feud that was then ſubſiſting in large diſtricts and territories eſcheated, or was forfeited

forfeited to the crown, the king divided it, and gave it out in leſſer feuds, thereby to deſtroy the power of the peerage: this the barons ſaw would tend to the ruin of their body, and therefore paſſed this act to make all ſuch new feuds unalienable, and by that means not forfeitable for treaſon, though the condition ſhould be performed by having iſſue; and from the time of this ſtatute, the donor's poſſibility or right of reverter was turned into a reverſion; and the donee, who before had a fee-ſimple conditional, has now but an eſtate-tail.

Under this Head we ſhall conſider,

(A) What Things may be entailed within the Statute *de donis conditionalibus*.

(B) What Words are requiſite to create an Eſtate-tail in a Deed or Gift.

(C) Of the ſeveral Sorts of Eſtates-tail.

(D) How far Tenant in Tail may charge his Eſtate, and what Acts of his relating to the Inheritance ſhall bind the Iſſue, though the Entail continues.

(A) What Things may be entailed within the Statute *de donis conditionalibus*.

THE ſtatute makes uſe of the word *tenementum*, and therefore the eſtate to be entailed may be as well incorporeal as corporeal inheritances, becauſe the word *tenementum* comprehends the one as well as the other, and, conſequently, not only lands may be entailed, but all rents, commons, eſtovers, or other profits ariſing from lands. Co. Lit. 19. b. 20. a.

But it is not neceſſary that the thing to be entailed ſhould iſſue out of land; for if it be annexed to lands, or any ways concern or relate to them, it may be entailed within the ſtatute; and therefore offices and dignities may be entailed; and accordingly it has been (*a*) reſolved, that if the king creates a man earl of *D.* to him and the heirs male of his body; this is a good entail of the dignity within the ſtatute, becauſe the title or dignity relates to lands; and anciently they were computed from their poſſeſſions, as a baron's fee, an earl's fee, *&c.* Co. Lit. 20. a. (*a*) 7 Co. 33. Nevil's caſe.

So offices may be entailed; as the office of earl-marſhal of *England*; or the office of a ſteward, bailiff, or receiver of a manor, becauſe theſe are demandable in a *præcipe*, *ut tenementa*, and being exciſable within the manor, are therefore looked upon as members or branches of it. Co. Lit. 20. a. 1 Roll. Abr. 838. 7 Co. 33. Plow. 2.

An

Hard. 465. An equity of redemption is entailable, becauſe the mortgage being a pledge for money, equity looks upon the eſtate in the ſame plight as it was before.

Co. Lit. 20. Charters may be entailed, becauſe they are muniments belonging to the land itſelf; but if the entail be barred by collateral warranty, then the heir ſhall not have detinue for them, for then he cannot make title by virtue of the entail.

Co. Lit. 20. a. Plow. 2. b. Maxwel's caſe. Roll. Abr. 837. But things merely perſonal, which only charge the perſon, and neither iſſue out of land nor relate to it, nor can be demanded *ut tenementum* in a *præcipe*, cannot be entailed within the ſtatute; and therefore, if I grant to *B.* and the heirs of his body, to be maſter of my hawks, or keeper of my hounds, with a fee or ſalary annexed to it, this is no entail within the ſtatute, becauſe this can no way fall within the notion of *tenementum*.

Plow. 3. a. Roll. Abr. 837. [*Vide* tit. "Annuity and Rent-charge. So, if *A.* for him and his heirs grants an annuity to *B.* and the heirs of his body; this, having no manner of relation to land, is no entail within the ſtatute, for ſuch grant only affects the perſon of the grantor. Tom. 1. 177. note.]

Co. Lit. 20. a. 10 Co. 87. Roll. Abr. 837. Cro. Eliz. 143. Chanc. Rep. 200. Vent. 194. 2 Chan. Rep. 233. but for this *vide plus*, tit. Deviſe. No chattels real can be entailed, and therefore, though a man, poſſeſſed of a term for years, ſhould deviſe his term to *J. S.* and the heirs of his body, yet the term would go on in its old channel to the executors, and the iſſue of the body of the donee has no intereſt in the term, and *J. S.* may ſell or diſpoſe of it as he pleaſes; for this being no *tenementum* within the ſtatute, the deviſee is not tied up from alienating it by that act. So it is of a truſt, for a man can no more entail a term in groſs by way of truſt, than by way of deviſe. But a term for years, which is created or kept on foot to attend the inheritance, is allowed in Chancery to wait upon the entail of the inheritance.

[Two things ſeem eſſential to an entail within the ſtatute *de donis*. One requiſite is, that the *ſubject* be land or ſome other thing of a *real* nature. The other requiſite is, that the *eſtate* in it be an *inheritance*. Therefore, neither eſtates *pur autre vie* in lands, though limited to the grantee and his heirs during the life of *ceſtuy que vie*, nor *terms for years*, are entailable any more than perſonal chattels; becauſe, as the latter not being intereſts either in things *real* or of *inheritance*, want *both* requiſites; ſo the two former, though intereſts in things *real*, yet not being alſo of *inheritance*, are deficient in *one* requiſite. However, eſtates *pur autre vie*, terms for years, and perſonal chattels, may be ſo ſettled, as to anſwer the purpoſes of an entail, and be rendered unalienable almoſt for as long a time as if they were entailable in the ſtrict ſenſe of the word. Thus, eſtates *pur autre vie* may be deviſed or limited in ſtrict ſettlement by way of *remainder* like eſtates of inheritance; and ſuch as have intereſts in the nature of eſtates-tail may bar their iſſue and all remainders over by *alienation* of the eſtate *pur autre vie*, as thoſe, who are ſtrictly ſpeaking tenants in tail, may do by *fine* and *recovery*: but then the having of iſſue is not an eſſential preliminary to the power of alienation in the caſe of an eſtate *pur autre vie* limited to one and the heirs of his body, as it is in the caſe of a conditional fee, from which the mode of barring by alienation was evidently borrowed. The manner of ſettling terms for years and perſonal chattels is different: for in them no *remainders* can be limited; but they may be entailed by *executory deviſe* or by deed of truſt, as effectually as eſtates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being, and 21 years after, and perhaps in the caſe of a poſthumous child a few months more; a limitation of time not *arbitrarily* preſcribed by our courts of juſtice, but wiſely and reaſonably adopted in analogy to the caſe of freeholds of inheritance, which cannot be ſo limited by way of remainder, as to poſtpone a complete bar of the entail by fine or recovery for a longer ſpace. It is alſo proper to obſerve, that in the caſe of terms of years and perſonal chattels, the *veſting* of an intereſt, which in reality would be an eſtate-tail, bars the iſſue and all the ſubſequent limitations, as effectually as fine and recovery in the caſe of eſtates entailable within the ſtatute *de donis*, or a ſimple alienation in the caſe of conditional fees and eſtates *pur autre vie*; and further, that if the executory limitations of perſonalty are on contingencies too remote, the whole property is in the firſt taker. Upon the whole, by a ſeries of deciſions within the laſt two centuries, and after many ſtruggles in reſpect to perſonalty, it is at length ſettled, that every ſpecies of property is in *ſubſtance* equally capable of being ſettled in the way of entail; and though the modes vary according

according to the nature of the ſubject, yet they tend to the ſame point, and the duration of the entail is circumſcribed *almoſt* as nearly within the ſame limits as the difference of property will allow. As to the entail of eſtates *pur autre vie*, ſee 2 Vern. 184. 225. 3 P. Wms. 262. 1 Atk. 524. 2 Atk. 259. 376. 3 Atk. 464. 2 Vez. 681. As to the entail of terms for years and perſonal chattels, ſee Manning's caſe, 8 Co. 95. Lampet's caſe, 10 Co. 46. b. Child and Bailey, W. Jon. 15. Duke of Norfolk's caſe, 3 Ch. Ca. 1. a caſe in Carth. 267. and one in 1 P. Wms. 1. Foley v. Burnell, 1 Br. Ch. Ca. 274. Hargr. note, Co. Litt. 20. a. b.—The doctrine upon this part of the ſubject is ſtated in the above note with ſuch nearneſs, perſpicuity, and ſuccinctneſs, that the editor, feeling it impoſſible to deliver it in fewer or better words, has taken the liberty of tranſcribing it at length.]

As to the entail of copyholds, *vide* tit. *Copyhold*, vol. 1. 709.

(B) What Words are requiſite to create an Eſtate-tail in a Deed or Gift.

WHEN the notion of ſucceſſion prevailed, it was neceſſary in feudal donations to uſe the word *heirs* to diſtinguiſh ſuch deſcendible feud from that which was granted only for life, but as to the word *body*, it was not neceſſary to make uſe of that in the donation, but it might be expreſſed by any equivalent words; and (*a*) therefore, a gift to a man, and *hæredibus de ſe*, or *de carne*, *quos ſibi contigerit habere*, or *procreavit*, is a good eſtate-tail, for theſe ſufficiently circumſcribe the word *heirs* to the deſcendants of the feuditary.

For the words which create an entail in a will, *vide* tit. Deviſe.

(*a*) Co. Lit. 20. 7 Co. 41. b. and the reaſon of the difference is, for that inheritances being only derived from the law, the law requires the word *heirs* that comprehends the whole notion of ſuch legal repreſentation; but the limiting of the inheritance to the deſcendants of this or the other body, is only the particular intention of the perſon that forms the gift, and therefore the law leaves every man to expreſs himſelf in ſuch manner as may manifeſt that intention.

Therefore, if lands are given to a man & *hæredibus*, *quos ſibi contigerit*, *habere de uxore ſuâ*; this is an eſtate-tail, though the word *body* be omitted: ſo, if the gift had been to him & *hæredibus ſuis de primâ uxore ſuâ*, for this confines the word *heirs* to the deſcendants of his body, ſince his heirs, who can inherit that gift, muſt be of his wife, which no collateral heir can poſſibly be.

7 Co. 41, 42.

A feoffment was made to the uſe of *A.* for life, remainder to the uſe of *B.*, and of the heirs male of the ſaid *B.* lawfully begotten, and for default of ſuch iſſue, remainder over, *A.* dies; this is no eſtate-tail in *B.*, but a fee-ſimple, becauſe there are no words to ſhew from whoſe body the heirs male of *B.* muſt proceed; for, to the creation of an eſtate-tail, it is requiſite that there be words ſufficient to ſhew from what body the heirs mentioned in the gift are to proceed, though the word *body* be not expreſsly uſed; for in this caſe ſuch may be heirs male of *B.* as were never proceeding from his body, ſince the words of the donation leave it at large, and do not require that they ſhould be begotten by any particular perſon.

Cro. Eliz. 478. Mo. 424. 7 Co. 41. S. C. between Abraham and Twigg. Lit. Rep. 344. Plow. 541. 3 Leon. 5. Hob. 32. 37. 2 Sid. 41.; but it would be otherwiſe in a will, which being made without the aſſiſtance of a lawyer, receives always a favourable interpretation; *vide* title Deviſe.

So, where *A.* ſeiſed in fee of a copyhold, ſurrendered the ſame to the uſe of himſelf for life, and after to *B.* and *C.* his wife, *pro*

2 Salk. 620. pl. 3. Idle v. Cook.

2 Ld. Raym. 1144. S. C. 1 P. Wms. 70. S. C. Paſch. 4 Ann. in B. R. and *per cur.* it is the rather a fee-ſimple

pro & durante termino vitarum ſuarum naturalium & hæred. & aſſignat. prædict. B. & C. *& pro defectu talis exitus*, to the uſe of himſelf and his heirs; it was held by *Holt*, C. J. and two judges, againſt *Gould*, that *B.* and *C.* had a fee-ſimple, and that *pro defectu talis exitus* imported nothing of their dying without iſſue, but was to be taken generally, and every heir is the iſſue of ſome body.

in this caſe, becauſe of the word *aſſigns*, for an eſtate-tail is not aſſignable; but Gould *cont.* becauſe the intent of the party was to create an eſtate-tail.

Carth. 343. 5 Mod. 266. Ld. Raym. 101. 3 Salk. 337. S. C. adjudged between Leigh and Brace. Hil. 6 W. 3. in B. R. and ſame point ſaid to have been adjudged upon this very deed in C. B. between Coke and Roberts. Hil. 2 W. 3.

But if *A.* ſeiſed in fee makes a voluntary feoffment to the *uſe* of himſelf for life, remainder to the uſe of *J. S.* and his heirs for ever; and for default of iſſue of the body of *J. S.* then to the uſe of the right heirs of *A.*, this being in a conveyance by way of *uſe*, which is always conſtrued like a will, and according to the intention of the party, gives *J. S.* but an eſtate-tail.

7 Co. 41.

If land be given to *A.* and *B.* his wife, and their heirs, & *aliis hæredibus* of the ſaid *A. ſi dicti hæredes de* A. & B. *exeuntes obierint ſine hæredibus de ſe*, this is a good eſtate-tail, though the word *body* be omitted, becauſe there are words equivalent, which equally circumſcribe the general import of the word *heirs* to the deſcendants of the body of *A.* and *B.*

Roll. Abr. 838. Co. Lit. 20. b. [A ſettlement was made on *A.* for life, remainder on *B.* and the heirs-male of his body, with power of revocation to *A.* of *B.*'s remainder.—*A.* reciting

If lands are given to a man and the heirs of his body, remainder to *J. S.* and his heirs in *formâ prædictâ*; this is a good remainder in tail to *J. S.* for by a neceſſary relation the mind is carried to the words of the firſt gift, which circumſcribe the heirs of the donee to the deſcendants of his body: ſo, if the remainder had been limited to *J. S. in formâ prædict.* this limitation, without the word *heirs*, had veſted a good eſtate-tail in him in remainder: or, if a leaſe for life had been made to *A.*, the remainder to *B.* and the heirs of his body, remainder to *J. S. in eâdem formâ*, theſe words, having ſuch a neceſſary relation to thoſe words which immediately precede them, repreſent to us the intention of the donor as plainly as if he had expreſſed himſelf in all the terms of the firſt limitation.

the ſettlement to be on *B.* and his heirs male, omitting the words *of his body*, revoked the old uſes, and by the new deed limited *the ſaid eſtate in the ſaid deed named* to *B.* and his heir-male, omitting the words *of his body*, and ſubjected the eſtate thus limited to a charge of 100*l.* It was holden, that this was a good revocation, and a good limitation of a new eſtate-tail; for that the recital, though inaccurate, referred to the limitation in the ſettlement to the heirs *of the body*; the revocation was of thoſe uſes which the recital had referred to and profeſſed to ſtate; and the new limitation was of the eſtate deſcribed in the ſettlement, ſubject only to the charge of 100*l.* Gilmore v. Harris, 3 Lev. 213. Carth. 292. S. C. Skin. 325. S. C.]

Co. Lit. 20. b.

But if a gift be made to *A.* for life, remainder to *B.* and the heirs of his body, remainder to *J. S. in formâ prædict.*, this, according to my Lord *Coke*, is a void limitation to *J. S.*; for, though the mind is carried to the former limitations, yet finding no neceſſary relation to one more than the other, it can determine nothing

thing poſitively as to the intention of the donor, and therefore ſuch limitation is void for uncertainty *.

* Note: Co. Lit. 385. b. ſays, "If a man letteth lands for life, the remainder *eâdem formâ*, this is a good eſtate-tail, *quia idem ſemper* "*refertur proximo præcedenti.*" And this ſeems to be law, for the reaſon aſſigned.

If lands be given to a man and his heirs, *habendum* to him and the heirs of his body; this is but an eſtate-tail, becauſe the *habendum* expounds the general word *heirs* in the premiſes; for though it cannot change or alter them, ſo as to retract the gift in the premiſes, yet it may well conſtrue and explain them while ſuch conſtruction is conſiſtent with the premiſes, and does not deſtroy the operation of the words mentioned in them, but only explains in what ſenſe they are to be taken, and what heirs are comprehended. But if the limitation in the premiſes had been to a man and the heirs of his body, *habendum* to him and his heirs, it had been a tail with a fee-ſimple expectant, becauſe this *habendum* cannot be conſtrued an expoſition, for that it comprehends all heirs in general, and doth not confine or interpret the premiſes, and therefore, being more comprehenſive than the premiſes, paſſes the fee-ſimple expectant. Co. Lit. 21. a. 8 Co. 54. b. 2 Roll. Abr. 66. 68.

If lands be given to a man and his heirs, *habendum* to him and his heirs, if the donee has heirs of his body; and if he dies without heirs of his body, that the land ſhall revert to the donor, or *habendum* to him and his heirs, if he hath iſſue of his body begotten; and if he dies without heirs of his body, that the lands ſhall revert to the donor; this is but an eſtate-tail in the donee, becauſe the *habendum* plainly explains in what ſenſe the word *heirs*, which are uſed generally in the premiſes, are to be taken, nor does ſuch explanation retract the gift in the premiſes, becauſe the word *heirs* have ſtill their operation, and by ſuch conſtruction are more conformable to the will and intention of the donor: but if the *habendum* had been for life, that had been a void limitation, becauſe no explication can reconcile the *habendum* to the premiſes; and where the laſt words of the donation retract the former gift, they are taken as inſignificant and void, becauſe no man is allowed to vacate his own grant. Roll. Abr. 838. Co. Lit. 21. a. Ero. tit. Tail, 20.

If a feoffment be made to *A.* and his heirs, with warranty to him and his heirs, and if it happens that he dies without heirs of his body, that it ſhall remain to *J. S.* in fee; this limitation of a remainder explains what heirs of the donee ſhould take; for it is plain that the donor intended the word *heirs* in the premiſes ſhould not be taken in their moſt extended ſenſe, for then they would convey an abſolute eſtate, which would bear no limitation of a remainder over to *J. S.*, and then that part of the gift would be void, which, by an eaſy explication of what heirs the donor meant in the premiſes, is made good and conſiſtent, without any force or violence to the premiſes. Roll. Abr. 839. 2 Roll. Abr. 68.

If lands are given to a man and a woman and their heirs, *habendum* to them and the heirs of their bodies, remainder to them and the ſurvivor of them for life, to hold of the *chief lord*; this has been adjudged an eſtate-tail with a fee-ſimple expectant; for though Cro. Car. 476. 2 Roll. Abr. 68. Thurman and Cooper.

[2 Roll. Rep. 19. 23. In this caſe there was alſo a warranty to the grantee and his heirs. However, the court intimated, that their opinion would have been the ſame, if theſe ſpecial circumſtances had not occurred.]

though the *habendum* explains what heirs are meant in the premiſes, and there is no mention of the word *heirs* in the remainder; yet it is plainly the intention of the donor, that the intereſt in the land ſhall not ceaſe upon the determination of the eſtate-tail, becauſe there is a remainder limited over to take effect when the tail is ſpent; and if the limitation of the remainder paſſes any thing, it muſt be a fee, becauſe they had a greater eſtate already in them than for life; and this the rather, becauſe the *tenend.* is expreſsly to be of the *chief lord*, which ſhews they intended to leave no eſtate in themſelves.

Hob. 172.

If I give land to a man and his heirs, *viz.* the heirs of his body; this is but an eſtate-tail; for here I explain the general import of the word *heirs* to the deſcendants of the body of the donee.

Cro. Jac. 400. Cooper and Franklin. 2 Co. 78. Plow. 555. Bro. tit. Feoffment to Uſes, 40. Co. Lit. 19. b.

A feoffment was made to *A.*, *habendum* to him and the heirs of his body, to the uſe of him and his heirs and aſſigns for ever; this is only an eſtate-tail in *A.* and no fee-ſimple, for the lands are ſo appropriated by the firſt words to the donee and his iſſue, that no act or limitation of the parties can take it out of them; nor does the ſtatute 27 *H.* 8. *c.* 10. execute the poſſeſſion to the uſe; for the ſtatute never intended to execute any uſe but that which the legal tenant had been obliged to execute before the ſtatute; but the act *de donis*, as it tied down the donee from alienating, ſo it would nor permit the Chancery to oblige the donee to give the land away from his iſſue: the ſame law, if the uſe had been limited over to a ſtranger, for the ſame reaſon.

Cro. Car. 231. Jenkins v. Young. 245. Meredith v. Jones.

Lands were given to baron and feme, *habendum* to baron and feme to the uſe of them and the heirs of their bodies; this was adjudged an eſtate-tail; for though ſuch limitation of a uſe to a ſtranger had not been a good eſtate-tail, becauſe the legal eſtate in baron and feme had only been for their lives, yet here being no feoffee diſtinct from the *ceſtui que uſe*, but they being all the ſame perſon, by conſequence, there is no uſe diſtinct from the legal eſtate, and therefore, the word *uſe* may be very properly rejected, in order to eſtabliſh the intention of the conveyance, and then the caſe amounts to no more than if an eſtate were limited to baron and feme for their lives, with remainder to them and the heirs of their bodies.

Hebblethwaite v. Cartwright, Ca. temp. Talb. 30. Long v. Beaumont, 1 P. Wms. 231. Hewitt v. Ireland, *id.* 427.

[Lands were given to one for life, remainder to the heirs male of his body hereafter to be begotten. This was adjudged to be an eſtate-tail, and that the words *hereafter to be begotten* do not confine it to the iſſue born after, but will take in that born before, the words *procreatis et procreandis* being of the ſame import, according to 1 *Inſt.* 20. and 24 *E.* 3. *pl.* 15. And this is to prevent the great confuſion that would otherwiſe be in deſcents by letting in the younger before the elder.]

Gore v. Gore, 2 P. Wms. 33. S. P. But it hath been holden, that where the words were *in poſterum procreandis*, ſons born *before* ſhall be excluded, on account of the peculiar force of *in poſterum*. Mich. M. 26 Eliz. B. R. 3 Leon. 87. Hargr. Co. Lit. 20. b. n. 3.

(C) Of the ſeveral Sorts of Eſtate-tail.

IF lands are given to a man and the heirs of *his body*, this is a *tail general*; becauſe all his deſcendants may poſſibly come into the ſucceſſion; ſo that if the donee has ſeveral wives, the deſcendants of every wife may inherit, becauſe they fall within the words of the donation: but the donor might by particular expreſſions have confined the ſucceſſion to any particular deſcendant, as to the heirs male or heirs female; and hence the diſtinction between eſtates in *tail male* and *tail female*. Lit. § 14.

If lands are given to a man and the heirs male and female *of his body*, this is a tail general; becauſe by ſuch limitation all the deſcendants of the feuditary may inherit. Co. Lit. 25. b. but great care muſt be taken to limit the eſtate to the deſcendants of *the body* of the donee, for if lands be given to a man and his heirs male, this is a fee-ſimple. Co. Lit. 13. So, if the limitation had been to the donee and his heirs female, or to the donee and his heirs male or female. Lit. § 31.

If land be limited to the ſon and his heirs, of the body of his father, this is a fee-ſimple in the ſon, and no entail at all, not being limited to the ſon's deſcendants; nor is there in this caſe any proper limitation or reſtriction of the word *heirs*, becauſe it limits it to his heirs of the body of the father. Now there is plainly a deſign to place the intereſt that is to veſt in the ſon; and yet it ſhould not go merely to the ſon's deſcendants, but to all collaterals, as far as they could claim under the body of the father: but ſuch a limitation the law will not endure, it not being an eſtate-tail confined to the deſcendants only; and therefore it muſt be a fee-ſimple; for to allow men to form ſuch new ſorts of eſtates would be very inconvenient, as it would put it in the power of private perſons to make new limitations touching the courſe of deſcents, and thereby render all deſcents uncertain. Co. Lit. 27.

But if the eſtate were limited to the ſon, and to the heirs of the body of the father, though the father was dead at the time of the gift; yet it is a good entail, becauſe here the word *heirs* is a word of purchaſe; and it is a good name of purchaſe after the father's deceaſe; and the ſon, being only tenant for life by the words of the gift, by the ſecond words takes the entail as a purchaſer; but in the other caſe, the words *his heirs* are merely words of limitation, and therefore affect an entail, which the law will not endure. Lit. § 30. If there had been grandfather, father, and ſon, and the father dies, and the limitation had been to the grandfather and to his heirs of the body of the father, this is a good entail; for it goes to the deſcendants only, and it limits what ſort of deſcendants it ſhall go to, viz. ſuch only as were begotten by the father. Co. Lit. 20. b. Bro. Tail, 10.

If lands be given to huſband and wife, and the heirs of the body of the ſurvivor; this is a good donation to veſt an eſtate-tail general in the ſurvivor; but the eſtate-tail does not veſt till one of them dies; and then, becauſe all the deſcendants of the ſurvivor may inherit the gift, it is a tail general. Co. Lit. 26. a. 10 Co. 51. Reg. 239. b.

Tail ſpecial is where the eſtate is limited to ſome particular heirs of the body of the donee, as to the heirs of ſuch a woman; as Lit. § 16.

if lands be given to a man and his wife, and the heirs of their two bodies begotten; for though all the deſcendants of that marriage may inherit the gift, yet all the heirs of the body of the donee cannot inherit; for if the woman ſhould die, and the man take another wife, the iſſue of the donee by the ſecond wife ſhould not inherit, becauſe the limitation of the gift was only to the deſcendants of the feuditary by the firſt marriage.

Co. Lit. 25. b. Bro. Eſtate, 22. Tail, 16.

If land be given to a man and a woman unmarried, and the heirs of their bodies, this is a tail ſpecial, for the poſſibility that they may marry, and then the deſcendants of that marriage can only inherit. So, if the gift be made to a man that hath a wife, and to a woman that hath a huſband, and the heirs of their bodies; this is a tail ſpecial preſently in them, for the poſſibility that they may marry; and the deſcendants of ſuch marriage may inherit according to the limitation of the gift.

Plow. 35. a. Co. Lit. 25. b.

But if land be given to two men and their wives, and the heirs of their bodies begotten, they have a joint eſtate for life, and ſeveral inheritances, but no joint eſtate in tail; becauſe, though the huſband and the wife of the other may die, and the ſurvivors may marry, yet the gift being made to them all, and the heirs of their bodies, it is impoſſible that there ſhould be one heir or deſcendant of all their bodies, and therefore it can be no joint eſtate-tail in them all; but they all four take jointly for life, and each huſband and his wife have a ſeveral inheritance in a moiety.

Lit. § 283.

If lands be given to two men, and the heirs of their bodies begotten, they have but a joint eſtate for life, and ſeveral inheritances; for though the gift be limited to the deſcendants of their bodies; yet, it being impoſſible there ſhould be one deſcendant of both their bodies, they cannot have a joint eſtate-tail.

Lit. § 283. Co. Lit. 25.

So, if lands be given to one man and two women, and the heirs of their bodies begotten, they have a joint eſtate for life, and ſeveral inheritances; becauſe there can be no one iſſue of both the women's bodies; and if the man ſhould marry one of them, yet it is not limited in the donation, which of them, in caſe of ſuch intermarriage, ſhould firſt take.

3 H. 6. 48. 7 H. 7. 16.

If an eſtate be limited to huſband and wife, and the heirs of their bodies, and they are divorced *a vinculo matrimonii*, they are only tenants for life; becauſe they ſhall not be preſumed to intermarry after they are once legally divorced by church cenſures.

Co. Lit. 4. b. Heb. 31.

But there are other ſorts of eſtates-tail; as when the donation is limited not only to the deſcendants of the donee by one woman, but more particularly to one ſort of deſcendants of ſuch marriage, excluſive of others; as if lands be given to a man and a woman, and the heirs male of their bodies; this is an eſtate in tail-male, for the donor having expreſſed what heirs ſhall inherit, none can claim under ſuch gift that does not come under ſuch particular deſcription. So, if the limitation had been to the heirs female; for the donee being capable of taking by purchaſe, the donor may limit the ſucceſſion of the land to which of the de-

ſcendants of the donee he pleaſes. But if the limitation had been to *A.* for life, remainder to the heirs female of the body of *J. S.* and *J. S.* has iſſue a ſon and a daughter, the daughter can take nothing by ſuch gift; the reaſon of the difference is this; becauſe in the firſt caſe the donation ſpecifies what ſort of deſcendant of the donee ſhall take; but in the laſt caſe it ſpecifies who ſhall take originally; and the firſt purchaſer muſt come fully up to the deſcription in the donation, elſe there can be no gift, and while there is a ſon of *J. S.* no female can be heir, and conſequently not a perſon capable of taking originally by the gift; but if *J. S.* hath iſſue a ſon and a daughter, and the ſon hath iſſue a daughter, and dies, and a leaſe for life is made, remainder to the heirs female of the body of *J. S.* the daughter of the ſon ſhall be the purchaſer, becauſe ſhe comes within the deſcription, being both heir, and likewiſe a female, though ſhe was deſcended from a male.

If lands be given to a man and his wife and the heirs male of the body of the huſband; this is a ſpecial tail in the huſband, and but an eſtate for life in the wife. So, if the limitation had been to the heirs male of the body of the wife by the huſband begotten, it is an eſtate for life in the huſband, and a tail in the wife; for to which ever body the word *heirs* inclines by the limitation, it creates a deſcendible eſtate in ſuch perſon. But if it be not more particularly limited to the body of one than the other, but inclines to each alike, then it creates a deſcendible eſtate in both of them; as if lands be given to huſband and wife, and the heirs which the huſband ſhall beget on the body of his wife, both of them have an eſtate-tail, becauſe the word *heirs*, which creates the deſcendible eſtate, is not limited to one more than the other. Lit. § 26, 27, 28, Yelv. 13. Repps v. Bonham.

If a feoffment be made to the uſe of *A.* and *B.* huſband and wife, and the longeſt liver of them, and after the deceaſe of the ſaid *A.* and *B.* then to the uſe of the heirs of the body of the ſaid *A.* begotten on the body of *B.*, this is an eſtate-tail in the huſband, for the word *heirs* is limited to the body of *A.* though to be begotten on the body of the wife. Hob. 84. Skeat v. Oxenbridge.

So, if lands be given to baron and feme, and the heirs of the body of the feme, by the huſband and *J. S.* engendered; this is an eſtate-tail in the feme, but ſo far enlarged by the laſt words, that the heirs of her body begotten by *J. S.* may inherit after the iſſue by the preſent huſband. Yelv. 131. If the limitation had been to the heirs *ſupra corpus* of the feme by the huſband begotten, whether this had been an eſtate-tail in them both, is left a Q.

[Where an eſtate for life was limited to *S.* wife of *L*, remainder to the heirs to be begotten on the body of *S.* by *L.* her huſband, no eſtate being previouſly limited to the huſband himſelf; it was holden, that the word *heirs* related to both their bodies, and conſequently, did not create an eſtate-tail in *S.* Goſſage v. Taylor, Sty. 325.

Sir *R. F.* on the marriage of his ſon levied a fine, and declared the uſes to himſelf during the joint lives of himſelf and his ſon *L. F.*, and after the deceaſe of either of them, to the uſe of *S. C.* Frogmorton v. Wharley, 2 Term Rep. 435.

2 Bl. Rep. 1228. S. C. 3 Wilſ 125. 144. S. C.

for her life, and after her deceaſe to the uſe of the iſſue male of the ſaid *S.* and *L.* and the heirs of their bodies, and in default of ſuch iſſue, to the uſe of the heirs to be begotten on the body of *S.* by the ſaid *L.*, remainder to the right heirs of the ſaid Sir *R. F.* The marriage took effect, and *S.* died leaving ſix daughters, but no ſon. Sir *R.* died leaving *L.* his ſon and heir. A queſtion aroſe on the eſtate which *L.* took; and the court reſolved, that, if he had been joint-tenant with the wife for life, this had been an eſtate-tail in both; as the word *heirs* is not applied to any body particularly, as *Litt.* § 28. Secondly, that neither the huſband nor wife had an eſtate-tail: not the huſband, becauſe he had no prior eſtate for life: not the wife, becauſe though ſhe took an eſtate for life, yet the heirs are not applied to her body.

Dean v. Gillott, 2 Term Rep. 431.

On a marriage the huſband covenanted to ſtand ſeiſed of lands to the uſe of himſelf and his intended wife for their lives, and the life of the longer liver, remainder to the uſe of the heirs of the huſband *on* the body of his ſaid intended wife *by* him lawfully to be begotten, remainder to the uſe of his own right heirs. The huſband having ſurvived the wife, levied a fine of the lands, and after his deceaſe, a queſtion aroſe on the operation of this fine; which depended on the point, whether the words "to the "uſe of the heirs *on* the body of the wife *by* the huſband to be "begotten" gave an eſtate-tail to the wife only, or a joint eſtate-tail to both? It was decided, that the limitation gave an eſtate-tail to both, as well upon the authority of the above caſe in *Styles*, as of the caſe cited by Lord *Coke*, from 3 *E.* 3. *c.* 32., where, upon a gift to *I.* and *M. uxori ejus et hæredibus quos idem I. de corpore ipſius M. procrearet*, &c. it was adjudged an eſtate-tail in both, becauſe the eſtate was equally entailed to the heirs of the baron, as to the heirs of the wife.

Co. Lit. 26.

Roſe v. Aiſtrop, 2 Bl. Rep. 1228.

A freehold eſtate was ſettled on huſband and wife for life, and on the ſurvivor, remainder to the uſe of the heirs of the huſband on the body of the wife to be begotten, remainder to the right heirs of the huſband. A copyhold eſtate in borough-engliſh was likewiſe ſettled to the uſe of huſband and wife and the heirs of their two bodies to be begotten in like manner and to the ſame uſes as the freehold was ſettled and conveyed. *De Grey*, C. J. This is an eſtate executed, and ſeems to be an eſtate-tail in the huſband and wife. *Blackſtone*, J. I think the freehold is clearly veſted in the huſband only in ſpecial tail; the copyhold in both huſband and wife.]

Litt. § 24.

And it is to be obſerved, that in all inſtances of ſuch ſpecial tails, which limit the lands to one particular ſort of heirs, no deſcendant of the donee can make himſelf inheritable to ſuch gift, unleſs he can convey his deſcent through that particular ſort of heir to which the ſucceſſion of the land was firſt limited; therefore if lands be given to a man and the heirs male of his body, and he has iſſue a daughter, who has iſſue a ſon, this ſon ſhall never inherit that gift; for the ſon, being obliged to claim through the daughter, muſt neceſſarily ſhew himſelf out of the words of the firſt donation, which limited the lands only to the

heirs

heirs male of the donee, which the daughter cannot poſſibly be taken to be.

For the ſame reaſon, if the lands be given to a man and the heirs male of his body begotten, the remainder to him and the heirs female of his body, and the donee hath iſſue a ſon, who hath iſſue a daughter, who hath iſſue a ſon; this ſon can inherit neither of theſe gifts: not the tail male, becauſe whoever claims as heir to ſuch a gift, muſt convey his deſcent wholly through males, which the ſon cannot do in this caſe, becauſe he muſt neceſſarily ſhew himſelf a deſcendant of the daughter, before he can make himſelf heir to the firſt ſon; nor can he inherit the tail female, becauſe that limitation being to that particular ſort of heir, no male, though the immediate deſcendant of a female, can inherit, becauſe he is another ſort of heir than is deſcribed in the donation: but if, in this caſe, the gift had been to a man and the heirs male of his body, remainder to him and the heirs of his body; ſuch ſon may claim under that gift, becauſe every deſcendant of ſuch donee may claim under the remainder, it not being limited to one ſort of heir more than another. Co. Lit. 25. b.

[Lands were ſettled to the uſe of huſband and wife for their lives, remainder to the uſe "*of the heirs of the huſband on the body of the wife lawfully begotten or to be begotten, the male to be preferred before the female, and the elder before the younger.*" The leſſor of the plaintiff claimed as heir male under this ſettlement, that is, as ſon of the ſecond ſon of the marriage: the defendant claimed as heir at law, that is, as the ſon of a daughter of the eldeſt ſon of the marriage. It was argued on behalf of the defendant, that there was nothing to hinder the deſcent to the heir at law, though claiming through a female; that the limitation was to *all* the heirs; and that the words of regulation were referable merely to the immediate children of the marriage, to ſhew how they ſhould take. But the court ſaid, that if theſe words had any meaning, they deſcribed an eſtate-tail; and it was not to be ſuppoſed, that they were inſerted without any meaning at all. Denn v. Hobſon, 5 Burr. 2609. 2 Bl. Rep. 695. S. C. See Preſton on Eſtates, ch. Eſtates Tail.

If lands be given to a man to have and to hold to him and the heirs male of his body, and to him and the heirs female of his body, the eſtate to the heirs female is in remainder, and the daughters ſhall not inherit any part ſo long as there is iſſue male; for the eſtate to the heirs male is firſt limited, and ſhall be firſt ſerved; and it is as much as to ſay, and after to the heirs females, and males in conſtruction of law are to be preferred.] Co. Lit. 377. a.

Land given to a man and his wife *& hæredi de corpore & uni hæredi tantum*, was adjudged an eſtate-tail, though the limitation be to the heir in the ſingular number, becauſe the word *heir* is *nomen collectivum*, and extends to all that deſcend from him. Vent. 228.

(D) How far Tenant in Tail may charge his Eſtate, and what Acts of his relating to the Inheritance ſhall bind the Iſſue, though the Entail continues.

THE ſtatute *de donis* affecting a perpetuity reſtrained the donee in tail, either from alienating or charging his eſtate-tail; and by that act the tenant in tail was likewiſe to leave the land to his heirs as he received it from the donor; and the heir in tail might have avoided any alienation or incumbrance of his anceſtor; and as the law ſtood upon the act, ſo might he in reverſion, when the heirs of the donee failed, who were inheritable to the gift. The crown long ſtruggled to break through the perpetuity which was eſtabliſhed by this law; and in the reign of *E.* 4. we find the pretended recompence given againſt the vouchee in the common recovery to be allowed an equivalent for the eſtate-tail; and becauſe this recompence was to go in ſucceſſion as the land in tail ſhould have done, therefore they allowed the recovery to bar the reverſion as well as the iſſue in tail, becauſe he in the reverſion was to have the recompence upon failure of iſſue of the donee.

6 Co. 40. 10 Co. 39. Vent. 299.

The ſtatute *de donis*, by an expreſs clauſe, provides againſt the operation of a fine, and by that law a fine levied by tenant in tail amounted to no more than a diſcontinuance, like a feoffment *in pais* by tenant in tail at this day.

2 Inſt. 336. Plow. 57. b. But how theſe recoveries or fines affect the iſſue in tail, or him in reverſion or remainder, *vide* tit. Recoveries, and tit. Fines.

At the common law the tenant in tail could not grant or alien, or make any rightful eſtate of freehold to another, but for term of his own life; for though a feoffment in fee, or for life, made by tenant in tail, are good againſt the tenant himſelf, becauſe the law allows no man to avoid his own act; yet after his death the iſſue in tail, or thoſe in reverſion after failure of iſſue, may by proper actions avoid ſuch feoffments, and recover againſt the feoffee.

Lit. § 613. But how far the tenant in tail may at this time bind his iſſue, by making leaſes purſuant to the 32 H. 8. c. 28. *vide* tit. Leaſes and Terms for Years.

The tenant in tail is maſter of the inheritance, and as ſuch has power over all the laſting improvements growing on it; ſo that he may cut down the timber-trees, and diſpoſe of them as he pleaſes, without barring the entail. But this muſt be underſtood with this reſtriction, that, if tenant in tail ſells the trees growing on the inheritance, the vendee muſt ſever them during the life of tenant in tail; for if he dies before they are cut down, his heirs in tail ſhall have them as part of the inheritance, and the vendee, though obliged to pay the whole ſum contracted for, yet ſhall not be allowed to cut down one tree after the death of tenant in tail; for as the tenant in tail has power over the inheritance but during his own life, ſo he can delegate that power to another but for the ſame time; and conſequently, whatever remains part of the inheritance at the death of the tenant in tail, at which time his power

Bro. Contract, 26. 11 Co. 50. Poph. 194.

power over it ceaſes, muſt neceſſarily go to the heir to whom the inheritance belongs.

So, if tenant in tail grant eſtovers to another, or the veſture of his woods, theſe grants determine with his death; for as they are charges on the inheritance, ſo they muſt neceſſarily ceaſe when his power who granted them is determined. Roll. Abr. 841, 842.

If tenant in tail acknowledge a ſtatute or recognizance, upon which the land is extended, the iſſue may ouſt the conuſee after the death of his anceſtor; for the tenant in tail can charge the entail but during his life, becauſe the ſtatute *de donis* preſerves it free from all incumbrances for the iſſue in tail *ut voluntas donatoris obſervetur*. Roll. Abr. 842.

But if tenant in tail acknowledge a recognizance, and die, and the conuſee bring a *ſcire facias* againſt the heir in tail, who pleads *riens per diſcent* in fee-ſimple, and pending the *ſcire facias* make a leaſe for years to *J. S.*, and the jury find the iſſue in tail had land in fee-ſimple by deſcent, the conuſee ſhall extend the land againſt the iſſue in tail, and *J. S.* cannot falſify; for after the verdict the iſſue ſhall not be allowed to ſay, that he is tenant in tail; but the verdict, though a perverſe one, ſhall bind him, and be in force till diſproved by attaint; nor can the leſſee falſify, becauſe the leaſe was made after verdict given, when the iſſue himſelf was bound, and, conſequently, all that claim under him muſt be ſo too. 2 Bulſt. 245. Crawley and Marrow.

Yet if a diſſeiſor make a gift in tail to *A.*, and *A.* in conſideration of a releaſe from the diſſeiſee of all his right to the land, grant him a rent-charge in fee; this ſhall bind the iſſue, for this turns upon the reverſe of the former caſes; for as the iſſue in tail may avoid thoſe grants and charges, becauſe they tend to the prejudice of the iſſue and deſtruction of the entail; ſo this grant to the diſſeiſee is good to bind the iſſue, becauſe it tends to the advantage of the donee and his iſſue by ſtrengthening their title, and making that an indefeaſible which before was a precarious eſtate. Co. Lit. 343. b. Roll. Abr. 842. Plow. 436. 10 Co. 37.

So, where a deviſe was made of land in tail, upon condition that the donee ſhould grant a rent-charge out of the land to another and his heirs, the donee granted the rent purſuant to the condition; and adjudged the rent ſhould not determine with the death of the donee, but ſhould bind his iſſue, for this is in preſervation of the entail, and for the benefit of the iſſue, and is not *contra formam doni*, but in compliance with the will of the donor. Cro. Jac. 427. Dutton v. Ingram. Roll. Abr. 842.

A. ſeiſed of lands in tail, agrees with *B.* that he and his heirs ſhall enjoy the entailed lands, if *A.* and his heirs may enjoy his fee-ſimple lands; this agreement is executed accordingly; and *B.* has a decree againſt *A.* to levy a fine, and ſettle it purſuant to the agreement; but *A.* dies without doing of it: though it was decreed that *A.* himſelf was bound by his agreement to convey, yet ſince he died before he executed the fine, his iſſue was not bound by the agreement; but if the iſſue in tail had approved of his anceſtor's agreement, as he did in this caſe, by entering on the land of *B.*, then it becomes his own agreement, and, conſequently, in equity he ſhall be obliged to perform it. Chan. Caſes, 171. Roſs v. Roſs. *Vide* tit. "Agreements," tom. 1. 105.

Eſtate-tail after Poſſibility of Iſſue extinct.

(A) Who may be Tenant in Tail after Poſſibility of Iſſue extinct, and how their Eſtates are to be created.

(B) The Power this Tenant has over the Inheritance, and in what Reſpects he is conſidered as a bare Tenant for Life.

(A) Who may be Tenant in Tail after Poſſibility of Iſſue extinct, and how their Eſtates are to be created.

Lit. § 32. Doct. & Stud. 61.

SUCH perſon is tenant in tail *apres* poſſibility of iſſue extinct (*a*), as ſurvives the perſon by whom, or on whom, the iſſue was to be begotten; as where lands are given to a man and his wife in ſpecial tail, if the huſband dies without iſſue, the wife is tenant in tail after poſſibility, *&c.* becauſe the huſband, by whom the iſſue inheritable to ſuch ſpecial tail was to be begotten, is dead, ſo that, there being no iſſue living at his death, there is now no poſſibility of any by him: ſo *e converſo*, if the wife dies without iſſue the huſband is tenant in tail after poſſibility, becauſe ſhe being the perſon on whom the iſſue inheritable to the eſtate-tail was to be begotten, when ſhe dies without iſſue, there is no poſſibility of the huſband's having any iſſue by her inheritable to the tail.

[(*a*) "This long periphraſis, Sir William Blackſtone ſaith, the law makes uſe of as abſolutely neceſſary to give an adequate idea of ſuch perſon's eſtate. For had it called him barely *tenant in fee-tail ſpecial*, that would not have diſtinguiſhed him from others; and beſides, he has no longer an eſtate of inheritance or fee, for he can have no heirs, capable of taking *per formam doni*. Had it called him *tenant in tail without iſſue*, this had only related to the preſent fact, and would not have excluded the poſſibility of future iſſue. Had he been ſtyled *tenant in tail without poſſibility of iſſue*, this would exclude time paſt as well as preſent, and he might under this deſcription never have had any poſſibility of iſſue. No definition therefore could ſo exactly mark him out, as this *of tenant in tail after poſſibility of iſſue extinct*, which (with a preciſion peculiar to our own law) not only takes in the poſſibility of iſſue in tail which he once had, but alſo ſtates that this poſſibility is now extinguiſhed and gone." 2 Comm. 124.]

Lit. § 33.

If the lands be given to a man and his heirs which he ſhall beget on the body of his wife; in this caſe, though the wife takes nothing by the gift, yet if ſhe dies without iſſue of her body begotten

gotten by her huſband, he is tenant in tail after poſſibility, becauſe the wife, on whoſe body the iſſue was to be begotten, being now dead without iſſue, he can have none by her.

If baron and feme be tenants in ſpecial tail, and one of them dies, leaving iſſue, though the ſurvivor cannot be tenant in tail *apres* poſſibility during the life of ſuch iſſue; yet if that iſſue dies without iſſue, ſo as that there is not any iſſue living which can inherit by force of ſuch entail, then the ſurvivor becomes tenant in tail after poſſibility, &c. for ſince the iſſue inheritable to ſuch entail was to proceed from both the bodies of the donees, upon the death of either of them without iſſue, it is plainly impoſſible the ſurvivor ſhould have any iſſue inheritable to the entail. Lit. § 32.

But if baron and feme, tenants in ſpecial tail, live till each of them be 100 years old without iſſue, yet they ſtill continue tenants in ſpecial tail; for however improbable it may ſeem that they ſhould have iſſue at that age, yet the law ſees no impoſſibility of having iſſue, and there muſt be no poſſibility of having iſſue, before the donees or either of them can be tenants in tail *apres* poſſibility: beſides, there is not any particular and certain period of time in which the poſſibility of iſſue ceaſes, and therefore the law cannot make either of them tenant in tail after poſſibility, till after the death of one of them. Co. Lit. 28. a.

If lands be given to baron and feme and the heirs of their two bodies, and they are divorced *cauſâ præcontractus* or *affinitatis*, here there is no poſſibility of their having iſſue which can inherit by force of the gift, and yet they are not tenants in tail after poſſibility, &c. but the inheritance is turned into a bare joint eſtate for life; for the impoſſibility of having iſſue muſt proceed from the act of God, to make them tenants in tail after poſſibility, &c. but in this caſe it proceeded from the act of the parties. 11 Co. 80. b. Co. Lit. 28. a.

So, if lands be given to a man in tail upon condition, that if he does ſuch an act, that he ſhall have the land but for life; ſuch donee, upon breach of the condition, is but barely tenant for life, and not tenant in tail *apres* poſſibility, &c. becauſe here by his own act it becomes impoſſible to have iſſue inheritable to the tail, which by his own act he has deſtroyed and forfeited. 11 Co. 80. b.

A feoffment was made to the uſe of a man and his wife for their lives, remainder to the uſe of their next iſſue male to be begotten in tail, remainder to the uſe of the huſband and wife and the heirs of their two bodies begotten, they having no iſſue male at the time of the feoffment; in this caſe the huſband and wife are tenants in tail executed; and upon the birth of any iſſue male, their eſtate opens, and they become tenants for life, remainder to the iſſue male in tail, remainder to themſelves in tail; and if the huſband dies without having any other iſſue, the wife continues but tenant for life, becauſe the eſtate-tail, which was once executed in her and in her huſband, was changed into an eſtate for life by their own act; yet ſhe ſhall have the privileges of tenant in tail *apres* poſſibility, &c. for the inheritance which was once in her; for this is not like the former caſe, where the breach of the condition reſpects what was granted; for in this caſe the birth of 11 Co. 80, 81. Co. Lit. 28. a. Lewis Bowle's caſe.

iſſue

iſſue male ſhall not be preſumed to diveſt the privileges of tenant in tail, which were once legally veſted in her.

Co. Lit. 28. a. Lands were given to a man and his wife and the heirs of the body of the huſband, remainder to the huſband and wife and the heirs of their two bodies begotten; upon the death of the huſband without iſſue, the feme ſhall not be tenant in tail *apres* poſſibility, *&c.* for by the firſt limitation ſhe took only an eſtate for life, and the huſband an eſtate in tail general, and the remainder over was a void limitation, becauſe it could never take effect; for whatever iſſue the huſband and wife had muſt inherit by force of the firſt limitation of the tail general, becauſe all ſuch iſſue are of the body of the huſband; and when the tail general is ſpent in him, there cannot poſſibly be any iſſue to inherit the remainder in tail ſpecial, becauſe ſuch iſſue muſt be of the body of the huſband and wife; and while there is any iſſue in being of the body of the huſband, it inherits by force of the general tail; ſo that the remainder being void in its original creation, the wife had never an eſtate of inheritance in her, and, conſequently, cannot be tenant in tail *apres* poſſibility, *&c.* becauſe ſuch an eſtate can be carved only out of an eſtate-tail.

(B) The Power this Tenant has over the Inheritance, and in what Reſpects he is conſidered as a bare Tenant for Life.

Co. Lit. 28. 11 Co. 80. b. Doct. & Stud. 60. IF tenant in tail *apres* poſſibility, *&c.* alien in fee, it is a forfeiture of his eſtate, becauſe, having no longer a deſcendible eſtate in him, he cannot transfer it to another, without the prejudice and diſheriſon of him in remainder.

Co. Lit. 28. a. 11 Co. 80. b. Doct. & Stud. 60. If tenant in tail *apres* poſſibility be empleaded, and make default, he in reverſion ſhall be received, as upon the default of any other tenant for life, becauſe he having the inheritance in him only ſhall be admitted to defend it.

Co. Lit. 28. a. 11 Co. 80. b. An exchange by tenant in tail *apres* poſſibility, *&c.* with a bare tenant for life, is good, becauſe both their eſtates are of equal continuance and duration only: ſo for the ſame reaſon, if any eſtate of inheritance in reverſion or remainder deſcends upon him, the eſtate-tail *apres* poſſibility, *&c.* is merged, becauſe as to its duration, it is merely an eſtate for life, and in theſe reſpects we may call him but tenant for life; yet in other reſpects he has the privilege of one who has an eſtate of inheritance.

Doct. & Stud. 61. Co. Lit. 27. b. 11 Co. 80. a. For he is diſpuniſhable of waſte, ſo that he has power over the laſting improvements of the land; for ſince he formerly had the inheritance in him, which the act of God has ſtripped him of, without any default of his, the privileges and benefits of the inheritance ſtill continue in him. Beſides, to puniſh this tenant for waſte, ſeems to be againſt the deſign and intention of the firſt donation; for by that the donor gave the inheritance and an abſolute power over the laſting improvements, which are looked upon as

[But a court of equity will reſtrain him at leaſt from committing malicious

as part of the inheritance for their duration, and, conſequently, it can be no injury to him in reverſion, nor beſide his intention in the donation, if the donee exerciſes the power he was intruſted with by the donor; nor can the donor revoke it, becauſe the authority given by the gift muſt continue as long as the gift to which it was annexed continues. and extravagant waſte. Abraham v. Bubb, 2 Freem. Rep. 53. 2 Eq. Ca. Abr. tit. Waſte (A), pl. 1. S. C. 2 Show. 69. S. C. Anon. 2 Freem. 278. S. P.

He ſhall not have aid of him in reverſion, becauſe he having originally the inheritance by the firſt gift, has likewiſe the cuſtody of the writings which are neceſſary to defend it. Co. Lit. 27. b. 11 Co. 80. b.

For the ſame reaſon he may join the miſe in a writ of right, becauſe, the deeds belonging to the inheritance lying in his hands, he may make out his title without calling in the reverſioner. Co. Lit. 27. b. 11 Co. 8.

The writ of entry *in cauſa conſimili* doth not lie upon his alienation, as it does for him in the reverſion, upon the alienation of any other tenant for life, becauſe this caſe is not *conſimilis* to that of tenant in dower, becauſe this tenant had originally the inheritance in him, which the tenant in dower never had. Co. Lit. 27. b. 11 Co. 80. b. F. N. B. 206. Booth. 199.

If upon the death of tenant in tail after poſſibility, *&c.* a ſtranger intrudes, yet no writ of intruſion lies againſt ſuch intruder, becauſe this writ is given only upon an entry and intruſion after the death of a bare tenant for life, which this tenant is not. Co. Lit. 27. b. 11 Co. 80. b. Booth. 181.

He ſhall not be called tenant for life in a *præcipe* brought by or againſt him, becauſe his original infeudation, by which he claims, was of an eſtate of inheritance, not of an eſtate for life. Co. Lit. 27. b. 11 Co. 80. b.

Eſtate for Life and Occupancy.

(A) What Intereſt or Property in Land the Law calls an Eſtate for Life, either when there are expreſs Words in the Deed, or when the Law creates it by Implication.

(B) Who upon the Death of Tenant for Life is to enjoy the Land; and herein of Occupancy: And,

1. Of what Things a Man may make himſelf a Title to by Occupation.

2. What

2. What makes an Occupant.

3. The Way to prevent the General Occupant; and herein of the Special Occupant, and the Alteration made in the Common Law by the Statute 29 *Car.* 2. *c.* 3.

(C) How far Tenant for Life may diſpoſe of his Eſtate, either ſingly by himſelf, or by joining with him in Reverſion: And herein of his Forfeiture, either by Common Law or Statute.

(A) What Intereſt or Property in Land the Law calls an Eſtate for Life, either when there are expreſs Words in the Deed, or when the Law creates it by Implication.

Lit. § 56. IF a man lets lands to one for term of life of the leſſee, or any other, in this caſe the leſſee is tenant for term of life; but in common ſpeech, he, who holdeth for term of his own life, is called tenant for term of his own life; and he, who holdeth for term of another's life, is called tenant for term of another man's life, or tenant *per auter vie*.

Co. Lit. 41. b. 5 Co. 13. a. Cro. Eliz. 182. So, if a man lets land to another for term of his own life, and the lives of *A.* and *B.*, the leſſee has a freehold determinable upon his own death, and the deaths of *A.* and *B.*, nor can there be any merger of the freehold during the lives of *A.* and *B.* into the eſtate that the leſſee has during his own life; becauſe, though the eſtate for a man's own life is greater than an eſtate for another man's life, yet here the leſſee has not two diſtinct eſtates in him, but only one freehold circumſcribed with that limitation as the meaſure of its continuance.

Roll. Abr. 843. But if a leaſe be made to a corporation aggregate If a leaſe be made to a corporation aggregate for life of the leſſor; this is a good eſtate for life, becauſe the life of the leſſor, which is wearing and will determine, is the meaſure of its continuance.

for their own lives; this is no eſtate for life, but a fee-ſimple; for the leaſe being made to them as a body politick, which has a continued ſucceſſion, and never dies, a leaſe made to them during their lives is equal to a grant made to them while they continue a body politick, which by reaſon of the perpetual ſucceſſion of its members is in law looked upon to be for ever; and therefore, this is a good gift in fee, without the word *ſucceſſors*, becauſe the leſſor cannot have the land againſt his own grant till the corporation is diſſolved; for till their diſſolution they are in being and have a continuance, which is to be alive within the words of the leaſe. 21 E. 4. 76. Roll. Abr. 843.

Lit. § 283. Co. Lit. 42. 183. Roll. Abr. 846. If a man leaſes lands to another, without ſaying how long the leſſee ſhall enjoy them, he ſhall have them for his own life, if livery be made, becauſe every man's gift is taken moſt ſtrongly himſelf,

himſelf, and for the benefit of the grantee, to avoid all equivocation. But there is a difference between ſuch a leaſe made by tenant in fee-ſimple and tenant in tail; for if tenant in tail makes a leaſe generally with livery, the leſſee ſhall have the land but during the life of the tenant in tail, for that is the greateſt eſtate he can lawfully make, the power to leaſe ceaſing with his life; and where a man's act will bear different conſtructions, the law, for no conſideration, will make that conſtruction which muſt be injurious to another.

So, if leſſee for term of his own life makes a leaſe generally with livery; this the law conſtrues an eſtate for his own life only; for if it were to be taken an eſtate for the life of the leſſee, the leſſor, without any explicit act of his own, would not only diſcontinue the reverſion, but alſo forfeit his own eſtate, which conſtruction would make the conveyance uſeleſs and ineffectual; for it would be in the power of him in the reverſion to enter into the land for the forfeiture; and the law will make no conſtruction to do wrong, or in doubtful expreſſions preſume a wrongful intention, it being alſo moſt for the benefit of the leſſee, that he ſhould have a rightful eſtate. Co. Lit. 183.

So it is of things which lie in-grant, as rents, reverſions, commons, &c. for if a man grants theſe things by deed, without mentioning any particular eſtate, theg rantee hath an eſtate for term of his own life, becauſe a man's own act is taken moſt ſtrongly againſt himſelf; and where the words of the deed will bear two ſenſes without injury to any one, the purchaſer who comes in upon a valuable conſideration deſerves the moſt favour; and the conſtruction that moſt enlarges his intereſt is to be preferred: beſides, being granted to him, it cannot be ſuppoſed out of him, as long as the ſame perſon continues. Roll. Abr. 845. Co. Lit. 42. a. 8 Co. 85. b.

But if the king grants land or rent, and limits no particular eſtate in the gift, the patentee has no freehold, either for his own life or the life of the king. Roll. Abr. 845. For ſince the king is ſeldom known to make market of his titles, his grants proceeding from his own bounty, and not from any valuable conſideration of the patentees, ought not to be taken in a larger ſenſe than the words of themſelves import; and therefore, where he has not explicitly ſet forth the extent of his bounty, the law, with reaſon, conſtrues the grant in favour of the king, who is beſt judge of the ſervices of his ſubjects, and how far he intended to reward them, where the words of the grant do not declare it; and therefore ſuch grant, being capable of a double conſtruction, is void for the uncertainty, and ſhall not paſs ſo much as an eſtate at will; becauſe moſt grants proceeding from the inſtigation and application of the ſubject, they ought to know what they aſk; and if that does not appear, nothing ſhall paſs from the king for the uncertainty. Roll. Abr. 845. Dav. 43. 45. Co. 43. 49.

If an eſtate be given to a woman *dum ſola fuerit*, or *durante viduitate*, or to a man and woman during coverture, or as long as the grantee ſhall dwell in ſuch a houſe, or ſhall pay 10*l.* yearly to the grantor; in all ſuch caſes, where there is no fixed time appointed for the determination of the eſtate conveyed, the grantees have eſtates for life, if the ceremony required by law to paſs a freehold be obſerved; as if livery be made in caſe of things corporeal, or a deed be perfected in caſe of things incorporeal. Co. Lit. 42. a.

If

Roll. Abr. 844. If I make a leaſe to another till I go to *Weſtminſter*, the leſſee has an eſtate for life. So if *A.* leaſes to *B.* till *A.* makes *J. S.* bailiff of his manor, *B.* has the freehold in him; for ſince there is no particular time ſpecified, but it is left indefinitely, when I ſhall go to *Weſtminſter*, or *J. S.* be made bailiff of the manor, and theſe contingencies may or may not happen during the life of the leſſee, and the livery transfers the freehold to him; ſo he muſt, conſequently, by the words of the gift, enjoy it during his life, if none of theſe contingencies happen in that time, upon which his eſtate is to determine.

Co. Lit. 42. a. Roll. Abr. 844. Caſes in Parl. 161-2-3. 4 Mod. 173. If an office be granted to a man, to have and enjoy ſo long as he ſhall behave himſelf well in it, the grantee hath an eſtate of freehold in the office; for, ſince nothing but his miſbehaviour can determine his intereſt, no man can prefix a ſhorter time than his life, ſince it muſt be his own act, (which the law does not preſume to foreſee,) which only can make his eſtate of ſhorter continuance than his life. So, if the office had been granted to a man *quamdiu ſe bene geſſerit tantum*, his eſtate had not been leſs for the word *tantum;* for a grant to a man for ſo long time as he ſhall behave himſelf well, and for ſo long time only as he ſhall behave himſelf well, are of equal extent, and his miſbehaviour in each caſe determines his intereſt.

Co. Lit. 42. a. Roll. Abr. 845. 6 Co. 35. b. If a man grants a manor worth 10*l. per annum* to *J. S.* till he has received 100*l.*, this is an eſtate for life, if livery be made; for though at the time of the grant the manor be worth 10*l.*, and by that computation the 100*l.* muſt be paid in ten years; yet ſince the profits are uncertain, and may riſe or fall, there can be no definite time fixed for the limitation of the leſſee's eſtate; and therefore, ſince livery is made, he muſt have a freehold in the manor determinable upon the levying of the 100*l.*: but in this caſe, if no livery had been made, the leſſee had been only tenant at will; for it cannot be a leaſe for years, becauſe the determination of it is uncertain, and there can be no freehold without livery.

Roll. Abr. 845. Co. Lit. 42. a. But if I grant a rent of 10*l.* to *J. S.* till he has received 100*l.* this is an eſtate for years in the grantee, for the determinate ſum, which is payable yearly, muſt neceſſarily in ten years amount to the 100*l.*, and, conſequently, it is evident at the commencement of the grant, when the intereſt of the grantee is to determine.

Roll. Abr. 845. If I grant to another common of turbary in my land, to dig and carry away at his will, there being no particular eſtate limited in the grant, it muſt be conſtrued in favour of the grantee, to continue during the life of the grantee, for the words, *at his will*, cannot refer to the eſtate in the common, but to the privilege given to the grantee to dig and carry away, which by the grant he may uſe at his will and pleaſure.

Roll. Abr. 845. If a man ſeiſed of land in right of his wife for life, bargains and ſells it by indenture enrolled, the purchaſer has an eſtate for his life determinable upon the coverture; for the conveyance being by bargain and ſale transfers no more than the huſband may lawfully paſs, which is an eſtate during the coverture; for ſo long

long he has an eſtate in the freehold of his wife, and may lawfully diſpoſe of it; and ſince it cannot be foreſeen when the coverture will be diſſolved, the leſſee muſt, conſequently, have the freehold determinable with the coverture, ſince the bargain and ſale upon the ſtatute is equivalent to livery at law, to transfer the freehold.

If the king grants an office at will, and grants a rent to the patentee for his life, for the exerciſe of his office; this is no abſolute eſtate for life, becauſe the rent being granted on account of the office, and in diſcharge of the duty of the place, whenever his intereſt in the office ceaſes, the rent is determined, becauſe it was firſt granted for the exerciſe of the office which he is no farther concerned in. Co. Lit. 42. a.

And here it may be proper to obſerve, that though, by the common law, the inveſtiture of livery was the only ſolemnity required to convey the freehold, yet now, by the ſtatute of *frauds and perjuries, it is enacted, That all leaſes, eſtates, intereſts of freehold, &c. in any lands, tenements, or hereditaments, made or created by livery and ſeiſin only, and not put in writing, and ſigned by the parties ſo making or creating the ſame, or their agents thereunto lawfully authorized by writing, ſhall have the force and effect of leaſes or eſtates at will only, and ſhall not either in law or equity be deemed or taken to have any other or greater force or effect.* 29 Car. 2. c. 3.

(B) Who upon the Death of Tenant for Life is to enjoy the Land: And herein of Occupancy*.

* Few if any of the following caſes as to occupancy are now law, ſince the alterations by ſtatute, which *vide poſt*. But they ſhew the learning relative to occupancy, which may, on ſome occaſions, be of uſe.

IF a man leaſes to *J. S.*, and *J. S.* dies, the land returns to the leſſor, becauſe, the life being ſpent for which the land was granted, it muſt neceſſarily come back to the old proprietor. But if the leaſe had been made to *J. S.* during the life of *A.* and the leſſee had died living *ceſtui que vie*; or if in the former caſe *J. S.* had granted over his eſtate to *B.*, and *B.* had died; in theſe caſes, he that firſt took poſſeſſion of the land was lawfully the tenant; for the reverſioner could not claim in either caſe, becauſe he had parted with it during the life of *A.* in one caſe, and of *J. S.* in the other; and *J. S.* cannot have any right, for that were to act contrary to his own grant, and to claim an intereſt which he had transferred to another; and the tenant *pur auter vie* being dead, his deſcendants could not claim it, becauſe they were not comprehended in the words of the feudral donation; and therefore the firſt occupant muſt be the rightful tenant, ſince this, like all other things which are derelict and without an owner, belongs to the firſt occupier or poſſeſſor. But, the better to underſtand this matter, we ſhall conſider, Co. Lit. 41. b. Cro. Eliz. 182.

1. What Things a Man may make himſelf a Title to by Occupation.

2. What makes an Occupant.

3. The Way to prevent the General Occupant; and herein of the Special Occupant, and the Alteration made in the Common Law, by the Statute 29 *Car.* 2. *c.* 3.

1. Of what Things a Man may make himſelf a Title to by Occupation.

Vaugh. 199, 200. Co. Lit. 41. b. 2 Roll. Abr. 150. Cro. Eliz. 721. 901.

There can be no occupant (*a*) of things which lie in grant, and which cannot paſs without deed, as rents, advowſons, commons, reverſions, *&c.* becauſe theſe things having no natural exiſtence, but conſiſting purely in the agreement, and depending on the inſtitution of the ſociety for their being, no man can enter to poſſeſs them. Beſides, as theſe things are framed and have their exiſtence by the municipal laws of the nation, ſo thoſe laws have eſtabliſhed the ſolemnity of a deed to transfer them; from whence it follows, that, ſince no man can make himſelf a title to theſe things without deed, whoever claims them muſt ſhew he is a party to the deed before he can derive himſelf a title to the things contained in the deed.

[(*a*) That is, no *general* occupant; for Lord Coke writes in Co. Lit. 388. a. that if heirs are named in the grant of a rent *pur autre vie*, they ſhall take, though this was formerly doubted. Dy. 186. ed. in marg. 1 Bulſtr. 155. Mo. 625. 664. Godb. 172.]

Vaugh. 199.

Therefore, if a rent be granted to *A.* during the life of *B.*, and *A.* die, living *B.*, the rent is determined; becauſe the grant being originally made to *A.* only, when he dies, no body can claim it as occupant, becauſe there can be no entry into it to poſſeſs; nor by the deed, becauſe no one was party to it but *A.*; it muſt follow, therefore, that when nobody can take by the grant, it muſt ceaſe as a void grant, or as if it had never made; and, conſequently, the reverſion muſt neceſſarily commence.

Vaugh. 200. Mo. 664.

If a rent be granted to *A.* during the life of *B.*, remainder to *C.*, if *A.* dies living *ceſtui que vie*, the remainder which was limited to *C.* commences immediately; for the particular eſtate in the rent muſt determine, when nobody can enjoy it; and, conſequently, the remainder muſt take place, which was to commence upon the determination of the particular eſtate.

Cro. Eliz. 721. Crawley's caſe. Dy. 186. a. in marg. S. C.

But if a rent be granted to *A.* and *B.* during the life of *C.* to the uſe of *C.*, if *A.* and *B.* die, *C.* ſhall enjoy the rent during his own life; for the rent granted to *A.* and *B.* to the uſe of *C.* is by the ſtatute of uſes executed in *C.* as an eſtate for his own life; ſo that the lives of *A.* and *B.* are no ways material; for the eſtate being executed by the ſtatute to the uſe which was limited to *C.* during his own life, he muſt by the grant, notwithſtanding the death of *A.* and *B.* enjoy the rent during his own life.

2 Roll. Abr. 86. 403. Cro. Jac. 696. Euſtace and Scawen. Sir Wm. Jones, 55. S. C.

If there be two jointenants for life, and one be a feme covert, and the baron and feme levy a fine to the other jointenant, and thereby grant *totum & quicquid* in the land, for the life of the wife; upon the death of the other jointenant, there ſhall be no occupant during the life of the feme, but the feoffor may enter; for the fine inured by way of releaſe, and then the other jointenant muſt have

have claimed the whole from the firſt feoffment, ſo could have had the whole but for his own life.

But though there be no occupancy of things which lie in grant, yet they may be occupied as appendant to things which paſs by livery, and which may be occupied; as, if a manor conſiſting part in demeſne, and part in ſervices, be leaſed to *A.* for the life of *B.*, upon the death of *A.* whoever firſt enters and occupies the demeſnes has alſo the ſervices: ſo, the occupancy of a manor is the occupation alſo of the advowſon appendant to the manor; for though neither the ſervices nor the advowſon are ſeparately in their own nature capable of an occupancy, yet as they belong and are appendant to land which is ſubject to occupation, the occupant of the demeſnes has a right to the whole manor, becauſe the occupancy making no ſeverance or alteration in the manor, he, that has a right to the whole manor by occupation, muſt neceſſarily have a right to all its rights. Vaugh. 196.

So, the occupant of a houſe ſhall have the eſtovers, or way leading to the houſe; for ſince theſe things pertain to the houſe, and the occupation of the houſe makes no ſeverance of them, they muſt neceſſarily remain as they were before the occupant entered, and then the poſſeſſor of the houſe enjoyed the eſtovers or way alſo. Vaugh. 196.

If a leaſe be made of lands to *J. S.* for life, *habend.* to him, and *A.* and *B.* ſucceſſively, *A.* and *B.* cannot take the lands in poſſeſſion, becauſe not named in the premiſes, nor by way of remainder, becauſe the intent of the deed appears to give it them in poſſeſſion by the copulative words, and by joining them with *J. S.*, who is to take in poſſeſſion: nor can there be any occupancy upon the death of *J. S.*, becauſe *A.* and *B.* are mentioned in the deed, as perſons to take an eſtate, and not to make a limitation of the lands to *J. S.* during their lives; ſo that the leaſe in effect is no more than to *J. S.* during his own life, and, conſequently, upon his death it muſt return to the leſſor, ſince the life is ſpent for which he granted it. Cro. Eliz. 57. Hob. 313. Windſmore and Hubbard.

If tenant in dower, or by the curteſy, of lands, grant over their eſtate, and the grantee dies during their lives, whoever firſt enters ſhall be occupant; for though their eſtates are created by law, yet ſince they are to enjoy them during their own lives, the reverſioner has no right to enter till their deaths; nor can they enter upon the death of the grantee, becauſe this were to act contrary to their own grant, which conveyed their eſtates during their own lives; conſequently, ſince the poſſeſſion is vacant and derelict by the death of the grantee, he that firſt enters to poſſeſs is the occupant, and ſhall enjoy the land during the life of tenant in dower, or by the curteſy, though they cannot be ſaid to be tenants in dower, or by the curteſy. Co. Lit. 41. 2 Roll. Abr. 150. Palm. 32. *Vide* Cro. Eliz. 58.

If a leaſe be made to *A.* and *B.* for their lives, and the life of the longeſt liver of them, and they make partition, and then *A.* dies, the leſſor ſhall enter into his part; and there can be no occupancy; for *B.* has no title to it, becauſe the right of ſurvivorſhip was loſt by the partition which deſtroyed the jointenancy; nor will the words *to the longeſt liver* be of any uſe to *B.*, becauſe 2 Roll. Abr. 150.

they were void at firſt, being no more than the law employed in the joint eſtate: beſides, after the partition, each of the leſſees have but an eſtate for his own life in the ſeveral moieties, and, conſequently, the reverſion, which is to commence when the particular eſtate determines, muſt neceſſarily take place, for there can be no occupant where another has right, as the reverſioner has in this caſe upon the death of *A.* and *B.*

Co. Lit. 41. 2 Roll. Abr. 150. There can be no occupant of any of the king's poſſeſſions; for if the king grants lands to *A.* during the life of *B.*, and *A.* dies, living *B.*, the law allows no man to gain the poſſeſſion which is now vacant by the death of *A.*, but preſerves it for the king; for, he being employed in the care and buſineſs of the whole nation, ought not to ſuffer in his private eſtate and concerns: beſides, no man can make himſelf a title to any of the king's poſſeſſions without matter of record.

2. What makes an Occupant.

Vaugh 188. Occupancy in land being nothing elſe than the taking poſſeſſion or appropriating of that part which every man had a right to as much as another, it follows, that a claim without an actual entry makes no occupation, becauſe, notwithſtanding the claim, the poſſeſſion is ſtill vacant, and ſuch claim leaves no marks of an appropriation; beſides that, ſince the occupancy in civil ſocieties follows the natural, and a mere claim makes no natural occupancy, becauſe a man's natural right extends no farther than poſſeſſion and uſe, and not to what he may only wiſh for, by conſequence, if a claim doth not remove it out of the ſtate of nature, the occupancy in civil ſocieties, according to the nature of things, muſt be an actual poſſeſſion, and not a bare claim.

Co. Lit. 41. b. Riding over the ground to hunt or hawk makes no occupancy; for though this be an actual entry, yet (being only tranſitory and to a particular purpoſe, which leaves no marks of an appropriation, or of an intention to poſſeſs for the ſeparate uſe of the rider) can gain no occupancy; the intention of the perſon being to denominate his action according to the rule *quod affectio tua imponit nomen operi tuo.*

Vaugh. 189. 191. Cro. Jac. 554. Co. Lit. 4. If *A.* tenant *pur auter vie* leaſes to *B.* at will, and *B.* enters and is poſſeſſed, and then *A.* dies, and *J. S.* enters as occupant, yet he is no occupant, becauſe the poſſeſſion was taken up by *B.* before, and *B.* being found in poſſeſſion (which prevents any other occupant) the law caſts the freehold on him, not only to prevent any abeyance, but that there may be a tenant to do the ſervices, and to anſwer to the *præcipe* of ſtrangers.

2 Roll. Abr. 151. 2 Bulſt. 12, 13. Vaugh. 194 Comp. Incum. 348. If tenant *pur auter vie* makes a leaſe for years, and dies, the leſſee for years being in poſſeſſion ſhall be occupant without any act of his declaring his intention to be ſo; for being already in poſſeſſion, the law does not put a man to claim or enter into that of which he has already poſſeſſion, and in whomſoever the law finds the poſſeſſion, there it caſts the freehold for the former reaſons: nor is the leſſee for years injured by it, for he purchaſed his

his eſtate ſubject to this contingency of being merged by occupancy.

But if tenant in fee-ſimple makes a leaſe for years to *J. S.* and after ouſts him, and makes a leaſe to *A.* for the life of *B.*, *J. S.* re-enters, and *A.* dies, the leſſee for years is no occupant; for though he is found in poſſeſſion, yet it is by a title ſuperior to the leaſe for life, and ſince he did not purchaſe the term at firſt under the contingency of a merger by occupancy, the law will not permit the leſſor by any act of his to deſtroy the title he himſelf made; nor will the law merge the term, for that were to deſtroy the prior title of *J. S.* contrary to the rule of law, that *actus legis nemini facit injuriam.* Co. Lit. 41. b. 2 Roll. Abr. 151.

If *A.* tenant *pur auter vie* leaſes to *B.* for years, and *B.* makes a leaſe at will to *C.*, if *A.* dies, living *ceſtui que vie*, *C.* ſhall be the occupant, becauſe, being in poſſeſſion, the law gives him the freehold; and though *B.* ſhould enter upon him and claim as occupant, yet that would make no alteration in the caſe, becauſe *C.* becomes occupant immediately on the death of *A.*, and what one man is already poſſeſſed of, another cannot gain by occupation, for occupancy only gives a right where no man had it before, but the term of *B.* is ſtill in being, becauſe *C.* is to have the freehold as *A.* enjoyed it, which was, ſubject to the leaſe for years. 2 Roll. Abr. 151. Co. Lit. 41. b. 2 Bulſt. 11. Dyer, 328. in margine. Com. Incum. 348.

If tenant *pur auter vie* makes a leaſe for twenty years to *B.* reſerving 5 *l.* rent, and *B.* leaſes to *C.* for ten years, reſerving 3 *l.* rent, if the tenant for life dies, *C.* ſhall be occupant, becauſe he is in poſſeſſion, but yet he ſhall have the freehold only as a reverſion on the leaſe of twenty years; and therefore, ſince the term of ten years is not merged, *C.* muſt pay the 3 *l.* to *B.*, and *B.* muſt pay the rent of 5 *l.* to *C.*, becauſe *C.* as occupant comes in the place of tenant for life in all reſpects, and muſt anſwer the ſervices over, is ſubject to the conditions, and to all charges of tenant for life, and conſequently, ought to enjoy all the benefit and profit of it. Co. Lit. 41. Vaugh. 190.

So, if tenant *pur auter vie* makes a leaſe for years to *A.*, remainder to *B.* for years, and the leſſee for life dies, *A.* ſhall be occupant and have the freehold, becauſe the law finds him in poſſeſſion: but his term is not merged, by reaſon of the intermediate intereſt of *B.* which he muſt preſerve; becauſe, coming in the place of the tenant *pur auter vie*, he is obliged to take the freehold under the charges he laid on it, and in the ſame manner he enjoyed it, which was ſubject to the leaſe for years; and therefore, though the freehold be caſt on him, yet he holds it by way of reverſion upon the remainder for years. 2 Bulſt. 12, 13.

If tenant *pur auter vie* dies, and *J. S.* firſt enters, and claims in right of *J. D.*, yet *J. S.* himſelf ſhall be occupant, becauſe the freehold, being caſt on him who firſt takes poſſeſſion, cannot be deveſted out of him without a ſolemn act of notoriety. 2 Roll. Abr. 151. Vaugh. 192. 2 Bulſt. 11.

If tenant *pur auter vie* makes a leaſe for years to *A.* in truſt for himſelf for life, and after his death in truſt for his wife for her life; *A.* enters, but ſuffers the leſſee for life to enjoy the land; the Lev. 202. Sid. 346. 2 Keb. 148.

leſſee for life dies, and the wife finding the poſſeſſion vacant enters, ſhe is the occupant; for though upon the death of tenant for life (whom he ſuffered to enter and take the profits) he had ſo far a poſſeſſion in law before any actual entry, that he might have an action of treſpaſs; yet that made him no occupant, becauſe nothing but an actual poſſeſſion makes an occupant, which the wife firſt took in this caſe.

3. The Way to prevent the General Occupant, and herein of the Special Occupant, and the Alteration made in the Common Law by the Statute 29 *Car.* 2. *c.* 3.

Lit. § 739. Co. Lit. 41 b. 388. a. If lands be given to the leſſee and his heirs, during the life of another, the heir comes in as ſpecial occupant upon the death of the tenant for life, becauſe he is included in the words of the donation, which gave him a right to the land upon the death of the leſſee, and conſequently prevents an occupancy, which is admitted in other caſes, becauſe no man has a title to the vacant poſſeſſion.

2 Roll. Abr. 151. So, if leſſee for his own life leaſes to *B.* and the heirs of his body, during the life of the firſt leſſee; if *B.* dies during the life of his leſſor, the heirs of his body ſhall be occupant.

2 Roll. Abr. 150. 18 E. 3. 44. b. So, if the leſſee had made ſuch a leaſe to his leſſor, and the leſſor had died during the life of the leſſee, the heir of his body ſhall be occupant; for this is no ſurrender, becauſe the firſt leſſee has a poſſibility of reverter upon his leſſor's dying without heirs of his body.

2 Ven. 184. If tenant *pur auter vie* ſettles the term to the uſe of himſelf in tail, remainder to *J. S.* equity will not ſupport ſuch remainder for the benefit of *J. S.* Vern. 225-6. Tenant *pur auter vie* may limit the term to a man and his heirs, or to the heirs of his body, and ſuch eſtate ſhall deſcend, and is not within the ſtatute *de donis*.

2 Lev. 138. 3 Keb. 475. 486. Vaugh. 201. If lands in borough-engliſh be given to *A.* and his heirs for the life of *B.*, and *A.* die in the life of *B.*, leaving two ſons, the youngeſt ſhall be the ſpecial occupant, becauſe the heir, that is repreſentative of the father as to land of that nature, muſt be the occupant, ſince the heir muſt take by deſcent, and not by purchaſe.

Dyer, 328. 2 Roll. Abr. 151., and it was aſſets in their hands before the ſtat. 29 Car. 2. c. 3. 2 Vern. 720. [1 Atk. 466. If a leaſe be made of *land* to *J. S.* his executors and aſſigns, during the life of *B.*, the executors of *J. S.* ſhall be the ſpecial occupants, if he dies in the life of *B.*; for though it be a freehold, which in courſe of law would not go to executors, yet they may be deſigned by the particular words in the grant to take as occupants; and ſuch deſignation will exclude the occupation of any other perſon, becauſe the parties themſelves, who originally had the poſſeſſion, have filled it up by this appointment.

And now ſince the ſtatute, if an eſtate *pur auter vie* be limited to a man, his heirs, executors, adminiſtrators and aſſigns, and be not deviſed, it deſcends to the heir as a ſpecial occupant, and of courſe the perſonal repreſentative of the perſon laſt ſeiſed cannot recover the title deeds from the perſon laſt ſeiſed. Atkinſon v. Baker, 4 Term. Rep. 229.]

2 Roll. Abr. 151. But if *a rent* be granted to *J. S.* and his executors, during the life of *B.*, by the death of *J. S.* the rent is determined, becauſe the

the executors cannot take as ſpecial occupants, ſince the nature of the thing lying in agreement is not capable of occupation, nor can they take by the grant, becauſe then they muſt take as repreſentatives, which they cannot be of a freehold; and the law will not permit people at their pleaſure to vary the courſe of deſcents.

So, if *a rent* be granted to *A.* his executors and aſſigns, during the life of *B.*, and *A.* die inteſtate, the adminiſtrator cannot claim the rent; not as occupant, becauſe no man can make himſelf a title to rent by way of occupancy: not by the deed, becauſe he is not aſſignee within the words of the grant by the letters of adminiſtration, therefore the rent is determined, ſince none can claim it as occupant. Vaugh. 199, 200. Cro. Eliz. 901. Mo. 664. Yelv. 9. Salter and Butler.

Yet if the rent be granted to a man and his heirs during the life of another, and the grantee die, his heirs ſhall take as ſpecial occupants; for though in point of property the rent is not capable of occupation, yet ſince the heirs are included in the grant, and they are capable of taking the freehold as repreſentatives of the grantee, which the executors are not in the former caſe, it is but reaſon the rent ſhould not determine while any perſon compriſed in the grant is capable of taking. Vaugh. 201. 2 Roll. Abr. 151. Bulſt. 135. Cro. Jac. 282. Bowles and Poole. Yelv. 9.

So, if *an annuity* be granted to *A.* and his heirs during the life of *B.*, if *A.* die before *B.*, his heirs ſhall have the annuity, becauſe the heirs of *A.* being the proper repreſentatives to take the freehold deſcending from him, ſince they are compriſed in the grant, the grant cannot ceaſe or be void while they are in being, and the life not ſpent for which the grant was made. Bulſt. 135. Co. Lit. 388. a. 2 Roll. Abr. 151.

But though all or moſt of the above caſes might formerly have been good law, yet now by the ſtatute of *frauds and perjuries* it is enacted, That any eſtate *pur auter vie* ſhall be deviſable by will in writing, ſigned by the party ſo deviſing the ſame, or by ſome other perſon in his preſence, and by his expreſs directions, atteſted and ſubſcribed in the preſence of the deviſor, by three or more witneſſes; and if no ſuch deviſe thereof be made, the ſame ſhall be chargeable in the hands of the heir, if it ſhall come to him by reaſon of a ſpecial occupancy, as (*a*) aſſets by deſcent; as in caſe of lands in fee-ſimple; and in caſe there be no ſpecial occupant thereof, it ſhall go to the executors or adminiſtrators of the party that had the eſtate thereof by virtue of the grant, and ſhall be aſſets in their hands. 29 Car. 2. c. 3. § 12. (*a*) But ſhall be aſſets only to pay debts by bond or ſpecialty, in which the heir is bound, and not debts by ſimple contract. 2 Vern. 710. If tenant *pur auter vie* dies inteſtate, and

adminiſtration is granted to *J. S.* the adminiſtrator is not obliged to diſtribute this term amongſt the next of kin, as part of the inteſtate's perſonal eſtate, but ſhall have it himſelf as occupant, for it ſtill continues a freehold; and the alteration made by the 29 Car. 2. c. 3. was only with reſpect to creditors, that is, if it comes to the heir as ſpecial occupant, he ſhall be anſwerable for his anceſtor's debts as far as he is bound; and if to executors or adminiſtrators, they for all debts generally; but it ſhall not be aſſets to pay legacies, except ſuch as are particularly deviſed thereout. Mich. 8 Will. 3. in B. R. between Oldham and Pickering. 2 Salk. 464. *per totam curiam.* But ſee now 14 Geo. 2. c. 20. § 9. whereby diſtribution ſhall be made of eſtates *pur auter vie*, whereof there is no ſpecial occupant, and which are not deviſed.

(C) How far Tenant for Life may diſpoſe of his Eſtate, either ſingly by himſelf, or by joining with him in Reverſion: And herein of his Forfeiture, either by Common Law or Statute.

Digeſt. Feud. lib. 2. tit. 26. fol. 523. Vigellius, lib. 5. Cauſe, 32. f. 287. Staunf. Prær. 28. a.

BY the ancient feudal law no man could alien without licence from the lord of the fee; but any alienation or diſpoſition was then a forfeiture; but in *England*, where the allodial property prevailed in the *Saxon* times, they were allowed to alien in (*a*) ſome caſes, which privilege was not only confirmed, but alſo enlarged and made general by *magna charta;* ſo that by that act the feuditary might alien to whom he pleaſed, provided he left ſufficient to anſwer the lord's ſervices, which ſeems to have been a privilege mightily contended for.

(*a*) 1ſt, *In remunerationem ſervitii*, that is, for ſervices done to the feud, as for ſervices done in the wars by the feudal tenant, or in peace, by ploughing the feud at home; both theſe being either for the profit or honour of the feudal lord, they formerly valuing themſelves upon the number and honour of their tenants. 2dly, In frank marriage with the daughter of the feuditary, or ſome other of his blood, becauſe this multiplied tenants to the lord. 3dly, In frankalmoigne or free alms, the ſuperſtition of the times allowing it for the good of the ſoul. Glanvil, lib. 7. cap. 1. 44. Staunf. Prær. 27, 28.

2 Inſt. 65. Roll. Abr. 854. Co. Lit. 251.

Yet notwithſtanding this law, if tenant for life aliens in fee, this is ſtill a forfeiture, for that ſtatute only permits a lawful diſpoſition, but does not allow any alienation to the prejudice of him in reverſion, and therefore where tenant for life takes upon him to transfer the fee-ſimple, it is a renunciation of the feud, and contrary to his oath of fidelity. So, if tenant for life aliens to another for the life of the alienee, this is a forfeiture, for it can be no lawful alienation within *magna charta*, becauſe it is palpably to the prejudice of him in the reverſion.

Roll. Abr. 854.

If *A.* leſſee for life leaſes to *B.* for the life of *B.*, if *A.* lives ſo long; this is a forfeiture of *A.*'s eſtate, becauſe *B.* has an eſtate for his own life, though under a contingency, which muſt neceſſarily deveſt the reverſion.

Cro. Jac. 100. Caſtle v. Dod. Roll. Abr. 854.

But if *A.*, leſſee for life, levies a fine to *B.* for the life of *A.* to the uſe of *B.* for his own life, this is no forfeiture; for the eſtate granted by the fine was only for the life of *A.*, and the limitation of a greater uſe can be no forfeiture, for the eſtate out of which the uſe ariſes is only during the life of *A.*

Cro. Eliz. 131. Piers and How. So, if baron and feme be tenants for life, and they both join in a feoffment, or the huſband alone;

Huſband ſeiſed of lands in right of his wife for life, and they both by deed of feoffment convey the land to *J. S.* and his heirs, *habend* to him and his heirs, to the uſe of him and his heirs, for the life of the wife; this is a forfeiture of her eſtate; for there being a fee-ſimple conveyed to *J. S.* by the deed and livery, the words of reſtraint for the life of the wife refer only to the limitation of the uſe, ſo that the fee-ſimple remains ſtill in the feoffee; but this it ſeems is a forfeiture only during the coverture.

theſe are forfeitures, but they affect the wife only during the coverture; for ſhe can be bound by no act of hers without examination in the court of record. Roll. Abr. 851. 8 Co. 44.

If

If tenant for life makes a leaſe for years, this was never looked upon to be a forfeiture, becauſe the leſſee for years was originally but a bailiff to the freeholder, and the tenant for life only had the freehold, and was to anſwer the ſervices, and he in reverſion was nowiſe affected by it, becauſe there was no inveſtiture or other act of notoriety done to diſpoſſeſs him of his reverſion. But upon the death of tenant for life the termor's intereſt ceaſed, becauſe the perſon from whom he derived his authority as bailiff being dead, the authority muſt neceſſarily ceaſe with the perſon that granted it; and in this caſe, if tenant for life enters upon his leſſee, and makes a feoffment to another, this is a forfeiture of his whole eſtate, but the term for years continues, becauſe the wrongful act of tenant for life ſhall not prejudice a ſtranger's intereſt; and if he in reverſion enters, he muſt take it ſubject to the charges he had power by law to lay on it; yet in this caſe, if tenant for life had entered and committed waſte, this had been a forfeiture of his eſtate, and the term had been loſt too; but this is by the expreſs words of the ſtatute of *Glouceſter*, which gives the place waſted as a penalty to him in reverſion, and cannot be done if the term continues notwithſtanding the waſte. 8 Co. 45. Co. Lit. 233. b. But for this *vide* tit. Waſte.

Of things which may be transferred without the notoriety of livery and ſeiſin, ſuch as rents, advowſons, *&c.* which lie in grant, a man cannot by any diſpoſition or act *in pais* forfeit them; and therefore, if a man ſeiſed of a rent, advowſon, or common for life, grants them by *deed* to another in fee, this is no forfeiture, for this can be no way prejudicial to him in reverſion, becauſe, ſhould the grantee claim an eſtate in fee, he can make no title without the original grant made to his grantor, by which it muſt appear what intereſt he had, and conſequently, what eſtate he could convey; and ſo the grantee, notwithſtanding the grant in fee, can claim no larger eſtate than his grantor had power to make, and ſo he in reverſion can receive no prejudice. Co. Lit. 251. Co. 1. Roll. Abr. 854.

So, if tenant for life of lands, by indenture enrolled, bargains and ſells them to *J. S.* and his heirs, this is no forfeiture, but the bargainor paſſes only what he may lawfully paſs; for though by the ſtatute 27 *H.* 8. *c.* 10. deeds enrolled grew a common conveyance for transferring of lands, which could not paſs at common law without the inveſtiture of livery; yet being a manner of conveyance known before at common law, it was conſtrued to have no new effect given it by the ſtatute, but what the ſtatute expreſſed. 6 Co. 14. b.

But if a man be ſeiſed of a manor for life, to which an advowſon is appendant, and he alien one acre, or the whole manor, with the advowſon in fee; this is a forfeiture of the advowſon; for as it is a forfeiture of the acre or manor to which it is appendant, ſo it muſt be alſo of the advowſon, ſince the alienation makes no ſeverance of them. Roll. Abr. 854.

If leſſee for life of lands aliens in fee upon condition, and enters for the condition broken, yet the leſſor may enter for the forfeiture. Roll. Abr. 856. Co. Lit. 252. Palm. 202.

So, if tenant for life aliens upon condition, that if he himſelf pays 10 *l.* that he ſhall re-enter, and that if

if he fails in payment, that then the alienee ſhall have the fee-ſimple; though he pays the money, yet the reverſioner may enter for the forfeiture, becauſe the fee was transferred immediately upon the alienation, which was a renunciation of the feud, and conſequently a forfeiture. Roll. Abr. 856.

Co. Lit. 251. b. If tenant for life levies a fine, by which the reverſion is deveſted; this is a forfeiture, becauſe it is a more ſolemn renunciation of the feud than any alienation *in pais* can be.

Roll. Abr. 852. Co. Lit. 251. So it is of a rent, advowſon, or any thing elſe that lies in grant: for if tenant for life of them levies a fine, it is a forfeiture: for though the fine being of a rent, *&c.* paſſes no more than it may lawfully paſs, yet being a publick and ſolemn renunciation of the eſtate for life, in a court of record, this amounts to a forfeiture, and ſo differs from a grant *in pais*.

Vigellius Cauſe, 32. f. 287-8. Another way of forfeiture in a court of record is, by claiming a greater eſtate than he had by the feudal donation, or by affirming the reverſion to be in any other perſon than his lord. This ſeems to be grounded on a rule in the old feudal law, that if a vaſſal denied that he held the feud of his lord, and it was proved againſt him, ſuch denial was a forfeiture. Now this denial may be when the vaſſal claims the reverſion himſelf, or accepts a gift of it from a ſtranger, or acknowledges the reverſion to be in a ſtranger; for in all theſe caſes he denies that he holds the feud from the lord: but, as by the feudal law, the vaſſal was to be convicted of this denial, ſo in our law theſe acts which plainly amount to a denial muſt be done in a court of record, to make them a forfeiture; for ſuch act of denial appearing on record is equivalent and equally concluſive as a conviction upon ſolemn trial; and all other denials, that might be uſed by great lords for trepanning their tenants, and for a pretence to ſeiſe their eſtates, by our law were rejected, for ſuch convictions might be made by ſuch great lords where there was no juſt cauſe: but the denial of the tenure upon record could never be counterfeit, or be abuſed to any injuſtice; and therefore this notorious and ſolemn act of the tenant was retained as a juſt cauſe of forfeiture by our law.

7 Co. 55. Co. Lit. 251. b. So, if in a *quid juris clamat* brought againſt him, he claims the fee-ſimple; this is a forfeiture. Roll. Abr. 853. 2 Co. 68. b. And therefore, if tenant for life be diſſeiſed, and bring a writ of right, this is a forfeiture of his eſtate; becauſe by ſuing a writ of right he admits the reverſion in fee to be in himſelf, and by conſequence denies that he holds over. So it is, if, in a writ of right brought againſt him, he ſhould join the miſe on the mere right; for by taking upon him the privileges of tenant in fee, he admits the inheritance in him, which is a denial of the tenure.

Dyer, 148. Co. Lit. 252. Roll. Abr. 852. 9 Co. 106. If tenant for life accepts a fine *come ceo, &c.* of a ſtranger, this is a forfeiture of his eſtate; for this is a denial of the tenure on two accounts: 1*ſt*, In admitting the reverſion to have been in the ſtranger to convey. 2*dly*, In accepting of it himſelf to the prejudice of him in reverſion.

2 Lev. 202. Smith and Abell. If *A.* be tenant for life, remainder to *B.* for life, and *A.* levy a fine to *B.*, this is a forfeiture of both their eſtates; for by their own act on record, they have denied the reverſion to be in the lord, the firſt by giving, and the latter by receiving it.

If tenant for life be diſſeiſed, and the diſſeiſor make a leaſe at will, and tenant for life levy a fine *come ceo*, &c. to the leſſee; this is a forfeiture, and he in the reverſion, though he had but a right, may take advantage of it. 2 Co. 55. Moor, 423. Buckler's caſe. Co. Lit. 252. a.

If a ſtranger bring an action of waſte againſt tenant for life, and the leſſee plead *nul waſte fait*, in bar to the action; this is a forfeiture, becauſe by his plea he admits the ſtranger to be the proper perſon to puniſh the waſte, if there had been any committed. Co. Lit. 252. Roll. Abr. 853.

If the demandant in a real action recovers againſt the tenant for life by default or *nient dedire*, or by pleading covenouſly to the diſheriſon of him in the reverſion; theſe are forfeitures of his eſtate; for tenant for life is intruſted with the freehold, and is to anſwer to ſtrangers *præcipes*, and defend his own as well as the reverſioner's intereſt; but when he gives way to the demandant's action, he admits the right of reverſion to be in him, and, by conſequence, denies any tenure of his reverſioner, which is a forfeiture. Co. Lit. 252. a. Roll. Abr. 853.

If tenant for life prays in aid of him in reverſion, and has it granted him, and *J. S.* comes into court without proceſs, and ſays, he is the perſon of whom aid is prayed, and that he is ready to join in aid; but tenant for life denies him to be the perſon, and is adjudged to anſwer ſole; if this be the perſon that has the reverſion, tenant for life has forfeited his eſtate by his denial of him, becauſe the prayer in aid being always of him in reverſion, and the tenant denying him to be the perſon of whom he prayed in aid, he has denied the reverſion to be in him, and, conſequently, has denied to hold of him. So it is if he had at firſt prayed in aid of a ſtranger; this had been a forfeiture for the ſame reaſon. Roll. Abr. 853. Co. Lit. 252.

If a ſtranger grants the reverſion by fine, and the conuſee brings a *quid juris clamat* againſt the leſſee, who attorns to the grant; this is a forfeiture, becauſe he thereby admits the reverſion to be in a ſtranger; but if he be erroneouſly adjudged by the court to attorn, and he does it in obedience to the court, this is no forfeiture, becauſe he was bound by the judgment to attorn and did nothing wilfully to the prejudice of him in reverſion. Co. Lit. 252. a. Roll. Abr. 853.

Where he in reverſion is party to the conveyance, there, tenant for life may by ſolemn inveſtiture convey a greater eſtate than he had by the firſt feudal contract: as, if *A.* tenant for life makes a leaſe to *B.* who is in reverſion, for the life of *B.*, this is neither a ſurrender nor forfeiture: not the firſt, becauſe *A.* has not wholly parted with his own eſtate, but hath left a reverſion in himſelf after the death of *B.*, who may poſſibly die firſt; and therefore if *B.* takes a wife, ſhe ſhall not be endowed of ſuch eſtate, becauſe *B.* is but tenant for life by the conveyance: a forfeiture it cannot be, becauſe he in reverſion is party, who cannot take advantage of it as a forfeiture, contrary to his own concurrence and approbation, for that were to render his own act void and ineffectual. Co. Lit. 42. a.

If

Co. 76. b. Co. Lit. 42. a. S. P.

If *A.* tenant for life enfeoff *B.* in remainder for life; this is a ſurrender; for a forfeiture it cannot be, becauſe *B.* in remainder was party, and *A.* can have no reverſion, becauſe he conveyed the whole eſtate.

41 Aſſ. pl. 2. Co. 76. b. Co. Lit. 42. a. Roll. Abr. 855.

But if *A.* be tenant for life, remainder to *B.* in tail, remainder to *C.* in fee, and *A.* make a feoffment to *B.* and his wife, and their heirs, and then *B.* die without iſſue, *C.* may enter for the forfeiture: for this could be no ſurrender, becauſe the feme, who had no intereſt in the land, was party to the feoffment, and ſhe muſt claim under the feoffment, which being made to a ſtranger, muſt neceſſarily deveſt the remainder, which is a forfeiture of *A.*'s eſtate, and, conſequently, *C.* may enter, ſince the eſtates of *A.* and *B.*, which hindered him, are ſpent and determined.

Roll. Abr. 857. 1 Co. 140.

Therefore, if tenant for life, remainder in tail, remainder in fee, and the tenant for life enfeoffs him in the laſt remainder, the mean remainder-man may enter, becauſe this deveſted his remainder, and by conſequence was a forfeiture.

Roll. Abr. 855.

If tenant for life makes a feoffment in fee to baron and feme, ſeiſed of the reverſion in right of the feme; this can be no ſurrender; for whatever veſts in the huſband by the feoffment, muſt neceſſarily be deveſted out of the wife, and when ſhe enters into the land ſhe is remitted to her former right.

Roll. Abr. 855. Co. Lit. 42. a.

If baron and feme, ſeiſed in right of the feme for life, leaſe for life by indenture to him in reverſion, being within age, for the life of the huſband; this is a forfeiture; for though he in reverſion be party to the leaſe, yet being an infant he is not bound by the contract to his own prejudice; but if he in reverſion had been of full age, the leaſe had been good, becauſe he had diſpenſed with the advantage of the forfeiture by his acceptance of the leaſe.

Co. 76. 6 Co. 15. a. Plow. 140.

The next thing to be conſidered is, where tenant for life and he in reverſion join in the conveyance: and this has a different operation, as the feoffment is with or without deed; for if it be without deed, then this is conſtrued to be a ſurrender of the eſtate for life, and the feoffment of him in reverſion, for no other interpretation can make the feoffment effectual; for if the eſtate paſſes from the tenant for life to the feoffee, it will be a forfeiture of his eſtate, whereof he in reverſion may take advantage, notwithſtanding his joining; for he having only the reverſion had nothing to do with the freehold, and by conſequence could make no feoffment or livery: and it cannot be a grant or confirmation of him in reverſion for want of a deed: therefore, to make it effectual, it is conſtrued the ſurrender of the tenant for life, and the feoffment of him in reverſion.

Co. 76. Plow. 140.

But if tenant for life and he in reverſion join in a feoffment by deed, then each paſſes only his own eſtate; the tenant for life the freehold in poſſeſſion, and he in reverſion his reverſion: and this cannot be a forfeiture, becauſe he in reverſion joined in a proper conveyance to transfer his reverſion; and having paſſed it to another, has no intereſt left to entitle him to take advantage of the forfeiture, if it was one.

So,

So, if tenant for life, remainder in tail, join in a feoffment by deed; this is no diſcontinuance, but each gives only his own; and upon the death of tenant for life and him in remainder in tail, the iſſue, or thoſe in reverſion may lawfully enter, becauſe then the eſtate that paſſed is determined: but if ſuch feoffment had been by parol, then it had been the ſurrender of the tenant for life, and the feoffment of him in remainder, which would have made a diſcontinuance. Co. 76. b. 77. a.

A. tenant for life, remainder in tail to *B.*, remainder in tail to *C.*, *A.* and *B.* join in a fine *come ceo*, &c. to a ſtranger; this is neither a diſcontinuance nor forfeiture, for each gives what he may lawfully diſpoſe of; the tenant for life his eſtate, and *B.* a fee determinable on his eſtate-tail; and to prevent any diſcontinuance or forfeiture, it ſhall be firſt conſtrued to be the grant of *B.* in remainder, and then of *A.* the tenant for life. Co. 76. Bredon's caſe. Cro. Eliz. 827. Mo. 634. Vent. 160.

But if *A.* tenant for life, and *B.* in remainder for life, join in a feoffment; this is a forfeiture of both their eſtates, and he in remainder or reverſion may enter preſently, becauſe this feoffment paſſed a greater eſtate than both of them could lawfully make, and conſequently muſt deveſt the reverſion or remainder in fee, and ſo amount to a forfeiture. So it would be if a remainder had been to *C.* in tail, remainder to the right heirs of *B.* for the feoffment conveying a fee in poſſeſſion, which *B.* had not in him, muſt neceſſarily deveſt the remainder to *C.*, and, conſequently, be a forfeiture, whereof he may take advantage. Dyer, 339. Roll. Abr. 855. 1 Co. 76.

So, if *B.* in remainder for life, with ſuch laſt remainder to his right heirs, levy a fine *come ceo*, &c. to a ſtranger; this is a forfeiture of his remainder for life, becauſe the fine conveys a fee-ſimple in poſſeſſion by eſtoppel, againſt which he can make no averment; or by making fractions of the eſtate, ſay, he only paſt an eſtate for life *in præſenti*, with a fee-ſimple expectant on the death of *C.* without iſſue, becauſe the fine ſuppoſes a precedent gift in fee-ſimple, which he could not lawfully make whilſt the eſtate for life of *A.* and the intermediate remainder of *C.* in tail were ſubſiſting; and therefore ſuch fine is a forfeiture, though during the life of *A.*, *C.* can take no advantage of it. Wm. Jon. 65. 70. [Between Garret v. Blizard, Roll. Abr. 855. Sty. 192. S. C. the court divided; and the reporter ſays, *Qu.* What judgment was given? S. C. cited in Sir 3 Keb. 733.]

Tenant for life, the reverſion in fee being an infant, they both join in a fine, which is afterwards reverſed by the infant for his nonage; yet the conuſee ſhall hold during the life of tenant for life, becauſe diſtinct intereſts paſſed from each of them, and the defect in one ſhall give no advantage to the other. Co. 76. b. Vent. 160.

If tenant for life and he in reverſion join in a gift in tail, reſerving rent; this can be no forfeiture; becauſe he in the reverſion joined, and the tenant for life ſhall have the rent during his life, becauſe the rent comes in lieu of the land, and therefore ſhall go according to the eſtates they had reſpectively in the land. 6 Co. 15. a.

Tenant for life and he in reverſion join in a leaſe for life, the leſſee commits waſte, they both ſhall join in an action of waſte, and the tenant for life ſhall recover the place waſted, becauſe he in reverſion Co. Lit. 42. a.

reverſion by joining hath admitted a reverſion to be in the tenant for life, and conſequently the forfeiture to belong immediately to him: but he in the reverſion ſhall have the treble damages, becauſe they are given for the waſte and deſtruction done to the inheritance wherewith the tenant for life has nothing to do.

Co. Lit. 42. a. If *A.* and *B.* jointenants, and to the heirs of *B.* join in a leaſe for life, *A.* has a reverſion, and ſhall join in an action of waſte; but the writ muſt be *ad exhæreditationem* of *B.*, becauſe he only hath the inheritance.

6 Co. 14. b. Treport's caſe. Mo. 72. Co. Lit. 45. a. If *A.* tenant for life, and *B.* in remainder in fee join in a leaſe for years by deed; this, upon the delivery of the deed, is the leaſe of *A.* during his life, and the confirmation of *B.* for *A.* being tenant in poſſeſſion, the poſſeſſion could only paſs from him; and the leaſe being made by deed carries the approbation of the reverſioner, and therefore is conſtrued his confirmation; and therefore, where the leſſee declared of a joint demiſe by *A.* and *B.*, it was adjudged he had failed of his title, becauſe during the life of *A.* it was only his demiſe, and *B.* having only an intereſt in reverſion could give the leſſee no intereſt in poſſeſſion.

Dyer, 234. b. 235. Mo. 72. Newdigate's caſe. 6 Co. 15. a. Co. Lit. 45. a. But in this caſe, upon the death of *A.*, it becomes the ſole demiſe of *B.*, for it can be no longer the demiſe of *A.*, who is not in being, and whoſe intereſt in the land determined with his death; but the leaſe does not determine by the death of *A.*, becauſe, though *A.* could transfer the land only during his own life, yet the term having the approbation of *B.*, who has the abſolute property, ſuch joining and approbation has made the leſſee's intereſt abſolute and indefeaſible during the term; and therefore upon the death of *A.* it becomes the demiſe of *B.*, for *B.* has the ſole and abſolute intereſt in the land, and the leſſee can hold of none elſe; and therefore it ſeems that if *B.* brings an action of waſte againſt the leſſee, he may declare of a demiſe by himſelf, without taking notice of *A.*, becauſe upon the death of *A.* it becomes the ſole leaſe of *B.*

Lady Whetſtone v. Saintſbury, 2 P. Wms. 147. Pr. Ch. 591. S. C. [By marriage ſettlement lands were conveyed to truſtees and their heirs to the uſe of huſband for life, remainder to the uſe of truſtees to preſerve contingent remainders, remainder to the uſe of the wife for life, remainder to the firſt, *&c.* ſon of the marriage in tail male. The huſband and wife levied a fine, (they having then a ſon an infant,) and mortgaged the land to *J. S.* The huſband died; *J. S.* brought a bill againſt the wife and ſon then of age. The ſon pleaded the ſettlement, and inſiſted that his mother's eſtate was forfeited, and equity ought not to relieve. The lord chancellor upon argument allowed the plea. But the cauſe coming on to be heard by the maſter of the rolls, he obſerved, that the uſe and the legal eſtate were veſted in the truſtees; and the limitations to the huſband, wife, and ſons, were but truſts; and a truſt for life is not forfeited by a fine (*a*), and ſo the plea falſe, not being warranted by the ſettlement. He therefore decreed the plaintiff to hold and enjoy during the life of the wife.]

(*a*) So, Letheuillier v. Tracy, 3 Atk. 728.

Evidence.

AS in publick judicatures it is neceſſary to ſearch into the truth of facts as they really are; hence, whatever may be exhibited to a court or jury, whether it be by matter of record or writing, or by the teſtimony of witneſſes, in order to enable them to pronounce with certainty concerning the truth of any matter in diſpute, whether ſuch matter relates to a perſon's life, liberty, or property, is called evidence.

As the diſcovery of truth is of the utmoſt conſequence to the good of ſociety, ſo it lays men under the ſtrongeſt obligations, when called upon to give their evidence, to adhere inviolably to truth; and this is a matter, not only enjoined by the precepts of religion, but alſo by thoſe of reaſon; the violation of truth being a ſin againſt human ſociety, as it breaks in upon that correſpondence that is neceſſary to ſocial creatures, by deſtroying the end of language, which is the common tie and band of ſociety; and as raiſing a different idea in the mind of the hearer from that which is formed in the mind of the ſpeaker, deſtroys all intercourſe between mankind; ſo it prevents that truſt from being repoſed in them which is ſo neceſſary to their own preſervation and the good of others.

From the importance therefore of this matter, the wiſdom of our laws has laid down ſeveral rules relating to evidence, which we ſhall conſider under the following heads:

(A) Who may be a Witneſs: And herein,

1. Whether a Huſband or Wife may be Witneſs for or againſt each other.
2. Whether a Judge or a Juror may be a Witneſs.
3. Whether a Counſel, Attorney or Solicitor, may be a Witneſs againſt his Client.
4. Whether Plaintiffs or Defendants in the Cauſe may be Witneſſes.
5. Whether an Accomplice in a Crime may be a Witneſs for or againſt his Companion.
6. How far a Perſon is diſabled from being a Witneſs in reſpect of his having been attainted or convicted of a Crime.

(B) How

(B) How far a Perſon is diſabled from being a Witneſs in reſpect of his being intereſted in the Succeſs of the Cauſe.

(C) Of the Number of Witneſſes required in our Laws.

(D) Of compelling a Witneſs to appear and give Evidence.

(E) Of the Manner of giving Evidence: And herein,

1. Where the Examination is in open Court, and herein of ſuch Queſtions as may be aſked a Witneſs.

2. Of Examinations and Proofs in Chancery.

(F) Of written Evidence: And herein of admitting Exemplifications or Copies of Records, &c. in Evidence.

(G) Whether Parol Evidence is to be admitted to explain what appears on the Face of a Deed or Will.

(H) Of Preſumptive Proof.

(I) Where the Law requires the higheſt Proof the Nature of the Thing is capable of.

(K) Of Hearſay Evidence.

(L) Of the Party's Confeſſion.

(M) Of Similitude of Hands.

(N) Whether the Depoſitions of Witneſſes in another Cauſe may be given in Evidence.

What evidence will maintain the plaintiff's action, *vide* under the titles of the ſeveral actions; and what the defendant muſt plead, and cannot give in evidence, *vide* alſo under the titles of the ſeveral actions and head of *Pleadings*.

(A) Who may be a Witneſs.

Co. Lit. 6. (*a*) An infant of the age of nine

ALL perſons may be witneſſes who appear to have ſufficient (*a*) diſcretion, and who from their (*b*) principles muſt be preſumed to have a right ſenſe of the ſanctity of an oath (*c*), and of

the obligations it lays them under to depoſe the whole truth, and nothing but the truth; therefore infants, aliens, villeins, bondmen, *&c.* may be witneſſes.

years has been allowed to give evidence.

H. P. C. 263. [An infant under the age of ſeven years may be a witneſs in a criminal proſecution, provided ſuch infant appears upon examination to poſſeſs a ſufficient knowledge of the nature and conſequences of an oath: there is no preciſe or fixed rule as to the time within which infants are excluded from giving evidence; but their admiſſibility depends upon the ſenſe they entertain of the danger and impiety of falſehood, which is to be collected from their anſwers to queſtions propounded to them by the court. But if they are found incompetent to take an oath, their teſtimony cannot be received. Rex v. Braſier, Leach's Caſes, 180. Powell's caſe, *Id.* 104.——Mr. J. Rooke, in a criminal proſecution that was coming on to be tried before him at Glouceſter, finding that the principal witneſs was an infant, who was wholly incompetent to take an oath, poſtponed the trial till the following aſſizes, and ordered the child to be inſtructed in the mean time by a clergyman in the principles of her duty, and the nature and obligation of an oath. At the next aſſizes the priſoner was put upon his trial, and the child was produced as a witneſs, and being found by the court, upon examination, to have a proper ſenſe of the nature of an oath, was ſworn, and upon her teſtimony, the priſoner was convicted, and afterwards executed. Mr. J. Rooke mentioned this at the Old Bailey in 1795, in the caſe of Patrick Murphy, who was indicted for a rape on a child of ſeven years old; and the learned judge added, that upon a conference with the other judges upon his return from the circuit, they had unanimouſly approved of what he had done.] (*b*) But an infidel cannot be a witneſs, *i. e.* ſuch a one as neither believes the Old or New Teſtament to be the word of God, on one of which our laws require the oath ſhould be adminiſtered. 2 Keb. 314. 2 Hawk. P. C. c. 46. § 26. [All that the law of England requires is, that the witneſs ſhould profeſs a belief in a ſupreme being, and his moral providence, and appeal to his omniſcience for the truth of his atteſtation. The form of the oath is not of the eſſence of it. 2 Sid. 6. It is immaterial what may be its external form, provided it affect the conſcience of the party. An infidel therefore, that is, one not believing in revealed religion, is, in general, an admiſſible witneſs, if ſworn according to the ceremonies of his religion. Omychund v. Barker, 1 Atk. 21. 1 Wilſ. 84. But men wholly without religion (and many ſuch, at leaſt *profeſſedly* ſuch there are at preſent) ſhall not be permitted to bear teſtimony in any caſe whatſoever. 1 Atk. 44. Neither ſhall a perſon excommunicated be a witneſs, becauſe being excluded out of the church, he is ſuppoſed not to be under the influence of any religion. Bull. N. P. 292. 3 Bl. Comm. 102.——A man deaf and dumb, with whom communication could be held by means of ſigns, &c. was admitted to give material evidence againſt a priſoner at the Old Bailey, January Seſſions 1786, by Mr. J. Heath, after an argument againſt his competency. (*c*) The ſolemnity of an oath is required from all ranks. Lords of parliament, when they give their teſtimony, muſt be ſworn. Their privilege to proteſt upon honour only is confined to their anſwers in courts as defendants. Sir W. Jon. 153-4-5. Cro. Car. 64. 2 Mod. 99. 2 Salk. 513. 1 P. Wms. 146. In the caſe of the king, his teſtimony has in one inſtance been admitted without oath. This was in the reign of James the Firſt, whoſe certificate under his ſign manual, was received as evidence in a Chancery ſuit without exception. Abignye v. Clifton, Hob. 213. But the legality of admitting this evidence, was juſtly queſtioned by a great contemporary authority. 2 Roll. Abr. 686. In one caſe the law diſpenſeth with the formal manner of being ſworn in favour of certain ſects of our own people, and allows their affirmation to have the force and effect of an oath. But this indulgence it confines to civil actions. Stat. 7 & 8 W. 3. c. 34. 22 G. 2. c. 30. Perhaps the affirmation of one of theſe ſectaries may be read in defence of a criminal charge againſt the ſectary himſelf, but not where his evidence is collateral, and in exculpation of a third perſon, the ſectary himſelf not being charged at all. 2 Burr. 1117.]

[In the ſecond year of *Charles* the firſt, the Houſe of Lords referred it to the judges generally, whether, in caſe of treaſon and felony, the king's teſtimony is to be admitted: but the king prohibited them from giving their opinion. As to appearing perſonally, and being ſworn in court, that ſeems wholly inconſiſtent with the royal dignity.

7 Parl. Hiſt. 43. 3 Wooddeſ. 276. Com. Dig. tit. Teſtmoigne, (A. 1).

Lunaticks may be witneſſes *in lucidis intervallis.*]

But as our law has diſabled ſeveral perſons from being witneſſes, who may be ſuppoſed ſo far biaſſed as to be induced to go beyond the truth, I ſhall conſider this matter,

1. In relation to Huſband and Wife, and whether they may be Witneſſes for or againſt each other.

Huſband and wife are conſidered as one and the ſame perſon in law, and to have the ſame (*a*) affections and intereſt; from whence it

Co. Lit. 6 b. 2 Roll. Abr. 686. pl. 4.

H.P.C. 263. Brownl. 47. Hutton, 116. Raym. 1. 2 Keb. 403. 2 Hawk. P. C. c. 46. § 16.

it has been eſtabliſhed as (*b*) a general rule, that the huſband cannot be a witneſs for or againſt the wife, nor the wife be a witneſs for or againſt the huſband, by reaſon of the implacable diſſenſion which might be cauſed by it, and the great danger of perjury from taking the oaths of perſons under ſo great a bias, and the extreme hardſhip of the caſe.

[2 Term Rep. 265. 262. 4 Term Rep. 678. The huſband cannot be a witneſs for the wife even on a queſtion touching her ſeparate eſtate. 1 Burr. 424.] (*a*) But no other degree of kindred or affection, as that of parent to a child, &c., will diſable a perſon from being a witneſs. Sid. 75. Salk. 289. pl 28. (*b*) And holds as well in the courts of equity as in the common law courts. 2 Chan. Ca. 39. 2 Vern. 79.——But where, from the nature and difficulty of the caſe, the wife's evidence being corroborated by other circumſtances, was admitted to be read againſt the huſband, *vide* Abr. Eq. 226-7.

Raym. 1. State Trials, vol. 4. fol. 754. S. P. admitted in Fielding's trial, and 3 Keb. 490.

Hence it hath been adjudged, that the huſband cannot be a witneſs againſt the wife, nor the wife againſt the huſband, to prove the firſt marriage, on an indictment on the ſtatute of 1 *Jac.* 1. *c.* 11. for a ſecond marriage; but the ſecond huſband or wife may be allowed to give evidence, ſuch ſecond marriage being void, and therefore they were never huſband and wife.

S. P. admitted in Sir John Savil's caſe, who was convicted of marrying a ſecond wife. [Broughton v. Harper, 2 Ld. Raym. 752. S. P. 2 Term Rep. 263. S. P.]

(*c*) *Vide* Sid. 431. (*d*) Cro. Car. 488. Fulwood's caſe. Vent. 243-4. 4 Mod. 8. Stra. 633. (*e*) 2 Hawk. P. C. c. 46. § 16.

But ſome exceptions have been allowed to this general rule, eſpecially in caſes of (*c*) evident neceſſity; and therefore it hath been (*d*) adjudged, and is the conſtant practice at this day, that on an indictment for a forcible marriage grounded on the 3 *H.* 7. *c.* 2. the wife may be a witneſs againſt the huſband. So, (*e*) where huſband or wife have cauſe to demand ſureties of the peace againſt each other.

Hutt. 116. 2 Hawk. P. C. 432. But in Raym. 1. this caſe is denied to be law; and in Vent. 244. it is doubted of by my Lord Ch. Juſt. Hale, becauſe here is a wife *de jure*, and ſo not like the caſe, where a woman is admitted to prove a forcible marriage.

Alſo, in Lord *Audley*'s caſe, who held his wife's hands and legs, while his ſervant, by his command, raviſhed her, the wife was admitted an evidence.

(*f*) Raym. 1. (*g*) Brownl. 47.; and with this laſt book, 2 Hawk. P. C. c. 46. § 16. note ſeems to agree.

Alſo, in (*f*) *Raym.* 1. it is ſaid, that a huſband and wife may be witneſſes againſt one another in treaſon; but the contrary is adjudged in (*g*) 1 *Brownl.*

1 Brownl. 47.

[And by ſtat. 21 *J.* 1. *c.* 19. § 6. the wife of a bankrupt may be examined by the commiſſioners for the diſcovery of his eſtate: the contrary whereof was holden to be law before the paſſing of this act of parliament.

Salk. 289. Str. 925.

But no other relation is excluded, becauſe no other relation is abſolutely the ſame in intereſt: therefore in *Pendrel* and *Pendrel*, before Lord *Raymond*, which was an iſſue out of Chancery to try whether the plaintiff were heir to *T. O.*, the marriage and birth being admitted by order, the mother was admitted to prove the father had acceſs to her. So, in *Lomax* and *Lomax*, before Lord *Hardwicke*, the mother was admitted to prove the marriage; and in an ejectment againſt *Sarah Brodie* at *Hereford* 1744, Mr. J. *Wright*

Str. 940.

Wright admitted the father to prove the daughter legitimate; her title being as heir to her mother.

In Lord *Valentia*'s case in the House of Lords, where the question was, whether the Earl of *Anglesea* was married to the Countess Dowager of *Anglesea*, on 15th *September* 1741, prior to the birth of Lord *Valentia* their son, who was born in 1744, the countess dowager, having no interest, was admitted to prove the fact of the marriage. So, where the question was, whether the lessor of the plaintiff was the legitimate son of *Francis* and *Mary Stephens*, or was born of *Mary* before their marriage; the court determined, that general declarations by the parents, and the answer of the mother in Chancery, were good evidence, after the death of such parents, to prove that the lessor of the plaintiff was born before marriage. But they shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious, more especially the mother, who is the offending party. But the wife may be permitted to prove the fact of adultery with her, though not to prove the baron had no access.

April 22d 1771.

Goodright v. Moss, Cowp. 591.

Rex v. Rook, 1 Wilf. 340.

Rex v. Reeding, 8 G. 2. *per* Ld. Hardwicke.

A father who was a freeman of a borough by servitude, was admitted to prove the custom whereby his son was entitled to his freedom as eldest son of a freeman.—If a legacy be given to a son, a father may be a witness to prove the will. *Per cur. ibid.*]

1 Wilf. 332.

2. Whether a Judge or a Juror may be a Witness.

It seems (*a*) agreed, that it is no exception against a person's giving evidence, either for or against a prisoner, that he is one of the (*b*) judges who is to try him; and therefore in the case of (*c*) *Hacker*, two of the persons in the commission for the trial came off from the bench, and were sworn and gave evidence, and did not go up to the bench again during his trial.

(*a*) 2 Hawk. P. C. c. 46. § 17.

(*b*) A commissioner, by virtue of a commission out of Chancery, may himself be examined as a witness at the commission, but then he must be examined first by the other commissioners, after which he may proceed in the execution of the commission.

(*c*) Kelynge, 12. Sid. 133. Style, 233.

Nor is it any exception to a witness, that he is one of the jurors; but then he is, if called upon, to give his evidence on oath openly in court, and not to be examined privately by his companions.

3. Whether a Counsel, Attorney, or Solicitor, may be a Witness against his Client.

It seems agreed, that (*d*) counsellors, attornies, or solicitors are not obliged (*e*) to give evidence, or to discover such matters as come to their knowledge in the way of their profession; for by the duty of their offices they are obliged to conceal their clients' secrets; and every thing that they are intrusted with, is (*f*) *sub sigillo confessoris*: for were it otherwise, no person could ever with safety employ a counsel, &c.

Style, 449. Keb. 505. Vent. 197.

(*d*) That the same rule extends to a scrivener who has acted as counsel or attorney.

Skin. 404. [And to a person who acts as interpreter between the attorney and client. Madam du Barre's case,

caſe, 4 Term Rep. 756. (*e*) In 1 Vez. 63. Lord Chancellor Hardwicke is made to ſay, "that though "an attorney or counſel concerned for one of the parties, may, if he pleaſes, demur to his being examined "as a witneſs; yet if he conſents, the court will not refuſe the reading of his depoſitions: that the "objection had been often made; and though ſome particular judges had doubted, it was always over-"ruled." It ſhould ſeem from hence as if the right to object were the privilege of the attorney, not of the client; whereas nothing is clearer than that the obligation to ſilence is for the ſake of the latter, not of the former. Bull. N. P. 284. So far from the right to object being in the attorney, the court takes upon itſelf to ſtop the witneſs, whenever it diſcovers an anxiety in him to reveal the confidential communications of his client. 4 Term Rep. 759. 2 Vez. jun. 189. Nor is it true, that a court of equity will not refuſe the reading of the depoſitions in ſuch caſe; it will not indeed at once and without examination merely upon this ground, ſuppreſs the whole of the depoſition; but it will direct a reference to the maſter, and will expunge ſuch part as he ſhall find to be matter of that ſort, which from the confidence between attorney and client ought not to be diſcloſed. Sandford v. Remington, 2 Vez. jun. 189.] (*f*) From the truſt and confidence repoſed in counſellors, &c., it has been eſtabliſhed as a rule in the courts of equity, that if an attorney or ſolicitor, at the time that he is treating for his client about a purchaſe or mortgage, has notice of a prior title, ſuch notice ſhall not affect his client, though notice before, or in another tranſaction ſhall. 2 Vern. 474. [But it ſeems now to be ſettled, that ſuch notice to a man's ſcrivener, attorney, agent, or counſel, is ſufficient notice to the party himſelf. Merry v. Abney, 1 Ch. Ca. 38. Brotherton v. Hatt, 2 Vern. 574. Jennings v. Moore, *Id.* 609. 1 Br. P. C. 244. S. C. Le Neve v. Le Neve, 3 Atk. 646. Sheldon v. Cox, Ambl. 624. The notice however, muſt be in the *ſame* tranſaction. The examination of a title by a counſel, or ſolicitor on a former occaſion, ſhall not be ſuch a conſtructive notice, as to affect a client in a ſubſequent tranſaction. Fitzgerald v. Falconberg, Fitzg. 207. Warrick v. Warrick, 3 Atk. 291. Aſhley v. Baillie, 2 Vez. 368. Steed v. Whitaker, Barnard. Ch. Rep. 220.]

Vent. 197. Skin. 404. pl. 40. Doe v. Andrews, Cowp. 845. Sandford v. Remington, 2 Vez. jun. 189. Lord Say and Seal's caſe, Bull. N. P. 284. (*a*) Rex v. Watkinſon, 2 Str. 1122. *contr.*

But as the inconveniency would be very great, if a counſel, *&c.* were not at all to be made uſe of as a witneſs; (for by this means every ſuch perſon's evidence may be taken off by giving him a fee;) ſo the courts have come to this mean, *viz.* upon every queſtion, to aſk him if he knew it of his own knowledge, or from his client, *&c.* for though the oath is general, to ſwear the whole truth; yet the intention thereof, and of the law, is only, that he ſhould declare what he knew of his own knowledge, and not reveal what he was intruſted with by his client. [Collateral facts, and acts done by his client in the courſe of the buſineſs in which he has been employed, he is bound to give evidence of: nay, an attorney has been obliged to prove his client's having ſworn and ſigned the anſwer upon which he was indicted for perjury (*a*).

Cobden v. Kendrick, 4 Term Rep. 431. In this caſe the communication was made

It hath been adjudged too, that he was at liberty to give evidence of a converſation between him and his client touching the juſtice of his ſuit, after a writ of inquiry executed on an interlocutory judgment, and a compromiſe thereupon; for the purpoſe of the ſuit having been obtained, the communication could not be ſaid to be made by way of inſtruction for conducting the cauſe.

after the ſuit was at an end, and it was *that* which the judgment of the court turned upon. Had he acquired his information, pending the ſuit, during the time he acted as attorney, he would not have been permitted to diſcloſe it; for in that caſe, the obligation to ſecrecy continues after the determination of the ſuit, and indeed ceaſeth at no period of time. 4 Term Rep. 759.

Wilſon v. Raſtall, 4 Term Rep. 753.

So, where it appeared that the attorney propoſed to be examined, *though confidentially and profeſſionally* conſulted with by one of the parties, in parts of the buſineſs which conſtituted the ſubject-matter of the ſuit, was yet not actually employed as his attorney in that particular cauſe, it was adjudged, that he ought to be examined, for that the privilege of a client only extends to the caſe of the acting attorney for him.

Ducheſs of Kingſton's caſe, 11 St. Tr. 243.

This privilege is confined to the caſes of counſel, ſolicitor, and attorney, and does not extend to any other profeſſions.] 4 Term Rep. 758-9.

4. Whether

4. Whether Plaintiffs or Defendants in the Cauſe may be Witneſſes.

In an action of treſpaſs againſt ſeveral perſons, one of them, whom the plaintiff deſigned to make uſe of as a witneſs, was by miſtake made a defendant; and on motion the court gave him leave to omit him, and have his name ſtruck out of the record, though after iſſue joined, in order to have the benefit of his teſtimony. Sid. 441. but for this *vide* Style, 401. 404. Savil, 34. 2 Roll. Abr. 685. Sid. 237.

[And therefore, where in an information for a miſdemeanor the attorney general (*Trevor*) offered to examine a defendant for the king, which the court would not permit, he entered a *noli proſequi*, and then examined him. Bull. Ni. Pri. 285.

So, where two were indicted for an aſſault, and one ſubmitted, and was fined one ſhilling, the Chief Juſtice admitted him as a witneſs for the other. Rex v. Fletcher, 1 Str. 633.

If any perſon be arbitrarily made a defendant to prevent his teſtimony, it is ſaid, that if nothing be proved againſt him, he ſhall be ſworn, for he does not ſwear in his own juſtification, but in juſtification of another. But *quære*, whether a verdict ſhould not be firſt taken for him? Bull. Ni. Pri. 285.

If a material witneſs for the defendant in ejectment be alſo made a defendant, the right way is for him to let judgment go by default: but if he plead, and by that mean admit himſelf to be tenant in poſſeſſion, the court will not afterward, upon motion, ſtrike out his name. But in ſuch caſe, if he conſent to let a verdict be given againſt him for as much as he is proved to be in poſſeſſion of, there ſeems to be no reaſon why he ſhould not be a witneſs for another defendant. Dormer and Forteſcue, M. 9 G. 2. *ibid.*

In treſpaſs, the defendant pleaded in bar of the action that *R. M.* named in the *ſimul cum* paid the plaintiff a guinea in ſatisfaction, and iſſue was joined thereon: the defendant produced *R. M.* and *per Eyre*, C. J. he may be examined, for what he is now to prove cannot be given in evidence in another action, and in effect he makes himſelf liable by ſwearing he was concerned in the treſpaſs. Poplet v. James, Tr. 5 G. 2. *ibid.*

But if the plaintiff can prove the perſons named in the *ſimul cum* in treſpaſs guilty, and parties to the ſuit, which muſt be by producing the original or proceſs againſt them, and proving an ineffectual endeavour to ſerve them, or that the proceſs was loſt, the defendant ſhall not have the benefit of their teſtimony.] Reaſon v. Ewbank, H. 1 G. 1. *per omnes juſt. ibid.*

According to the law and practice in the courts of equity, defendants in a cauſe may be witneſſes, for they are forced into the cauſe; and if their being made parties ſhould abſolutely invalidate their teſtimony, it would be in the power of any one who had a mind to oppreſs another, to deprive him of his defence, by making the moſt material witneſſes defendants in the ſuit; and therefore any of the defendants to a ſuit may be examined as witneſſes, ſaving juſt exceptions to their credit. 2 Chan. Ca. 214. Vern. 230.

But plaintiffs cannot examine each other as witneſſes in the cauſe; becauſe if the cauſe miſcarries, the plaintiffs will be liable Vern. 230. Abr. Eq. 225.

liable to coſts, and therefore their ſwearing is to exempt themſelves.

And the practice is, that if a plaintiff wants to examine a defendant as a witneſs, he muſt obtain an order by motion or petition for that purpoſe. This order is of courſe, and muſt be ſerved on the adverſe party's clerk in court. The defendant too may obtain the like order to examine a co-defendant as a witneſs for him. But all theſe orders are upon ſuggeſtion, that the defendant is not concerned in point of intereſt in the matters in queſtion, and they are never granted but with a clauſe of (ſaving juſt exceptions to the other ſide); and theſe muſt be made at the hearing of the cauſe. The order for examining a defendant muſt be produced at the commiſſion office, or in the examiner's, when the defendant attends to be examined, for without it he cannot be examined, as it is by virtue of that order, and the authority given them by the court, that they are empowered to examine him, and they cannot do it otherwiſe.

Ibbotſon v. Rhodes, 1 Eq. Ca. Abr. 229. 2 Vern. 554.

[If there be but one witneſs againſt a defendant's anſwer, the court will direct a trial at law to try the credibility of the witneſs, and in ſuch caſe will order the defendant's anſwer to be read to the jury.]

5. Whether an Accomplice in a Crime may be a Witneſs for or againſt his Companion.

(a) 2 Hawk. P. C. c. 46. § 18.

As to this, the following particulars are laid down as law by Mr. Serjeant (a) *Hawkins*: 1ſt, That it hath been long ſettled, that it is no exception againſt a witneſs, that he hath confeſſed himſelf guilty of the ſame crime, if he hath not been indicted for it; for if no accomplices were to be admitted as witneſſes, it would be generally impoſſible to find evidence to convict the greateſt offenders.

[It was at one time doubted,

Alſo it hath been often ruled, That accomplices, who are indicted, are good witneſſes for the king, until they be convicted.

whether the evidence of an accomplice, unconfirmed by any other evidence that can materially affect the caſe, were ſufficient to warrant a conviction? But it is now ſettled, that an accomplice is a competent witneſs; and that a conviction, ſupported by his teſtimony alone, is perfectly legal. Atwood's caſe, Leach's Caſes, 365.]

Alſo it hath been adjudged, that ſuch of the defendants in an information, againſt whom no evidence is given, may be witneſſes for the others.

It hath alſo been adjudged, that where *A.*, *B.*, and *C.* are ſued in three ſeveral actions on the ſtatute, for a ſuppoſed perjury in their evidence concerning the ſame thing, they may be good witneſſes in ſuch actions for one another.

Bull. Ni. Pri. 286. Say. Rep. 290.

[It hath been adjudged, that a *particeps criminis* is a good witneſs for the plaintiff in treſpaſs: though he is left out on purpoſe to make him a witneſs, and a recovery againſt the defendants in the action is a good bar as to him.

Buſh v. Ralling, Say. Rep. 209., cited

In an information for bribery at an election on the ſtat. 2 *G.* 2. the perſon bribed, and who had taken the bribery-oath, was called

called as a witneſs. He was objected to as a *particeps criminis*, and on the ground that the tendency of his evidence was to diſcharge himſelf, as the ſtatute exempts from the penalty any perſon diſcovering another guilty of the offence. But it was holden, that a *particeps criminis* was in many caſes a good witneſs even to obtain a reward or pardon for himſelf: that unleſs a *particeps criminis* was admitted as a witneſs, the ſtatute would be of no avail, as ſuch tranſactions are generally matters of ſecrecy; and *Denniſon*, J. cited a caſe, wherein C. J. *Eyre* admitted ſuch a witneſs.

alſo by Ld. Mansfield, Cowp. 199.

So, where a clerk had embezzled money and notes, the property of his maſter, which he had laid out with the defendant in illegal inſurances in the lottery; on an action brought by the maſter to recover the money and notes, the clerk was allowed, on receiving a releaſe, to be a good witneſs, to prove that they had been ſo diſpoſed of by him.]

Clerk v. Shee, Cowp. 197.

6. How far a Perſon is diſabled from being a Witneſs in reſpect of his having been attainted or convicted of a Crime.

It ſeems now agreed, that a conviction, and therefore *a fortiori* an attainder or judgment of treaſon, felony, piracy, *præmunire*, or perjury, or of forgery on 5 *Eliz. c.* 14. and alſo a judgment in attaint for giving a falſe verdict, or in conſpiracy at the ſuit of the king (*a*), and alſo judgment for any crime whatſoever to ſtand in the pillory, or to be whipped or branded (*b*), being in a court which had a juriſdiction, are good cauſes of exception againſt a witneſs, while they continue in force.

2 Hawk. P. C. c. 46. § 19. and ſeveral authorities there cited.

[(*a*) A conviction of any crime which amounts to the *crimen falſi* incapacitates a man from being a witneſs, therefore conſpiracy, barratry, &c. Priddle's caſe, Leach's Caſes, 349. (*b*) It is now ſettled, that it is the infamy of the crime which deſtroys the competency of a witneſs, and not the nature or mode of the puniſhment. Pendock v. Mackender, 2 Wilſ. 18.]

But no ſuch conviction or judgment can be made uſe of to this purpoſe, unleſs the record be actually produced in court (*c*). Alſo, it is a general rule, that a witneſs ſhall not be aſked any queſtion, the anſwering to which might oblige him to accuſe himſelf of a crime, and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes whereof he never was convicted.

2 Hawk. P. C. c. 46. § 20.

[(*c*) And it is not ſufficient to produce the conviction alone; it muſt be followed up by the judgment to conſummate the incapacity. Cowp. 3.]

It is alſo agreed, that outlawry in a perſonal action is not a good exception againſt a witneſs, as it is againſt a juror; and that a perſon convicted of felony, who is admitted to his clergy and burnt in the hand (*d*), is thereby re-enabled to be a witneſs.

2 Hawk. P. C. c. 46. § 21.

[(*d*) In the caſe of the Earl of Warwick, one French, who had been convicted of manſlaughter and allowed his clergy, but not burnt in the hand, was holden by the judges not to be a competent witneſs; for that though the ſtatute operates as a pardon; yet the words are, that the offender, after the allowance of his clergy and burning in the hand, ſhall be enlarged out of priſon; and therefore both conditions are precedent, and until they are complied with, the party remains convict of felony, and conſequently his teſtimony cannot be received. 3 P. Wms. 456. The ſtat. 19 Geo. 3. c. 74. § 3. ſubſtitutes a diſcretionary power of fining, or ordering to be whipped, felons convicted, and liable to be burnt in the hand in lieu of the latter puniſhment; and ordains, that ſuch

ſuch fine or whipping ſhall have the ſame effect in reſtoring them to their credit. But felons convicted of petty larceny were never ſubject to burning in the hand; as they were never in need of praying their clergy. There was therefore this inconſiſtency: convicts of grand larceny, who had undergone the ſentence of the law, were competent witneſſes; convicts of petty larceny, who had alſo undergone the ſentence of the law, were incompetent. This is rectified by ſtat. 31 Geo. 3. c. 35. which provides, that no perſon ſhall be an incompetent witneſs by reaſon of a conviction for petty larceny. 3 Wooddeſ. 286, note.]

2 Hawk. P. C. c. 46. § 22.

Alſo, it it ſeems agreed, that the king's pardon of treaſon or felony, after a conviction or attainder, reſtores the party to his credit. And it was holden by Chief Juſtice *Holt*, that the king's pardon will remove a man's diſability to be a witneſs in all caſes whatſoever, wherein it is only the conſequence of the conviction or judgment againſt him, and not an expreſs part of the judgment, as it is in conſpiracy at the ſuit of the king, and in perjury on the ſtatute.

2 Hawk. P. C. c. 46. § 23.

It hath been ruled that a conviction of perjury doth not diſable a man from making an affidavit in relation to the irregularity of a judgment.

(B) How far a Perſon is diſabled from being a Witneſs in reſpect of his being intereſted in the Succeſs of the Cauſe.

Co. Lit. 6. Sid. 237. (*a*) And this rule has been ſo ſtrictly adhered to, that it is

IT has been always (*a*) held a ſacred and inviolable rule of evidence in all caſes (*b*) whatſoever, not to admit the teſtimony of a witneſs, who is either to be a gainer or loſer by the event of the cauſe, whether ſuch advantage be direct and immediate, or conſequential only.

ſaid, that though a witneſs is examined an hour together; yet, if in any part of his evidence it appear that he was a party intereſted, the court will direct the jury, that he is no witneſs, nor his evidence to be regarded. 2 Vern. 463. [The incompetency of a witneſs by reaſon of his being intereſted, may be aſcertained, either by examining the witneſs himſelf on a *voir dire*, or bringing other proof, whether he is intereſted in the event of the ſuit; but a party, it is ſaid, cannot have recourſe to both theſe methods. 10 Mod. 151. Ambl. 593. Ca. temp. Hardw. 358. It was formerly the rule to diſallow objections to the competency of a witneſs, as too late, after he was ſworn in chief: and though this rule is in ſome meaſure relaxed; ſtill the objections muſt be taken at the trial. 1 Term Rep. 719-20. 4 Burr. 2256. (*b*) Hence, he who is bail for another cannot be a witneſs for him, for he is directly and immediately intereſted; for if a verdict be given againſt the principal, he becomes immediately liable. 2 Hawk. P. C. c. 46. § 24. 1 Term Rep. 164. So, a *prochein ami*, by whom an infant ſues, cannot be a witneſs, becauſe liable to the coſts. Hopkins v. Neal, 2 Str. 1026. Clutterbuck v. Lord Huntingtower, 1 Str. 506.]

From this general rule ſeveral doubts and difficulties have ariſen with regard to thoſe caſes where the party may be ſaid to have an intereſt, and from the extreme difficulty attending certain particular caſes, this matter ſeems in ſeveral inſtances to be very unſettled, and any information upon it can only be collected from the nature and circumſtances of the caſes themſelves.

Salk. 283. pl. 13. Ld. Raym. 724. Ruled by Treby. Ch. J. [For the

It has been held, that an heir apparent may be a witneſs concerning the title of the land, for the heirſhip of the heir is a mere contingency; but if there be a tenant in tail, remainder in tail, he in remainder cannot be a witneſs concerning the title of thoſe lands; for he hath an eſtate, ſuch as it is.

bare poſſibility of an intereſt in the witneſs will not exclude his teſtimony. Hence, a liability to be rated to the poor is no objection to a witneſs in queſtions touching an exiſting rate, or the ſettlement of a pauper. Rex v. Proſſer, 4 Term Rep. 17. Rex v. South Lynn, 5 Term Rep. 664. So, a co-obligor in a bond

bond to the ordinary, under 22 & 23 Car. 2. c. 10. may be admitted to prove a tender by the adminiſtratrix. Carter v. Pearce, 1 Term Rep. 163. So, a creditor of the adminiſtratrix is admiſſible for the ſame purpoſe. *Ibid.*]

It ſeems to be agreed, that one commoner (*a*) cannot be a witneſs to prove the right of common in an action brought by another; for the right being entire, his ſwearing tends to entitle himſelf. Skin. 174. pl. 4.

(*a*) If the iſſue be on a right of common, which depends on a cuſtom pervading the whole manor, the evidence of a commoner is not admiſſible, becauſe, as it depends on a cuſtom, the record in that action would be evidence in a ſubſequent action brought by that very witneſs to try the ſame right. But the ſame reaſon does not hold where common is claimed by preſcription in right of a particular eſtate; for it does not follow, that if *A.* has a preſcriptive right of common belonging to his eſtate, that *B.* who has another eſtate in the ſame manor muſt have the ſame right; neither would the judgment for *A.* be evidence for *B.* *Per* Buller, J. 1 Term Rep. 302-3. So, by Lord Holt, in 1 Ld. Raym. 731. If *A.*, *B.*, *C.*, *D.*, and *E.* claim common excluſively of all others, and *A.*'s right be diſputed, *B.* may be a witneſs for him, for it tends to narrow his own right. But if there be a cuſtom that all the inhabitants of Blackacre ought to have common there, one of the inhabitants in that caſe cannot be a witneſs.]

[So, where the queſtion reſpected the rights of lords of cuſtomary manors, the lords of other manors were deemed incompetent witneſſes, becauſe the queſtion concerned a general right. Duke of Somerſet v. France, 1 Str. 658.

A tenant in poſſeſſion is not an admiſſible witneſs to prove the eſtate of his landlord, for this would be to uphold his own poſſeſſion. So (*b*), where a motion was made to admit the landlord a defendant in ejectment, inſtead of the tenant, upon an affidavit that the tenant was a material witneſs, the court refuſed it, becauſe the tenant was liable to anſwer for the meſne profits, and therefore could not be a competent witneſs. Doe v. Williams, Cowp. 621. (*b*) Bourne v. Turner, 1 Str. 632.

If two perſons are contending for the poſſeſſion, who are to pay rent in different rights, the landlord cannot, in that caſe, be admitted as a witneſs to prove the demiſe in the ejectment. But where the queſtion is merely touching the ſettlement of the tenant, the landlord may be received to explain the terms of his demiſe. So, where in action of covenant for rent upon a leaſe by *A.* to *B.*, the point in iſſue was, whether *C.* (whoſe title both admitted) demiſed firſt to *A.* or to another perſon, *C.* was allowed to be a competent witneſs to prove that point. Bell v. Harwood, 3 Term Rep. 308. Rex v. Woodlands, 1 Term Rep. 262.

It hath been uſual in actions on policies of inſurance, not to admit underwriters on the ſame policy to be witneſſes for each other. But this is now treated rather as an objection to the credit, than the competency of the witneſs.] Ridout v. Johnſon, Bull. Ni. Pri. 283.

(*c*) Bent v. Baker, 3 Term Rep. 27.

So, where the maſter of a ſhip brought an action againſt the cuſtom houſe officers, for refuſing to clear his ſhip and re-deliver his cockets; it was held, that the owners of the goods on board could not be admitted as witneſſes to prove him maſter, *&c.* for that they were all concerned in (*d*) one bottom, and in one adventure. Skin. 174. pl. 4. Sands v. the Cuſtom-houſe Officers.

(*d*) But one mariner may be admitted as a witneſs to prove wages due to another, for there the contracts are ſeveral. Skin. 174. pl. 4 ſeems to be admitted. And this is certainly law, and every day's practice.

In an action againſt the maſter of a ſhip for ſo negligently managing the ſhip, that it ran over the plaintiff's barge; it was held, Salk. 287. pl. 22. ruled by Holt,

Ch. Juſt. Ld. Raym. 1007. held, that the pilot could not be a witneſs, becauſe he was anſwerable, if faulty in ſteering, to the maſter (*a*).

(*a*) But he might have been releaſed by the maſter and owner, and made a good witneſs.——On an action brought againſt a maſter, for a carman's driving his cart negligently, *per quod, &c.* the carman was admitted witneſs for his maſter on ſhewing a releaſe from him. Jarvis v. Hayes, Stra. 1083. [But without a releaſe, the teſtimony of the ſervant in ſuch caſe is not admiſſible. Green v. The New River Company, 4 Term. Rep. 559.]

Skin. 403. pl. 38. [But there are many caſes where ſervants and ſailors, though parties intereſted, will be admitted *ex neceſſitate*. The maſter of a ſhip took a prize, and diſpoſed of 100 cheſts of lemons to *A.*, for which he brought his action, and a mariner was allowed to be ſworn as a witneſs, though it appeared, that by the Admiralty law he was to have a ſhare of the prize; for the maſter is accountable to the mariners for their ſhare, which they ſhall recover from him, whether he recovers in this action or not.

In actions by informers for ſelling coals without meaſuring by the buſhel, the ſervants are witneſſes for their maſter, notwithſtanding 3 Geo. 2. inflicts a penalty upon them for not doing it; though Eyre, C. J. did on that account, in two or three inſtances, refuſe to receive them. Per Lee, C. J. in E. I. Company v. Gofling, Bull. N. P. 289. So, where the queſtion was, whether the maſter had deſerted the ſhip without ſufficient neceſſity? a ſailor, who had given a bond to the maſter (as a truſtee for the company) not to deſert the ſhip during the voyage, was admitted evidence for the maſter, it appearing all the ſailors entered into ſuch bonds. *Ibid.* So, if a man pays money by his ſervant, the ſervant may be a witneſs from the neceſſity of the thing. Tybbald v. Tregott, 4 Mod. 26. So, where a ſon, having a general authority to receive money for his father; received a ſum, and gave it to the defendant; the ſon was admitted as a good witneſs (his teſtimony being corroborated by other circumſtances) for his father in an action of trover for the money. 1 Salk. 289. So, in trover againſt a pawn-broker, the ſervant embezzling his maſter's goods and pawning them, will be admitted to prove the fact. Mich. 1752. C. B. at Weſtminſter, Bull. N. P. 290. So, in an action to recover money from a lottery-office keeper which the plaintiff's clerk had embezzled, and paid to the defendant upon the chances of the coming up of tickets in the ſtate-lottery, contrary to the lottery act, the clerk was admitted as a witneſs to that fact. Clark v. Shee, Cowp. 197. In this caſe indeed the clerk had a releaſe from the plaintiff and his ſureties: but *qu.* if he would not have been admiſſible without a releaſe? So, in actions by maſters for aſſaulting a ſervant, *per quod ſervitium*, &c., it is every day's practice to admit the ſervant as a witneſs for the maſter. Duel v. Harding, 1 Str. 595 Lewis v. Fog, 2 Str. 944. Cock v. Wartham, *Id.* 1054. Tullidge v. Wade, 3 Wilſ. 18. *contr.* Dauſley v. Weſtbrowne, 1 Str. 414.—So, for the ſake of trade and the common uſage of buſineſs, an intereſted ſervant will be admitted. As, a porter is evidence to prove a delivery of goods: a banker's apprentice to prove the receipt of money. Bull. N. P. 289. So, a factor, who made the agreement between the parties, was allowed to be a witneſs to prove the contract, though he was to have a ſhilling in the pound; for, as factor he was concerned both for vendor and vendee, was a mere *go-between*, and might be a witneſs for either. Dixon v. Cooper, 3 Wilſ. 407.]

Hard. 331. 2 Salk. 691. pl. 5. It ſeems agreed clearly, that a legatee in a will cannot be a witneſs to (*b*) prove the (*c*) will, becauſe he is (*d*) preſumed to be partial in ſwearing for his own (*e*) intereſt.

(*b*) But he may be a witneſs againſt the will, for when he ſwears againſt the will, he ſwears againſt his own intereſt, and is therefore the ſtrongeſt witneſs. 2 Salk. 691. pl. 5.——So, freemen of a corporation were allowed witneſſes againſt the corporation. 2 Show. 146. pl. 127. (*c*) Yet he may be examined as a witneſs to prove a deed or other thing which has no relation to the will. Style, 370.——So, if the parſon ſues one of his pariſhioners for tithes, who pleads a *modus*, the other pariſhioners, though they cannot be witneſſes as to the cuſtom, yet they may be witneſſes as to the value of the tithes. (*d*) But if the legacy be ſo inconſiderable, as that he cannot be preſumed to be biaſſed by it; as if it be 5*s.* to a private perſon, or 5*l.* to a nobleman, it is ſaid that he may be a witneſs for the will. Vern. 254. But it is ſettled, that the minuteneſs of the intereſt is no anſwer to the objection, and that therefore where the party is concerned in intereſt, though never ſo ſmall, he cannot be a witneſs, 2 Vern. 317. 4 Burn's E. L. 95. Vent. 351. (*e*) Where a witneſs hath a legacy by the will, by a releaſe of the legacy, though at the trial, he becomes diſintereſted, and ſo is a good witneſs. Sid. 315. [See tit. "Wills and Teſtaments" (D), and 25 Geo. 3. c. 6.]——So, a bankrupt, who has aſſigned and releaſed all his eſtate and right to the aſſignees, may be examined as a witneſs for them. 2 Vern. 637.——[But in a *qui tam* action on the ſtatute of uſury, againſt the aſſignee of a bankrupt for taking uſurious intereſt on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witneſs to prove the offence, if he has not obtained his certificate, or re-paid the money; notwithſtanding he is ready to releaſe to his aſſignees all benefit which may ariſe from this debt in particular, and all claim to allowance

nd ſurplus in general; and notwithſtanding the aſſignee has proved his demand for the money lent under he commiſſion. Maſters v. Drayton, 2 Term Rep. 496.]

So, if *J. S.* deviſes lands to *A.* and the will is ſigned, ſealed, nd publiſhed in the preſence of the ſaid *A.* and *B.* and *C.* who ttеſted the ſame; yet this is no good will to paſs *thoſe* lands; for he ſtatute of frauds requires three or more competent witneſſes, which *A.* cannot be, being concerned in intereſt as deviſee of the ands, and therefore not a credible witneſs. Carth. 514. Hilliard and Jennings, *vide* tit. Wills. Ld. Raym. 507.

It is ſaid by *Hale*, Ch. Juſt. that he knew it to have been ad- udged, that an executor in a cauſe (*a*) concerning the teſtator's ſtate, if he hath not the ſurpluſage given to him by the will, may e a witneſs for the will. Mod. 107. [An executor in truſt is a good witneſs for the will.

nd though in the caſe of a truſtee, it hath been uſual to have a releaſe, yet that is not neceſſary, for ſuch erſon has in fact no intereſt to releaſe. Nor is it any objection to an executor's teſtimony, that he ay be liable to actions as executor *de ſon tort*. Lowe v. Jolliffe, 1 Bl. Rep. 365. Holt v. Tyrrell, Barnard. 12. Goodtitle v. Welford, Dougl. 139. Baillie v. Wilſon, 4 Burr. 2254. In Goſs v. Tracy, Canc. M. 1715, Lord Cowper determined, that a grantee, where he appears to be a bare uſtee, is a good evidence to prove the execution of the deed to himſelf. 1 P. Wms. 287.] (*a*) That e children of an inteſtate cannot, by reaſon of their intereſt, under the ſtatute of diſtributions, be witneſſes in any thing relating to the inteſtate's eſtate. Skin. 223.

[An informer under a penal ſtatute, who is entitled to part of he penalty, cannot be admitted a witneſs againſt the offender. Rex v. Stone, 2 Ld. Raym. 1545. Rex v. Piercy, Andr. 18. Rex v. Blaney, *Id.* 240. Rex v. Tilly, 1 Str. 316.—But ſome modern ſtatutes declare the informer to be a competent witneſs; as the act of 32 Geo. 3. c. 56. § 7. for preventing the counterfeiting of certificates of the characters of ſervants.

The plaintiff had been appointed huſband of a ſhip by a deed xecuted by all the joint owners; by which deed he was im- owered generally to lend or advance money, *&c.* He inſured or all the owners; and brought ſeparate actions of covenant gainſt two of them: they were each of them charged for the mount of the whole ſum paid. It was agreed, that a direction o inſure given by one part-owner did not bind the reſt, without n expreſs or implied authority for that purpoſe from the reſt. he plaintiff did not pretend that any expreſs general direction to nſure had been given by all the owners; but inſiſted that they ere all informed of it, and acquieſced in it, and called a wit- eſs to prove it. This the defendant denied, and offered to diſ- rove it by calling the defendant in the other cauſe, inſiſting, that e was a competent witneſs, becauſe he was not intereſted in the vent of that ſuit, for that each of the two cauſes was to ſtand n its own evidence. But Lord *Manſfield*, at the trial, and after- ards, the court of *K. B.* rejected this witneſs as incompetent; r unleſs there was a general direction to inſure, the plaintiff could ot recover in this action; and a verdict againſt one of theſe int-owners would affect the other of them; becauſe that other ould be obliged to contribute (*b*). French v. Backhouſe, 5 Burr. 2727. (*b*) According to this ſtatement, the court conſidered the witneſs as intereſted *in the event of the cauſe*; though Buller J. in the caſe of Walton v. Shelley, 1 Term Rep. 303. treats the deciſion as having proceeded upon the ground merely of *an intereſt in the queſtion*. His words

e, "In that caſe, the ſecond defendant was certainly not intereſted to ſupport the defence in the firſt cauſe; for if the plaintiff had recovered in that, the ſecond defendant, who was offered as the witneſs, could not have been charged with any part of the damages recovered in the firſt action."

A. gave

Trelawney v. Thomas, 1 H. Bl. 303.

A. gave a general bond to *B.* for the payment of a ſum of money. It appeared upon examining *A.* on a *voir dire*, that it was underſtood between them, that this money was to be applied towards indemnifying *B.* from the expences of an election in which *B.* was a candidate. In an action brought by *C.* againſt *D.*, an active member of a committee for carrying on *B.*'s election, for money advanced and ſervices performed in ſupporting the intereſt of *B.* at the requeſt of *D.*, it was holden that *A.* was not a competent witneſs; for he was intereſted in the event of the cauſe, inaſmuch as by procuring the plaintiff to be nonſuited or a verdict againſt him, he would ſave himſelf from the conſequences of this action, ſince, if he ſucceeded, as the defendant would call upon *B.* to be reimburſed the damages and coſts, *A.* would be liable by his engagements to *B.*; and if the plaintiff, having failed in this action, ſhould bring another againſt *B.*, *A.* might tender to *B.* the amount of the plaintiff's demand, and thereby eſcape the coſts; for if *B.* ſhould proceed againſt him on the ſecurity, he would be reſtrained in equity from having execution for more than the damages recovered by the plaintiff in the former action, which would have been tendered.]

Co. Lit. 6. b. 2 Roll. Abr. 685. Raym 191. 2 Hawk. P. C. c. 46. § 24.

He who borrows money upon an uſurious contract, cannot be a witneſs upon an information for the uſury (unleſs he hath paid the money) (*a*), whether ſuch information be brought by himſelf or any other; for if in ſuch caſe a man might be a witneſs, he would in effect ſwear for himſelf, by proving a matter which may avoid his own contract.

[Shank *q. t.* v. Payne, 1 Str. 633. S. P. (*a*) In which caſe he is a competent witneſs, though the fact of payment ſhould be proved by no other perſon but himſelf. Abrahams v. Bunn, 4 Burr. 2251.]

Rex v. Whiting, Salk. 283. pl. 12. Ld. Raym. 396. Rex v. Nunez, 2 Str. 1043. S. P. but *vide* Rex v. Ellis, *Id.* 1104.

Hence alſo it hath been held, that he, who by a ſlight has been impoſed upon to ſet his hand to a note for more money than he intended, is no good witneſs on an information for the cheat; becauſe a conviction may be a means to avoid the note, by being made uſe of by the party when ſued upon it, as a motive to influence the jury, which cannot well be prevented, though in law it be no evidence.

S. P. Rex v. Parris, Sid. 431. Vent. 49. 2 Keb. 572. [Rex v. Broughton 2 Str. 1229. *contr.* In the caſe of the King v. Bray, Ca. temp. Hardw. 359. Lord Hardwicke ſaid that if the caſe of the King and Whiting were examined into, it would be found to be rather an objection to the credit than the competency.]

Salk. 283. pl. 12. Ld. Raym. 396.

Alſo, it ſeems generally agreed, that he, whoſe property may be prejudiced by a (*b*) forgery, is no evidence to prove it on an indictment or information.

[Shanke *q. t.* v. Payne, 1 Str. 633. S. P. Rex v. Rhodes, 2 Str. 728. S. P. Though a perſon, as is ſaid, whoſe hand is forged, is not admiſſible to prove the forgery, yet under many circumſtances, may be admitted, where he is not directly intereſted in the queſtion; as in Wells' caſe, who was indicted for forging a receipt from a mercer at Oxford, the mercer having before recovered the money in an action againſt Wells, was admitted by Willes, C. J. to prove the forgery. Bull. Ni. Pri. 289. So, where Newland forged a bank-note in the name of William Lander one of the caſhiers; Lander was admitted *without a releaſe*, to prove that it was not his ſignature; becauſe the intereſt and liability to pay muſt be immediate and apparent either upon the face of the inſtrument forged, or on a *voir dire*; and Lander the caſhier, was only *mediately* liable over to the bank upon his ſecurity. O. B. 1784.—A bond was forged by Dr. Dodd in the name of Lord Cheſterfield, and the obligees executed a releaſe; upon which

his lordſhip was admitted to prove, that the ſignature was not his hand-writing. Leach's Hawk. 2 vol. c. 46. § 24. note. But on an indictment for forging a ſeaman's will, a perſon named executor in a will of a ſubſequent date, was holden an incompetent witneſs to prove that the name of the teſtator to the firſt will was a forgery; for that went to eſtabliſh the ſecond will in which he was named executor. Rhodes' caſe, Leach's Cr. Caſ. 25.] (*b*) And if it be a forgery within 5 Eliz. c. 14. a farther reaſon is given in 2 Hawk. P. C. c. 46. § 24. why ſuch perſon cannot be an evidence, becauſe he may have an action on the ſtatute.

So upon this reaſon it hath been adjudged, that he, againſt whom a verdict is given, cannot be a witneſs to prove perjury in the evidence. 2 Roll. Abr. 685. and the ſame point is taken for granted. Sid. 237. Keb. 836. Rex v. Whiting, Salk. 283. pl. 12. S. P. [Rex v. Nunez, 2 Str. 1043. S. P. But ſee Rex v. Broughton, 2 Str. 1229. *contr.* However, in the caſe of Rex v. Eden, Lord Kenyon held, that the defendant in the original action, againſt whom the verdict went, was an incompetent witneſs, he not having paid the debt and coſts. Hil. 34 G. 3. Eſpinaſſe's Ca. at Ni. Pr. 97.]

Yet notwithſtanding theſe caſes, and the force of theſe reaſons, there are ſeveral inſtances, where, in caſes of (*a*) neceſſity, a perſon, whoſe (*b*) damage an indictment or information concludes to, has been allowed and admitted an evidence, and his credit left to the jury. Sid. 211. 237. 2 Keb. 384. Salk. 286. pl. 20. 2 Ld. Raym. 1179.

Mod. 301. 311. 7 Mod. 119. (*a*) On the ſtatute of robberies, a man ſwears himſelf, becauſe there can be no other witneſs. 3 Mod. 114, 115. *per cur.* (*b*) As in an indictment for a battery, &c. 2 Hawk. P. C. c. 46. § 24.—Where a perſon reſcued was admitted a witneſs for the perſon againſt whom an action was brought for the reſcue, and his credit left with the jury. 6 Mod. 211.

If the warden of the *Fleet* ſuffers a voluntary eſcape, and an inquiſition, by virtue of a ſpecial commiſſion iſſuing out of Chancery, is taken thereof, which he traverſes; the perſon eſcaping, though he gave a bond to be a true priſoner, is a good witneſs to prove the eſcape; for this does not make the bond void, as a conviction on the ſtatute of uſury does; beſides, this is a matter privately tranſacted between the party and officer, of which there can be no other evidence. 2 Salk. 690. pl. 3. The King and Ford. [See Fitzg. 80. The King againſt Huggins, S. P. ruled on the authority of this caſe.]

Upon this rule, that an intereſted perſon cannot be a competent witneſs, it has been often doubted, how far (*c*) freemen of a corporation, the inhabitants of a hundred or pariſh, ſhould be admitted as witneſſes in matters which concern thoſe places; and there it is (*d*) ſaid, that no general rule can be laid down, but that every caſe muſt ſtand upon its own particular (*e*) circumſtances, viz. Whether the intereſt be of that nature, or ſo conſiderable as to preſumption to produce partiality in the witneſſes.

(*c*) Where there has been a diſpute between two counties, *vide* Sid. 192. (*d*) By Scroggs, Chief Juſt. Lev. 231. (*e*) Where the party releaſed all his right to the corporation, and this made them good witneſſes. 2 Jon. 116. 2 Lev. 236.—* The uſual way is to diſfranchiſe thoſe, a corporation calls as witneſſes.*

Hence in an information in nature of a *quo warranto*, for taking 2 *d. per* chaldron for all ſea-coals brought to *London*, where the defendants preſcribed for the duty, upon which iſſue was taken and tried at the bar, it was held, that the freemen of *London* were good witneſſes to prove the preſcription, though the mayor, &c. have the whole profit of this toll, which is for the benefit of the corporation, of which all the citizens and freemen are members; for it cannot be preſumed, that for an advantage ſo ſmall and ſo remote, they would be partial and perjure themſelves (*f*). 2 Lev. 281. The King v. the Mayor of London. [(*f*) The *quantum* of intereſt will not affect the caſe at all: if the party have any intereſt, is diſabled from being a witneſs. Hence, where a corporation, being lord of a manor, had approved part

part of a common, and leaſed it, reſerving rent to the corporation, a freeman was not admitted to prove, that there was a ſufficiency of common left for the commoners. Burton v. Hinde, 5 Term Rep. 174.]

Vent. 351. In 1 Vern. 254. it is held generally, that freemen of a corporation cannot be witneſſes, and this caſe is there cited, as a caſe in which ſuch evidence was rejected, and ſo ſaid to be reſolved, 2 Vern. 317. [4 Burn's E. L. 95.]

So, in the caſe of the city of *London*, concerning the duty of water-bailage, where the mayor and commonalty brought an *indebitatus aſſumpſit* againſt *A. B.* for 5 *l.* for ſo much due to them for divers tons of wine brought from beyond the ſeas to the port of *London*, at 4*d. per* ton; and ſome freemen being produced as witneſſes, it was objected, that the commonalty of *London* comprehending all the freemen, this made them intereſted in the ſucceſs of the cauſe; but it was held by three judges againſt one, that ſo ſmall and remote an intereſt did not diſable them from being competent witneſſes. However, they were laid aſide by conſent.

The Company of Carpenters, &c. v. Hayward, Dougl. 374.

[A perſon, who has acted in breach of an alleged cuſtom, is not a competent witneſs to diſprove the exiſtence of the cuſtom; for if the cuſtom ſhould not be eſtabliſhed, he would be diſcharged from any actions he may be liable to for the breach of it.]

7 Mod. 63. Lord Wharton and Sir John Robinſon.

At a trial at bar concerning boundaries of lands; the parſon of the one pariſh, the land lying in two pariſhes, was rejected, becauſe he might enlarge his own pariſh, and by conſequence the tithes; but one, who about ſeven years before had taken the profits, under the title of one of the parties, was received as a witneſs, becauſe now he might plead the ſtatute of limitations.

2 Sid. 109. Townſend and Row. (*a*) But in 2 Vern. 317. where the queſtion related to the loſs and miſapplication of a ſum of money given for the benefit of the pariſhioners, it was held, that an inhabitant of the pariſh could not be a witneſs; and that the caſes where the party was concerned in intereſt, though never ſo ſmall, have always prevailed.

It is ſaid in 2 *Sid.* to have been ruled on evidence at a trial at bar, that if a remainder after an eſtate for life be limited to the miniſter and churchwardens of a certain pariſh, for the uſe and benefit of the poor of the pariſh, (*a*) that any of the pariſhioners may be witneſſes to prove this deviſe.

Vent. 351. admitted. (*b*) Mod. 73. S. P. though he be poor, and pays no taxes, or pariſh duties; for when the money recovered of the hundred comes to be levied, he may then be worth ſomething; but ſervants, and thoſe who receive alms may be witneſſes. 2 Keb. 73. S. P. [But now by ſtat. 8 Geo. 2. c. 16. § 15. inhabitants of hundreds are made competent witneſſes at trials on the ſtatutes of hue and cry.]

In an action againſt the hundred, upon the ſtatute of *Winton*, an hundredor (*b*) cannot be a witneſs.

Vent. 351. (*c*) If there be a diſpute between two pariſhes, which of them ſhall repair a certain highway, the inhabitants of neither of the pariſhes be witneſſes. 4 Mod. 48, 49.

On an indictment againſt the county for not repairing (*c*) a bridge, it has been doubted whether an inhabitant of the county could be a witneſs.

But now by the 1 *Ann. ſt.* 1. *c.* 18. reciting, That whereas many private perſons, or bodies politick or corporate, are of right obliged to repair decayed bridges, and the highways thereunto adjoining, but becauſe the inhabitants of the county, riding, or diviſion, in which ſuch decayed bridge or highways lie, have not been allowed upon informations or indictments brought againſt ſuch perſon or perſons

perſons, bodies politick or corporate, for not repairing ſuch decayed bridges and the highways thereunto adjoining, by the judges before whom ſuch information or indictment is to be tried, to be legal witneſſes; it is enacted, "That in all informations or indictments to be brought and tried in any of her Majeſty's courts of record at *Weſtminſter*, or at the aſſizes or quarter-ſeſſions of the peace, the evidence of the inhabitants, being credible perſons, or any of them of the town, corporation, county, riding or diviſion, in which ſuch decayed bridges or highway lie, ſhall be taken and admitted in all ſuch caſes in the courts aforeſaid."

And by the 3 & 4 *W.* 3. *c.* 11. "In all actions to be brought in the courts of *Weſtminſter*, or at the aſſizes, for money miſſpent by church-wardens, the evidence of the pariſhioners, other than ſuch as receive alms, ſhall be taken and admitted."

On this rule, that an intereſted perſon cannot be a witneſs, the time and manner of a witneſs's becoming intereſted ſeems alſo material; and therefore it has been held, that it is no good exception againſt a witneſs, that he hath a promiſe of a reward, on condition of giving his evidence, eſpecially if ſuch reward be not promiſed by the perſon for whoſe benefit he is to ſwear, and by way of contract for giving ſuch and ſuch particular evidence. Alſo it has been held, that a witneſs's laying a wager about the ſucceſs of the cauſe is no objection againſt his being ſworn as a witneſs, for the party hath an intereſt in his teſtimony, which to deprive him of by his own act would be unreaſonable. Skin. 586. pl. 5.

Hence it hath been held, that on a *ſcire facias* againſt the king's patentee, a perſon, who has a promiſe of being made a deputy, may be a witneſs. Mod. 21. 2 Keb. 576. So ruled at a trial at bar by three judges againſt Twiſden, who held, that it was like a man's promiſing another, that, if he recovered the lands, he ſhould have a leaſe of them, which, he ſaid, diſabled him from being a witneſs.

But it has been held, that if ſeveral perſons lay wagers at a horſe-race, &c. and an action is brought againſt one of them for the money loſt, that a better on the ſame ſide cannot be a witneſs for him who loſt; but if ſuch perſon acknowledges that he loſt the wager, and pays the money, he may be a witneſs. 3 Lev. 152, 153. Reſcous and Williams, adjudged, and Jones, Ch. Juſt.

Held, that laying a wager, or being a better, did not deſtroy the teſtimony of the witneſs, but went only to his credit.—— [See Baron v. Bury, Vin. Abr. tit. Evidence (I), pl. 33. S. P. and ſame diſtinctions as in the text. In Str. 652. Rex v. Fox, on an indictment for an aſſault, it was proved, that the proſecutor had laid a wager that he ſhould convict the defendant: And Lord C. J. Raymond held him to be a good witneſs for the king, though it might go to his credit. And the better opinion ſeems to be, that it is no objection to the *competency* of a witneſs, that he has laid a wager on the ſubject of the ſuit, though it may affect his *credit*. Cowp. 736. 3 Term Rep. 37. And it ſeems now to be a ſettled rule, that where a perſon makes himſelf a party in intereſt after a plaintiff or defendant has acquired an intereſt in his teſtimony, he ſhall not by this deprive the plaintiff or defendant of the benefit of his teſtimony. Therefore, a broker who underwrites a policy after getting it underwritten by others, is a competent witneſs for the defendant in an action againſt any of thoſe who underwrote before him. Bent v. Baker, 3 Term Rep. 27.]

It has been held in Chancery, that if a perſon is examined as a witneſs, who is no ways concerned in intereſt, and afterwards he becomes heir at law, and thereby intereſted in the matter, that notwith- 2 Vern. 699. [1 P. Wms. 287. S. C.] Abr. Eq. 224.

[2 Atk. 615. 2 Vez. 42. Tully's caſe, 2 Ld. Raym. 1008.

notwithſtanding, his depoſitions, when thus diſintereſted, may be read, even (*a*) at a trial at law; and that it was like the caſe, where the only ſurviving witneſs to a deed becomes the party intereſted (*b*), or where a witneſs to a deed becomes blind, in which caſes his hand may be proved at law.

1 Salk. 286. Holcroft v. Smith, 1 Eq. Ca. Abr. 224. Baker v. Lord Fairfax, 1 Str. 1001. contr. But depoſitions have been allowed to be read at law, where the witneſs was beyond the reach of judicial proceſs. Lord Altham v. Lord Angleſey, Gilb. Ca. in Eq. 16. 11 Mod. 210. S. C. So, where he could not be found, or was diſabled from attending by ſickneſs. Fry v. Wood, 1 Atk. 449. Bull. Ni. Pri. 239.] (*a*) But at a trial at bar in C. B. on an iſſue directed out of Chancery, the judges refuſed to have ſuch depoſitions read, becauſe the witneſs was ſtill living. Abr. Eq 224. But in 2 Vern. 699. ſuch depoſitions were read in Chancery, and there ſaid, that the reaſon of rejecting ſuch evidence at law was, becauſe it was againſt the rule, viz. that where the witneſs is living, and might be produced at the trial, the depoſition of ſuch witneſs cannot be read. [(*b*) As, where he becomes executor or adminiſtrator to the obligee of a bond. Godfrey v. Norris, 1 Str. 34. Goſs v. Tracy, 1 P. Wms. 289. So, where he becomes infamous. Jones v. Maſon, 2 Str. 833. But if the ſubſcribing witneſs be intereſted both at the atteſtation and at the trial, he can neither be examined as a witneſs to prove the execution, nor can his hand-writing be proved. Swire v. Bell, 5 Term Rep. 371.]

2 Vern. 472. Callow and Mine.

A witneſs was examined whilſt ſhe was intereſted, before the hearing; and the cauſe being heard and decreed to an account, ſhe was re-examined after the hearing, before the maſter, on the account, having firſt releaſed her intereſt: it was objected, that ſhe ought not to be heard, for having been examined whilſt intereſted, and her depoſitions publiſhed, ſhe was thereby engaged, and almoſt under a neceſſity of ſtanding to what ſhe had before ſworn, and could not be free to retract or contradict it; but the lord keeper over-ruled the objection.

2 Hawk. P. C. c. 46. §. 25. [(*c*) But Sir Matthew Hale is of a different opinion. 2 Hal. H. P. C. 280.]

It is no good exception againſt a witneſs, that he has a maintenance from the king or other perſon, for every one may maintain his own witneſſes; nor is it any exception againſt a witneſs, that he has received a reward for having made a diſcovery of the crime to be proved againſt the priſoner, nor that he hath the promiſe of a pardon on condition of giving his evidence (*c*).

Fotheringham v. Greenwood, 1 Str. 129. But *qu.* whether the being under mere honorary engagements ought not to go rather to the credit, than the competency of the witneſs, ſince it is impoſſible to render the witneſs competent, a notional honorary intereſt not being the ſubject of a releaſe.

[A perſon cannot be a witneſs who apprehends himſelf to be intereſted, though in fact he be not ſo; or, who admits himſelf to be under honorary engagements, though not under any legal obligation, to contribute to the expences of the action.

Walton v. Shelly, 1 Term Rep. 300. But this rule is confined to *negotiable* inſtruments; for in the caſe of Mr. Jolliffe's will, all the ſubſcribing wineſſes were allowed to give evidence of the inſanity of the teſtator at the time of making it. Love v. Jolliffe, 1 Bl. Rep. 365.

A perſon ſhall not be permitted to give evidence to invalidate a negotiable inſtrument which he has ſigned.

Goodtitle v. Welford, Dougl. 139.

If a perſon who is tendered as a witneſs does every thing in his power to get rid of the objection to his teſtimony, it ſhall not be competent to the other party by an obſtinate refuſal to prevent him from being examined.]

(C) Of the Number of Witneſſes required in our Laws.

IT is holden by my Lord Chief Juſtice *Holt*, that at common law it was not neceſſary in any caſe, that a proof of matter of fact ſhould be made by more than one witneſs, and that the ſingle teſtimony of one credible witneſs was ſufficient to prove any fact, and that the authorities cited by my Lord (*a*) *Coke* do not warrant the opinion founded on them. Carth. 144.

(*a*) Co. Lit. 6. a. where my Lord Coke ſays, that when a trial is by witneſſes, as of the challenge of a juror, or ſummons of a tenant, the affirmative ought to be proved by two or more witneſſes; but when the trial is by verdict, there, the judgment is not given upon witneſſes, or other kind of evidence, but upon the verdict; and upon ſuch evidence as is given to the jury they give their verdict.

But the civil law requires two witneſſes to prove a fact; and therefore it has been holden, that if the ſpiritual court, which proceeds according to the civil and canon law, refuſe, where a temporal matter is pleaded in bar of an eccleſiaſtical demand, to admit the evidence of one witneſs, they ſhall be prohibited; as where an executor proves payment of a legacy by one witneſs, *&c.* Show. 158. 3 Mod. 172. 283. Comb. 160. Holt. 752. pl. 1. Ld. Raym. 220. Vent. 291. Carth. 142. 2 Salk. 547. pl. 1.

Hence it hath been eſtabliſhed as a fundamental rule in the courts of equity, that a decree cannot be made on the teſtimony of one ſingle witneſs againſt the flat and poſitive denial of a fact by the defendant's anſwer; (*b*) becauſe the oath of the party is ever looked upon, in equity, to be as good as the oath of a ſingle perſon. Vern. 161. 3 Chan. Ca. 123.

(*b*) If an executrix to a firſt huſband marries a ſecond, and a bill is exhibited againſt them to diſcover a truſt, and they, in their anſwers, diſagree in the matter, the wife confeſſing what the huſband denies, and what the plaintiff can prove only by one witneſs, the plaintiff can have no relief; for one witneſs is not ſufficient againſt the huſband's anſwer; and the wife's confeſſion will not avail, for ſhe can be no witneſs againſt her huſband. 2 Chan. Ca. 39. 3 P. Wms. 238.

Yet caſes may, and do often fall out, that the court may ground a decree upon the oath of a ſingle witneſs, attended with other circumſtances to corroborate it; as where the anſwer of the party appears to be notoriouſly falſified, by which means it comes to loſe that credit which otherwiſe it would and ought juſtly to have. *Vide* 2 Vern. 554. Abr. Eq. 229. 2 Atk. 19. 3 Atk. 419. 1 Br. Ch. Ca. 52.

Alſo, by ſeveral acts of parliament, a certain number of witneſſes is required, as by the 29 *Car.* 2. *c.* 3. "That all deviſes of "lands ſhall be atteſted and ſubſcribed in the preſence of the "teſtator, by three or four credible witneſſes, or elſe ſhall be "void." But for this *vide* head of Wills.

By the 7 *W.* 3. it is enacted, "That no perſon ſhall be indicted, "tried or attainted for high treaſon, but upon the oaths of two "lawful witneſſes, either both of them to the ſame overt act, or "one of them to one, and the other of them to another overt act "of the (*c*) ſame treaſon."

(*c*) There muſt be one witneſs to one, and another witneſs to another overt act of the ſame ſpecies of treaſon, or at leaſt one witneſs to an overt act, and another to a material circumſtance to prove it. 2 Hawk. P. C. c. 46. § 2. But for this *vide* tit. Treaſon.

(D) Of compelling a Witneſs to appear and give Evidence.

21 H. 6. 6. a. 11 H. 6. 4. b. Bro. Maintenance, 5. 51. 2 Roll. Abr. 118.

IT is held to be maintenance for a perſon officiouſly to give evidence in a cauſe, without being called (*a*) upon to do it: alſo, if a man, who is not *ſubpœnaed*, happens to be in court during a trial, he ſhall not be forced to be ſworn againſt his will; but if he conſents, the want of a *ſubpœna* is not material: and in certain caſes, the court will, in diſcretion wait, till a *ſubpœna* can be procured.

[(*a*) This is now not law. See 4 Term Rep. 340]

(*b*) And therefore witneſſes are privileged *eundo & redeundo*, for which *vide* tit. Privilege.

From hence it follows, that the parties have (*b*) a right to proceſs to bring in their witneſſes, and to this purpoſe it is enacted by 5 *Eliz. c.* 9. § 12. "That if any (*c*) perſon or perſons, upon "whom any proceſs out of any of the courts of record within "this realm, or *Wales*, ſhall be (*d*) ſerved, to teſtify or depoſe "concerning any cauſe or matter depending in any of the ſame "courts, and having (*e*) tendered unto him or them, according "to his or their countenance or calling, ſuch (*f*) reaſonable "ſum of money for his or their coſts and charges, as, having "regard to the diſtance of the place, is neceſſary to be allowed "in that behalf, do not appear according to the tenor of the ſaid "proceſs, having not a lawful and reaſonable let or impediment "to the contrary, that then the party in making default to loſe "and forfeit for every ſuch offence ten pounds, and to yield ſuch "further recompence to the party (*g*) grieved, as by the diſcre-"tion of the judge of the court out of which the ſaid proceſs "iſſues ſhall be awarded, according to the loſs and hindrance "that the party which procured the ſaid proceſs ſhall ſuſtain, by "reaſon of the non-appearance of the ſaid witneſs or witneſſes; "the ſaid ſeveral ſums to be recovered by the party ſo grieved "againſt the offender or offenders, by action of debt, bill, "plaint, or information, in any of the queen's majeſty's courts "of record."

(*c*) A feme covert is within the ſtatute, and if ſhe be ſerved with a *ſubpœna*, and refuſe to appear, the action lies againſt the huſband and wife. Cro. Eliz. 122. Havithlome and Harvy, adjudged. Jon. 430. S. C. and S. P. adjudged.

(*d*) A delivery of a ticket containing the ſubſtance of the writ, is a ſufficient ſervice within the act. 5 Mod. 355. Cro. Car. 540. S. P. for there being two, three, or four names of witneſſes in one writ, he cannot leave the writ with every one of them; and to have ſeveral writs for every witneſs would be very chargeable to the ſubject. [Four witneſſes only can be put in one writ of *ſubpœna*. Cowp. 846. and a ticket ſhould be made out for each witneſs, and perſonally delivered to him, a reaſonable time before the day of trial, 2 Str. 1054.; for witneſſes ought to have a convenient time to put their own affairs in ſuch order, as that their attendance on the court may be of as little prejudice to themſelves as poſſible. 1 Str. 510.]——(*e*) If a feme covert be the perſon to appear as a witneſs, the tender muſt be to her, and not to her huſband. Cro. Eliz. 122. Jon. 430. S. P. (*f*) If the party gives the witneſs a ſhilling, which he accepts, and promiſes, that on his appearance he will pay him all further reaſonable charges; this is ſufficient. Cro. Car. 522. 540. March, 18. (*g*) In Cro. Eliz. 130. and the S. C. Leon. 122. it is adjudged, that the plaintiff need not ſet forth any ſpecial damage which he ſuſtained by the negligence of the defendant in not appearing to give evidence, where the action is brought for 10*l.* only, and not for any more damages; but the contrary has ſince been reſolved in Cro. Car. 522. 540. Goodwin and Weſt, Jon. 430. and 5 Mod. 355. Maddiſon and Shore, which was affirmed on a writ of error; for there muſt be a party grieved, otherwiſe there is no cauſe of forfeiture, and a particular damage muſt be ſet forth, &c. [But the action for the further recompence will not lie, unleſs ſuch recompence hath been previouſly aſſeſſed by the court out of which the proceſs iſſued; neither the jury, nor the judge at *niſi prius* being competent to do it. Pearſon v. Iles, Dougl. 556. Upon ſuch aſſeſſment debt may be brought. However, the more uſual way is to proceed by attachment againſt the witneſs

witneſs neglecting to attend. But in order to ground this ſummary mode of proceeding, it is neceſſary to prove that the witneſs was perſonally ſerved. Smalt v. Whitmill, 2 Str. 1054. Wakefield's caſe, Ca. temp. Hardw. 313. and that his reaſonable expences were paid or tendered to him. Chapman v. Pointon, 2 Str. 1150. Stephenſon v. Brookes, Barnes, 33. Bowles v. Johnſon, 1 Bl. Rep. 36.]

If a perſon, who can give evidence againſt one who is accuſed of felony, refuſes to be bound to give evidence, at the general gaol-delivery, *&c.* the juſtice of peace may either commit to priſon ſuch perſon ſo refuſing, or may bind him to his good behaviour, and to appear at the next gaol-delivery or quarter-ſeſſions. Dalt. Juſt. 111.

Lord *Preſton* was committed by the court of quarter-ſeſſions for refuſing to be ſworn to give evidence to the grand jury on an indictment of high treaſon; he was brought by *habeas corpus* in *B. R.*; and *Holt*, C. J. ſaid, it was a great contempt, and that had he been there, he would have fined him, and committed him till he paid the fine; but being otherwiſe, he was bailed. Salk. 278. pl. 2.

[Where a witneſs is detained in priſon, a *habeas corpus ad teſtificandum* is neceſſary to bring him up; for which an application is made to a judge, upon an affidavit, ſworn to by the party applying(*a*), ſtating that he is a material witneſs, and willing to attend(*b*): Upon this application, the judge, if he think proper, will grant his *fiat* for the writ, which is then ſued out, ſigned, and ſealed (*c*). But a *habeas corpus ad teſtificandum* will not lie to bring up a priſoner of war (*d*); and where the application for it appeared to be a mere contrivance to remove a priſoner in execution, the court refuſed to grant it (*e*). The writ being ſued out, ſhould be left with the ſheriff, or other officer in whoſe cuſtody the witneſs is detained, who will bring him up, on being paid his reaſonable charges (*f*).] Tidd's Pr. 528. (*a*) Forteſc. 396. (*b*) Cowp. 672. (*c*) Imp. K. B. (*d*) Dougl. 419. (*e*) 3 Burr. 1440. 2 Cr. Pr. 248, 9. *Qu.* Whether the officer may not require an indemnity againſt the priſoner's eſcape? *Id. ibid.*

It ſeems that by the common law the defendant, in capital caſes, had no right to any proceſs againſt his witneſſes, without a ſpecial order of the court; but now by the 7 *W.* 3. *c.* 3. it is enacted, that all perſons accuſed and indicted for any high treaſon, whereby any corruption of blood may enſue, ſhall have the like proceſs of the court, where they ſhall be tried, to compel their witneſſes to appear for them at any trial or trials, as is uſually granted to compel witneſſes to appear againſt them; and now ſince the ſtatute of 1 *Anne*, *c.* 9., which ordains, that the witneſſes for the priſoner ſhall be ſworn, proceſs may be taken out againſt them of courſe in any cauſe whatſoever. 2 Hawk. P. C. c. 46. § 30.

On a commiſſion iſſuing out of Chancery for the examination of witneſſes, there muſt be a *ſubpœna ad teſtificandum* taken out, directed to the witneſſes, and a ſummons from two of the commiſſioners, of the time and place where they are to be examined; and, if the witneſs ſo ſummoned and ſerved do not appear, the court will grant an attachment againſt him, unleſs he come up at his own expence to be examined before the examiner; or if he be ſummoned by the commiſſioners without a *ſubpœna ad teſtificandum*, and do not appear, the court will order ſuch witneſs to attend at his own expence, and to be examined; and if he diſobey ſuch order, then an attachment ſhall go againſt him.

(E) Of the Manner of giving Evidence: And herein,

1. Where the Examination is in open Court; and therein of such Queſtions as may be aſked a Witneſs.

Hob. 325. Hale's Hiſt. C. L. 253. & 259. Pref. to Forteſc. Rep. ii. to iv. Vaugh. Rep. 143, 144.

THE examination of witneſſes *vivâ voce*, in open court, is juſtly eſteemed one of the greateſt excellences of our law, not only from the awe and reverence which the ſolemnity of the manner is ſuppoſed to produce in the witneſs, and the regard which from thence he muſt have for truth, but alſo from the benefit of croſs-examining: and further, the air and manner of giving evidence often carry ſuch convictions with them, as will induce the court and jury to believe or reject what the witneſs has ſworn.

2 Hawk. P. C. c. 46. § 1.

Hence it hath always been held as a ſettled rule, that in caſes of life, no evidence is to be given againſt a priſoner, but in his preſence.

Cro. Eliz. 189. Metcalfe and Dean.

Alſo in a civil cauſe, where the jury withdrew to confer about their verdict, one of the witneſſes, that was before ſworn on the part of the defendant, was called by the jurors, and he recited again his evidence to them, and they gave their verdict for the defendant; and complaint being made to the judge of aſſiſe of this miſdemeanor, he examined the jury, who confeſſed all the matter, and that the evidence was the ſame in effect that was given before, & *non alia nec diverſa*; and this matter being returned upon the *poſtea*, the opinion of the court was, that the verdict was not good, and a *venire facias de novo* was awarded.

Style's Pract. Reg. 671. 672 (*a*) In Comb. 63. it is ſaid, that witneſſes may

But it is ſaid, that a witneſs, who by reaſon of ſickneſs, extreme age, or (*a*) other cauſe, cannot come to a trial, may, by order of court (*b*), be examined in the country before any judge of the court where the cauſe depends; and the teſtimony ſo taken ſhall be allowed to be given in evidence at the trial.

be examined before a judge, by leave of the court, as well in criminal cauſes as in civil, where a ſufficient reaſon appears to the court, as going to ſea, &c. and then the other ſide may croſs-examine them; but for this *vide* Keb. 36. 249. 787. 2 Keb. 13. [(*b*) The order for this purpoſe cannot be obtained without conſent; the depoſitions of witneſſes, upon interrogatories, not being the beſt evidence the nature of the caſe admits of. Tidd's Pr. 529. The court, however, will do every thing in their power to make the parties conſent, when neceſſary; as by putting off the trial, at the inſtance of the defendant, if the plaintiff will not conſent, Cowp. 174. Dougl. 419.; and if the defendant refuſes, the court will not give him judgment as in caſe of a nonſuit. Tidd's Pr. 529.]

2 Salk. 691. pl. 4.

But if a witneſs going to ſea be by rule of court examined upon interrogatories before a judge, and the trial come on before he is gone, his depoſition ſhall not be read, but he muſt appear; for the rule was made on ſuppoſal of his abſence.

(*c*) Cro. Car. 292. 2 Bulſt. 147. (*d*) But my Lord Coke ſays, that he never read in any

Every perſon produced as a witneſs muſt, before he gives his evidence, be ſworn to depoſe the truth, the whole truth, and nothing but the truth: this the law required in all caſes, (*c*) except on indictments for capital offences, where by (*d*) immemorial practice, the witneſſes againſt the king were not ſuffered to be ſworn.

ſtatute, ancient author, book, caſe or record, that in criminal caſes the party accuſed ſhould not have witneſſes

witneſſes ſworn for him; and therefore that there is not ſo much as *ſcintilla juris* againſt it. 3 Inſt. 79. And in H. P. C. 264. it is ſaid, that there is no known law againſt it.—But in 2 Hawk. P. C. c. 46. § 29. it being the conſtant practice not to ſuffer witneſſes to be ſworn againſt the king upon indictments of capital crimes, the judges preſumed it founded originally on ſome ſtatute, or other good foundation, and were therefore tender of departing from the ſettled practice.

But now by 1 *Anne*, *c.* 9. it is enacted, "That every perſon "who ſhall be produced, or appear as a witneſs on the behalf of "the priſoner, before he or ſhe be admitted to depoſe, or "give any manner of evidence, ſhall firſt take an oath to depoſe "the truth, the whole truth, and nothing but the truth, in ſuch "manner as the witneſſes for the queen are by law obliged to "do; and, if convicted of any wilful perjury in ſuch evidence, "ſhall ſuffer all the puniſhments, penalties, forfeitures, and "diſabilities, which by any of the laws and ſtatutes of this "realm are or may be inflicted upon perſons convicted of wilful "perjury."

By the practice of the courts, if one be produced and ſworn for the plaintiff or defendant, being once ſworn, the other may examine him to any thing whatſoever, though he be the ſolicitor of the party who produces him (*a*): alſo either party may, on application to the court, have the witneſs examined apart, and out of the hearing of the others (*b*).

[(*a*) But a ſolicitor cannot be compelled, and ought not to diſcloſe matters confidentially communicated to him by his client. (*b*) The like indulgence will be given to a priſoner; but he cannot demand it as of right. 4 Str. Tr. 9.]

It is a general rule, that a witneſs ſhall not be aſked any queſtion, the anſwering to which might oblige him to accuſe himſelf of a crime; and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes againſt which he cannot be preſumed prepared to defend himſelf. 2 Hawk. P. C. c. 46. § 20. 7 Mod. 129. Dougl. 593.

If a witneſs, when under examination, through ſurpriſe and inadvertency, gives a wrong anſwer to a queſtion that is aſked him, he is always allowed to recollect himſelf, and that, which he affirms on due deliberation, is to be taken for the truth. So, if he miſtakes the true ſtate of the queſtion, in ſuch a manner as ſhews, that it is rather owing to his weakneſs than perverſeneſs, he cannot be puniſhed for it as guilty of perjury. 5 Mod. 350. and tit. Perjury.

If a perſon is produced as a witneſs for the king, upon a trial in an information, and he is guilty of perjury, he cannot be puniſhed for it on the 5 *Eliz.* by way of indictment, which is the ſuit of the king; and ſuch a one hath been diſcharged accordingly *. Cro. Jac. 120. Price's caſe. * *Qu. de hoc?*

If a witneſs in giving evidence reflects on the character of another, or makes uſe of ſuch words as are actionable; yet this being in a judicial way, he cannot be puniſhed for it, nor will an action lie for ſuch words. Roll. Rep. 61.

[A witneſs ſhall not be allowed to read his evidence, but he may refreſh his memory by any book or paper, if he can afterwards ſwear to the fact from recollection: but if he cannot ſwear to the fact from recollection any further than as finding it entered in a book or paper, the *original* book or paper muſt be produced.] Roe v. Perkins, 3 Term Rep. 749.

2. Of Examinations and Proofs in Chancery.

Gilb. For. Rom. 115, 16.

By the civil and canon law it was abſolutely neceſſary, that there ſhould be a citation taken out againſt the defendant previous to the examination of witneſſes; and the reaſon is, that the defendant, if cited, might either examine or object to their credibility, or put ſuch croſs-interrogatories to them, as might bring out circumſtances in his favour, which he would not have an opportunity to do, if he were not cited; but it was not neceſſary for the defendant to appear, becauſe the citation is in his favour, and he might renounce a privilege introduced in his favour.

Hence it is, that in Chancery, after the plaintiff has replied to the defendant's anſwer, before he proceeds to examine any witneſſes, he muſt take out a *ſubpœna* againſt the defendant to rejoin; but if the plaintiff ſerves the defendant with a *ſubpœna* to rejoin before he has filed a replication, the defendant appearing upon ſuch *ſubpœna* ſhall have his coſts taxed, becauſe the plaintiff has not cloſed the conteſt of the anſwer before he ſerved the *ſubpœna* to rejoin.

The defendant being ſerved with a *ſubpœna* to rejoin, the plaintiff, of courſe, upon producing an affidavit thereof, is to have an order for the defendant to rejoin and join in commiſſion in four days, giving the defendant's ſolicitor notice thereof; and the plaintiff thereupon may, in eight days afterwards, leaving his commiſſioners' names at the office, have, at his own coſts, a commiſſion *ex parte* directed to two of the plaintiff's commiſſioners, and two ſuch as the officer ſhall think fit to nominate.

Alſo, it is uſual to apply by petition or motion, that a *ſubpœna* to rejoin *return. immediatè* may be awarded againſt the defendant; and that ſervice thereof on the defendant's clerk may be deemed good ſervice of the defendant; and to this is often added, eſpecially in a country cauſe, that the defendant may join and ſtrike commiſſioners' names ſometimes in four days, ſometimes in a week, that the plaintiff may have a commiſſion *ex parte*, directed to his own commiſſioners; and all this is of courſe.

But the more uſual way is for each party to name four commiſſioners for the examination of witneſſes, and two a-piece are ſtruck out of each ſide; and if a defendant joins in a commiſſion and names commiſſioners, and yet afterwards refuſes to ſtrike, the court, upon petition, will ſtrike out ſuch two of them as they pleaſe, and the commiſſion ſhall go to ſuch of the four as are left ſtanding.

But here it is neceſſary to obſerve, that there is an office called the Examiner's Office, which extends itſelf, and has a right to examine all witneſſes in town, or within ten miles of the town, which is the circuit of the court; and if any commiſſion be made out, or witneſſes examined within that diſtrict, the depoſitions taken by commiſſion will, upon complaint, be ſuppreſſed, and the clerk who made out the commiſſion will ſtand committed for a miſbehaviour, and breach of the known duty of his office.

Where

When interrogatories are filed in the examiner's office, the witneſs is carried to the ſeat of the examiner, and a note in writing is there taken of his name and place of abode, to the end the other ſide may croſs-examine, if they think fit; and, to prevent the perſonating of any witneſs, he is conſtantly carried in perſon, and, ſhewn at the ſeat of the adverſe party's clerk in Chancery; this being done, he returns back to the examiner's office, and is there examined.

If interrogatories are filed for his croſs-examination, the party who produces him muſt ſee that he ſtays, or returns, and attends to be examined; but if no ſuch interrogatories are filed, or he is not demanded to be croſs-examined at the ſame time when he is under examination, and if he goes away about his buſineſs, the party who intends to croſs-examine him muſt get him examined as well as he can; and the adverſe party is not in that caſe bound to produce him over again, to attend to be croſs-examined, ſince it was the party's fault he had not his interrogatories ready to have croſs-examined him whilſt he was under his former examination.

If the examiner is ſerved with an order whereby publication is to paſs on ſuch a day, he cannot afterwards examine any witneſs, though it often falls out, that three or four witneſſes have been before that time ſworn to the interrogatories, but have not attended to be examined: in this caſe the party cannot examine them without leave of the court, which is ſeldom denied on motion.

If a witneſs is duly *ſubpœnaed* to attend and be examined, and he refuſes to attend, then, upon a certificate from the examiner, that interrogatories are filed, and the witneſs hath not attended to be examined, he ſhall ſtand committed, unleſs he attends and is examined in four days after notice; and this is ſometimes allowed as a good cauſe for enlarging publication or putting off the cauſe; but where publication is actually paſſed, and depoſitions are delivered out, if the party moves for enlarging publication, he muſt offer good reaſons, by affidavit, of ſome material witneſſes whom he hath to examine, and the reaſons why they could not attend and be examined before publication paſſed.

And in this caſe the plaintiff or defendant, as the caſe falls out, muſt make oath, and ſo muſt his clerk or ſolicitor, that they have neither ſeen, heard, read, nor been informed of any of the contents of the depoſitions taken in that cauſe, nor will they ſee, hear, read, or be informed of the ſame, till publication is duly paſſed in the cauſe; and upon ſuch an affidavit it is uſual for the court to enlarge publication, and give the party an opportunity to examine his witneſſes: but he is to be limited to a time, and ſo as not to put off the hearing of the cauſe; for otherwiſe it would be hard to put the defendant to hear his cauſe without proof.

If the party examines ſome witneſſes in town, and others by commiſſion, he is not obliged to exhibit or file his whole ſet of interrogatories in the examiner's office; he only files ſuch and ſuch alone as he hath occaſion to examine in town; for if this were

otherwiſe, it would put the plaintiff to a double expence of paying for copies of the whole interrogatories twice over.

Gilb. For. Rom. 117. Here alſo we muſt obſerve, that anciently the examination was before a judge of the court, who was to conſider whether the witneſs anſwered readily, or whether he brought a ſtory, formed, to the judge: the examination in Chancery was originally before the maſter of the rolls, who was one of the judges of the court; and therefore it ſhould ſeem that the examination might be upon the bill without interrogatories drawn and framed, as the examination with the canoniſts may be upon the *libellus articulatus*: but afterwards the maſter of the rolls having left the examination of the witneſſes to his clerks, as the barons of the Exchequer did to theirs, thenceforward the judge did not, but the counſel for the party, whoſe witneſſes were to be examined, framed the interrogatories upon which the clerks examined; and ſo thenceforward it became the practice to ſend the commiſſion to the commiſſioners to examine upon interrogatories, as the examiners did above.

Id. 118. But as witneſſes often lived remote from the court, it was thought more convenient to appoint commiſſioners to examine ſuch witneſſes, the court ſending a notary of their own, who was often in commiſſion with them, and with thoſe commiſſions a copy of the articles. The commiſſioners are to examine themſelves, and cannot delegate their power, for *delegata poteſtas non poteſt delegari.*

Id. ibid. The commiſſioners were likewiſe to be indifferent, for, upon exception to the partiality of any of them, the court will ſupply their places by putting in others; for though they are named by the parties, yet that is but by way of propoſal to the court; for they are the miniſters of the court, and therefore muſt be impartial.

(*a*) But there ſeems to be no ſuch rule or diſtinction at this day, and therefore it hath

These commiſſioners were to have their charges, and the (*a*) rule was, that rich perſons were to have their expences only, becauſe they were not to be paid for their duty; but the poor were to have, not only their expences, but the price of their labour over and above, that they might not be damaged for doing their duty.

been reſolved, that a commiſſioner may maintain an action for the labour and pains he has been at in the execution of the commiſſion. Carth. 208.

The interrogatories were anciently annexed to the commiſſion, and ſo now they are ſuppoſed to be; but by conſent of parties they are delivered to the commiſſioners at the opening of the commiſſion; and this is the preſent practice.

The commiſſioners can only examine upon the ſet of interrogatories that are firſt put in before them, and no new ones can be examined upon before them, without leave of the court, becauſe their commiſſion is to examine upon ſuch interrogatories as are ſuppoſed to be annexed to the commiſſion, or ſuch as are delivered in at the opening of the commiſſion.

But before the examiner they may examine upon a new ſet of interrogatories, becauſe that is preſumed to be the examination of the

the judge; and the judge might examine upon interrogatories *ex re natâ* out of the articles.

The plaintiff has regularly the carriage of the commiſſion, and ſo is to appoint time and place; but if the defendant ſuppoſes that the plaintiff will aggrieve him by ſuch appointment, he may move for a duplicate of the commiſſion, and that the officer may appoint time and place.

But if the officer appoints time and place, yet the commiſſioners may agree to adjourn, becauſe the appointment of the maſter is only for the opening of the commiſſion; and, therefore, if the commiſſioners agree, they have yet power to make proper adjournments.

If the plaintiff, or his commiſſioners, abuſe the carriage of the commiſſion, by making unneceſſary adjournments, or an irregular examination of the witneſſes, that will entitle the defendant to a commiſſion of his own, and he may have the carriage of it himſelf, becauſe he ſhall not be obliged to produce and examine his witneſſes where it cannot be done impartially.

The fair examination by commiſſioners is not to adjourn without neceſſity, becauſe that would be to haraſs the defendant by obliging him to travel from place to place to croſs-examine; but if it be neceſſary, they may adjourn, not only as to time, but place.

And this affair muſt be performed as far as it is poſſible *uno actu*, that there may be as little opportunity as poſſible to divulge the depoſitions, that neither ſide may better their proof.

When a witneſs is produced, he muſt firſt be examined upon the interrogatories of the producer, and then forthwith, without ſuffering him to go abroad, upon the croſs-interrogatories of the other ſide; and the depoſitions are to be read over to him, every ſheet whereof he is to ſign, that ſo they may have the ſenſe of the witneſs, without being tampered with.

The depoſitions, thus taken, are to be bound up, and ſigned and ſealed by the commiſſioners, and ſent by a meſſenger of their own to the court out of which the commiſſion iſſued, who is to ſwear that they were not opened or altered ſince they were delivered to him.

If there be due notice of executing the commiſſion, and at the day appointed the commiſſioners meet, and the commiſſion be opened, but no witneſſes examined nor adjournment made, the commiſſion is loſt; but if it be not opened, they may give new notice, and proceed, unleſs in the mean time the court be moved, and order be made to pay the coſts of the former day before they proceed. And the reaſon of this rule ſeems to be, that the not adjourning is a refuſal of the commiſſioners to act any further upon it; for though the court itſelf never adjourns, becauſe it is always open; yet the delegated power muſt adjourn, becauſe they have no ſtanding and conſtant power, as the ſeal has, but their power ariſes from the words of their commiſſion, which are *quod mandamus quod ad certos dies & locos quos ad hoc provideritis teſtes præd. coram vobis venire faciatis & advocetis*; ſo that if they do

do not provide time and place by an adjournment, they have no authority further to act by that commiſſion, for the delegated authority muſt purſue the words of the commiſſion, elſe it will be conſtrued a refuſal to act. But if they do not open the commiſſion, their not acting at that time will not be conſtrued as a refuſal to act; but it is an haraſſing of the defendant, for which he may complain to the court and have his redreſs; and the not acting before the commiſſion is opened, is not conſtrued to be a refuſal, becauſe they do not know what their authority is till the commiſſion is opened.

Where one of the plaintiff's commiſſioners and one of the defendant's meet, and the commiſſioner for the plaintiff refuſes to act, the commiſſion is loſt; but the plaintiff ſhall pay the defendant his coſts, and the defendant ſhall have a new commiſſion and the carriage of it: and ſo it is when any commiſſion is loſt through the default of him that has the carriage of it; for he is unworthy to have the carriage of the commiſſion, who appears to make default in the execution of it.

If due notice be given, and the one ſide proceed and examine his witneſſes; the other, if he does not examine, ſhall not have a new commiſſion, unleſs affidavit be made of ſome reaſonable cauſe of his non-attendance, and that neither the party who did not examine, nor any for him, or by his direction or knowledge, have ſeen, heard, or been informed of the depoſitions taken, or any part of them, nor willingly will ſee, *&c.* till he has examined, or till publication: and the reaſon hereof is, that the defendant may not have an opportunity to know what has been proved for the plaintiff, and ſo have an opportunity to conteſt it.

And where ſuch a new commiſſion is granted, it ſhall all be at the charge of the defendant, and the plaintiff is permitted to croſs-examine without charge.

But if the plaintiff will, upon ſuch new commiſſion, produce any witneſſes, he muſt be at equal charges of the commiſſion, becauſe he has equal benefit by the examination of his own witneſſes.

But he at whoſe inſtance a commiſſion is renewed, muſt examine all his witneſſes upon ſuch commiſſion, or in court, before the return of it, becauſe he cannot be indulged a farther probatory term.

If the commiſſioners on both ſides attend the execution of the commiſſion, and the one ſide examines, and the other neither examines nor puts in interrogatories, he ſhall never afterwards examine, unleſs upon ſpecial order of court, upon good cauſe ſhewn, becauſe he might form his interrogatories upon the diſcovery made to his commiſſioners of what the other ſide examined to.

Where the commiſſioners meet and examine, and afterwards adjourn, and one of the defendant's commiſſioners takes away the commiſſion, and the other commiſſioners meet at the day adjourned, and examine witneſſes and return the depoſitions, the court will order ſuch depoſitions to lie, and the *ſubpœna duces tecum* to iſſue againſt the commiſſioner, that he may bring in the au-

thority

rity by virtue of which the depoſitions were taken; for if they had a proper authority, the not having the commiſſion before them does not impeach the depoſitions.

There muſt be fourteen days notice given by the commiſſioners to all the defendants, of the time and place of the execution of the commiſſion, elſe it is not good notice, and the depoſitions will ſtand ſuppreſſed for irregularity, in not purſuing the tenor of the commiſſion. This rule ſeems to be taken from the common law, which requires fourteen days notice of trial; but where it is a ſhort vacation, as between *Eaſter* and *Trinity term*, ten days, or leſs, is good notice.

No commiſſion can be executed in term-time, unleſs by leave of the court, or conſent of the parties; for the commiſſioners being generally country attornies, it is more than probable they are in town attending the term, on their other clients' affairs, and, conſequently, cannot attend upon the execution of the commiſſion.

If two of the plaintiff's commiſſioners attend at the time and place appointed for the execution of the commiſſion, they may proceed therein *ex parte*, if the defendant's commiſſioners do not then attend; but if the defendant's commiſſioners attend at the time and place appointed, and the plaintiff's commiſſioners are not there, they cannot go on, becauſe the plaintiff having the carriage of the commiſſion, he will not produce it, if he is diſappointed of his commiſſioners, and, conſequently, there can be no proceedings for want of the commiſſion. This makes a duplicate of the commiſſion more neceſſary; for in this caſe, if the defendant's two commiſſioners meet, they may proceed in the execution of the commiſſion; but where there is no duplicate, and the defendant's commiſſioners attend at the time appointed, and none attend for the plaintiff, the party grieved is to be recompenſed in coſts upon complaint made thereof to the court; and in that caſe the court will give him leave to ſue out another commiſſion.

There muſt, at leaſt, one commiſſioner attend on each ſide; for if the plaintiff hath but one commiſſioner that attends on his ſide, he cannot proceed to execute the commiſſion, unleſs one of the defendant's commiſſioners attends and joins with him therein; but if one commiſſioner for each party attend, they may proceed in the execution of the commiſſion, and not otherwiſe.

It having been found by common experience, that country commiſſioners were apt to publiſh and divulge all the evidence taken before them, and this even before the paſſing of publication, and that in ſuch a manner, as that it could rarely, if ever, be detected, becauſe they uſually diſcloſed it to the attorney or ſolicitor who employed them, and who was always their friend; and ſince the very life and vitals of almoſt every cauſe, and of every man's property, lie in keeping cloſe and ſecret his evidence, till after the depoſitions are publiſhed, becauſe after that there is an end of examining unleſs it is to prove exhibits, which may be done after

after the hearing, or by order *vivâ voce*, and then they must be particularly named in the order, that the other ſide may have notice what is to be proved; (and this indeed can only be to prove the execution of deeds, or ſigning receipts or acquittances; but a man cannot have leave to prove a will *vivâ voce* at the hearing, becauſe the due execution may come in queſtion (*a*), which cannot be examined at the hearing *ore tenus*, but ought to have been done before publication paſſed).

[(*a*) No examination is allowed to points that would admit of a croſs-examination. 2 Vez. 480.]

To remedy this inconvenience, the following order was made the 9th of *February*, the 8th year of *G.* 1. in Chancery:

Whereas this court hath been informed, that commiſſioners and their clerks attending the execution of commiſſions for examination of witneſſes in cauſes depending in this court, do frequently before publication is paſſed, and even before the executing of ſuch commiſſions, diſcloſe to or inform the parties, or their agents, of the contents of the depoſitions of witneſſes taken on ſuch commiſſions, which leads to introduce perjury, and occaſions tedious and unneceſſary examinations; for remedying and preventing whereof for the future, the right honourable the lord high chancellor of *Great Britain*, by and with the advice and aſſiſtance of the right honourable the maſter of the rolls, doth order, that from and after the laſt day of this preſent *Hilary term*, where any commiſſion iſſues for examination of witneſſes, all and every the commiſſioners named in ſuch commiſſion ſhall, before they act in or be preſent at the ſwearing or examining any witneſs or witneſſes upon interrogatories in ſuch cauſes, ſeverally take the oath following: "You ſhall, according to the beſt of your ſkill and know- "ledge, truly, faithfully, and without partiality to any or either "of the parties in this cauſe, take the examinations and depoſi- "tions of all and every witneſs and witneſſes produced and ex- "mined by virtue of the commiſſion hereunto annexed, upon the "interrogatories now produced and left with you, and you ſhall "not publiſh, diſcloſe, or make known to any perſon or perſons "whatſoever, except to the clerk or clerks by you employed and "ſworn to ſecrecy in the execution of this commiſſion, the con- "tents of all or any of the depoſitions of the witneſſes, or any "of them, to be taken by you and the other commiſſioners in "the ſaid commiſſion named, or any of them, by virtue of the "ſaid commiſſion, until publication ſhall paſs by rule or order of "the high court of Chancery."——Which oath is to be annexed in a ſchedule to the ſaid commiſſion.——And it is further or- dered, that all and every the clerk or clerks attending the execu- tion of ſuch commiſſion, and employed in taking, writing, tran- ſcribing, or engroſſing the depoſition or depoſitions of witneſſes examined on ſuch commiſſion, ſhall, before he or they be permit- ted to act as clerk or clerks as aforeſaid, or be preſent at the exe- cution of ſuch commiſſion, ſeverally take the oath following: "You ſhall truly and faithfully, and without partiality to any of "either of the parties in this cauſe, take and write down, tran- "ſcribe and engroſs the depoſitions of all and every witneſs and "witneſſes produced before and examined by the commiſſioners "or

" or any of them named in the commiſſion hereunto annexed, " as far forth as you are directed and employed by the ſaid com- " miſſioners, or any of them, to take, write down, or engroſs the " ſaid depoſitions, or any of them, and you ſhall not publiſh, " diſcloſe, or make known to any perſon or perſons whatſoever, " the contents of all or any of the depoſitions of the witneſſes, " or any of them, to be taken, wrote down, tranſcribed, or en- " groſſed by you, or whereto you ſhall have recourſe, or be any " ways privy, until publication ſhall paſs by rule or order of the " high court of Chancery."—Which oath is likewiſe to be annexed in the ſame ſchedule to the ſaid commiſſion.—Which oaths the ſaid commiſſioners are by ſuch commiſſions to be empowered jointly and ſeverally to adminiſter to each other, and alſo to the perſons attending as clerks to the ſaid commiſſioners.

If any practiſer, or other perſon, goes about to tamper with or ſuborn any witneſs, upon complaint made thereof, and upon examination of the matter upon oath, he muſt ſtand committed.

When the parties have examined, they give a rule, as they do in the civil and canon law for publication; and if no cauſe be ſhewn to the contrary within four days, the rule is made abſolute.

When publication is moved to be enlarged, it muſt be upon notice, and upon good reaſons offered to the court, and upon affidavits, ſhewing the reaſons why the party could not examine his witneſſes ſooner; and it is ſeldom or never done where it is to put off the hearing of the cauſe.

But where the adverſe party can ſuffer no injury, as where the cauſe is not ſet down, or where the party is not ſerved to hear judgment, there the court will enlarge publication for aſking for.

And in ſome caſes they will do it, though the cauſe is ſet down, and the party is ſerved to hear judgment; but this muſt be when it is ſhewn to the court, that it is not poſſible for the cauſe to come on very ſoon, and the court will in this caſe expect the party to appear *gratis* to hear judgment, on ſix days notice to be given to his clerk in court, and pray no day over, and will often oblige him to take no advantage for want of parties at the hearing; this forwards the plaintiff; for if default is made at the hearing, the decree cannot be made abſolute till the next ſucceeding term; but if the party who moves to enlarge publication, will not appear *gratis*, and pray no day over, he is often denied his motion, and with great juſtice, becauſe in that caſe he intends only delay, which the courts always avoid when in their power.

When publication is paſſed, and the depoſitions are copied and delivered out, and either party has a mind to examine touching the credit or reputation of any of the witneſſes, the way is,

They muſt file objections or articles, ſo called, in the examiner's office; theſe contain in ſubſtance the objections they make to the reputation of the witneſs, as in caſes of felony, burglary, perjury, forgery, ſtanding in the pillory, or any other criminal caſe

that would diſable the party from being a good witneſs at t
common law; for the rule of evidence is the ſame in equity as
law; and if the party cannot be a good witneſs at law, no mo
can he be in equity; theſe articles may be founded upon t
party's leading a lewd life, or being a common drunkard
ſwearer, or of ill repute and character in his neighbourhood,
common vagabond, a man not known, that hath no abode,
ſuch like; though all theſe latter objections ſeldom come to a
thing; for notwithſtanding theſe, the man is a legal witneſs, a
the court will hear his evidence, and judge of the probability
improbability accordingly.

Theſe articles being filed, and a certificate being produced fr
the examiner that they are ſo, the court, upon application, by m
tion or petition (or, it may be done without) will give leave to t
party to examine witneſſes thereon; and the other party, who
to ſupport the credit and reputation of his witneſs, may exami
accordingly *toties quoties*, and their depoſitions muſt be publiſh
as in other caſes; but this is a caſe which but very rarely happe
and, generally ſpeaking, it ends in nothing more than putting t
party to an expence to no purpoſe.

When the depoſitions are thus copied and delivered out, a
both parties come to ſee the interrogatories examined by ea
ſide, if they find them to be leading or impertinent, then
is the proper time to refer them to a maſter, for being too le
ing, impertinent, or ſcandalous; this is done by motion or pe
tion of courſe.

If the maſter reports the interrogatories to be leading, and t
report is not excepted to, then all the depoſitions taken to th
interrogatories muſt ſtand ſuppreſſed, as of courſe, by motion
petition; but if the report is excepted to, as, on the one han
the court never countenances leading or impertinent interroga
ries; ſo, on the other hand, they are not over curious in th
matters, becauſe it may fall out that the interrogatories be
ported leading in the very vital of the examination, and on t
very point on which the cauſe turns; and when this comes to
the caſe, the party who referred them hath gained his end;
perhaps he had a very bad cauſe, if the depoſitions had ſtoo
whereas if they are ſuppreſſed, he hath a very good one, ſince
adverſary muſt have his cauſe without any proof at all, unleſs t
court is pleaſed to grant him another commiſſion on payment
coſts, for his leading interrogatories, which is ſeldom or ne
done after the depoſitions are publiſhed. And it is hard, that
equity, a man ſhould be deprived of a plain right, through t
ſlip of another man's pen, or the inadvertency or unſkilfulneſs
his counſel's penning his interrogatories; and therefore, if it
poſſible for the court to help him, they will, from the manif
inconvenience which muſt attend ſuch a caſe: indeed, if the i
terrogatories are reported to be leading in points upon which t
jet of the cauſe does not turn, if the depoſitions in theſe poi
ſhould be ſuppreſſed, and the party have evidence enough le
witho

without it, there is no hurt done; but if the merits and very life turns upon it, he will ſtruggle to the laſt before he will let his depoſitions be ſuppreſſed.

Therefore, where interrogatories and the depoſitions of a witneſs taken on them had been ſuppreſſed, for that the interrogatories were leading, and the court being moved, that a new ſet of interrogatories might be drawn, and ſettled by the maſter for the examination of this witneſs, whoſe evidence was very material, and yet would be wholly loſt, unleſs the court would indulge them this way, and though the practice was admitted to be always againſt it, and it was urged to be of dangerous conſequence; yet one precedent being produced to this purpoſe; and the interrogatories, which had been ſuppreſſed, being ſuch as might be drawn by many other counſel, without any apprehenſion of their being leading, the court, to let in the party to the benefit of his witneſs's teſtimony, ordered interrogatories to be put in, and ſettled by a maſter for his examination over again.

If the commiſſioners miſbehave themſelves, or if the commiſſion is executed contrary to notice given to the party, or if the depoſitions returned by commiſſion are ſo engroſſed, or ſo interlined, that they are not legible, in thoſe and many other caſes of the like nature, there may be good reaſon to ſuppreſs the depoſitions; but in this laſt caſe the record or engroſſment of the depoſitions is always brought into court by the proper officer; the court take the engroſſment into their hands; and if it is poſſible to be read, or if it is handed down to the ſix clerk, and he can read it, they will hardly ſuppreſs the depoſitions, or put the parties to a new trouble, or to the expence of examining all over again.

When the depoſitions are copied, they muſt be ſigned by the examiner or proper ſix clerk; for if either of the ſix clerks, who conſtantly attend the court every day of hearing, ſtands up and ſays, that the books are not ſigned, they are not to be admitted to be read.

The civilians had a manner of examining witneſſes (*a*) *in perpetuam rei memoriam*, which was two-fold, either the common examination, or *in meliori formâ:* the common examination was, when witneſſes were very old and infirm, or ſick and in danger of death, or were going into other countries; in this caſe it was uſual to file a libel, and without ſtaying for the *litis conteſtatio*, the plaintiff examined his witneſſes immediately, and gave notice, if it were poſſible, to the other ſide, of the time and place of the examination, that he might come and croſs-examine ſuch witneſſes if he thought fit, and theſe depoſitions ſtood good, in caſe the witneſs died or went abroad; but the plaintiff was obliged *edere actionem* within a year, otherwiſe theſe examinations went for nothing; but if the witneſſes lived, or did not go abroad into other countries, then they were to be examined *poſt litem conteſtatam.*

(*a*) In what caſes a bill to examine witneſſes *in perpetuam rei memoriam* will now lie, *vide* Vern. 105. 185. 331. 354. 2 Vern. 159. Abr. Eq. 233, 4. 1 Atk. 571. 620. 1 P. Wms. 117. 1 Br. Ch. Rep. 469. 2 P. Wms. 162.

The examination *in perpetuam rei memoriam in meliori formâ*, is *ad tranſumenda inſtrumenta;* and in this caſe there muſt be a *litis*

conteſtatio before the examination, becauſe there is no need of ſ much in proving inſtruments, as there is where the witneſſes a likely to die, or are going into remote parts; in theſe caſes th are not confined to proceed in any action upon theſe inſtrumen within a year.

[A witneſs may be examined *de bene eſſe* on affidavit that the thing to be examined into lies in the knowledge only of the witneſs, though there be no affidavit of his being old, or infirm, or in danger of dying. Shirley v. Ferrers, 3 P. Wms. 78. Hankin v. Middleto 2 Br. Ch. Rep. 641.]

But now the uſual method is, where one man brings a b againſt another, and hath a moſt material witneſs to examin upon affidavit made, that this witneſs is in a languiſhing conditi or danger of dying before he can be examined in chief, or whe the witneſs is going a long voyage to *India*, or other remote par from whence he cannot return by the time he is to be examin in chief, and to which place he is bound, and cannot poſſibly ſta in either of theſe caſes, the court upon motion or petition either party will, and never denies to make an order as of cour for leave to examine ſuch witneſs *de bene eſſe*, ſaving juſt exce tions to the other ſide.

If the witneſs lives till he can be examined in chief, he muſt examined over again as other witneſſes in chief are; but if he dies the mean time, then, upon producing and proving the regiſter of h death, the party for whoſe benefit he was examined, may appl by petition or motion, for an order, with liberty to publiſh h depoſitions, (for they cannot be publiſhed without ſuch an order and to the petition muſt be annexed a certificate of the death the witneſs, and the party muſt ſhew that he died before the tim that he could be examined in chief; and hereupon the cou makes an order, not only to publiſh his depoſitions, but to re them as a witneſs at the hearing, ſaving exceptions; and notic of this order is always given to the adverſe clerk to prevent ſu priſe, and give him an opportunity to object thereto, as he ſha ſee occaſion.

If the witneſs beyond ſea be not returned, there muſt be a affidavit of it, and that the party had not heard from him of ſuc a time, nor doth he know whether he is living or dead; and in thi caſe there will be the like order, as in the caſe of the witneſs wh died before he could be examined in chief.

(F) Of written Evidence: And herein of admittin Exemplifications or Copies of Records, &c. Evidence.

Co. Lit. 283. a. (*a*) That a jury may and muſt take knowledge of any particular record, either patent, ſtatute, or judgment, if it be given in evidence to them, for that is their *allegata*

THE word *evidence*, as has been obſerved, comprehends n only the teſtimony of witneſſes, but alſo matters of recor as letters patent, fines, recoveries, enrolments, and the like writings under ſeal, as charters and deeds; and other writi without ſeal, as court-rolls, accounts, &c. and (*a*) records are f to prove themſelves, and to admit of no averment againſt the tru of them.

alleged and produced, if it make to the iſſue. Hob. 227. & *vide* Leon. 206. And. 37. Plow. 92. 2. 411. Dyer, 118. 9 Co. 12. Co. Lit. 227.

[The firſt ſort of records are acts of parliament: theſe are the memorials of the legiſlature, and therefore are the higheſt and moſt abſolute proof: and they either relate to the kingdom in general, and then are called general acts of parliament, or only to the concerns of private perſons, and are thence called private acts. Gilb. L. E. 11.

On general acts of parliament, the printed ſtatute book is evidence; not that the printed ſtatutes are the perfect and authentic copies of the records themſelves, for there is no abſolute aſſurance of their exactneſs, but every perſon is ſuppoſed to apprehend and know the law which he is bound to obſerve, and therefore the printed ſtatutes are allowed to be evidence, becauſe they are the hints of that which is ſuppoſed to be lodged in every man's mind already. *Id.* 12. 2 Salk. 566. 10 Mod. 216. 126. 181. Keb. 2. Jenk. Cent. 280. pl. 5. Hale's Hiſt. of the Common Law, 15, 16. Style, 462. L. E. 89. Tri. per Pais, 226, 232. Stra. 446. 3 R. S. L. 90.

In private acts of parliament the printed ſtatute book is not evidence, though reduced into the ſame volume with the general ſtatutes, but the party ought to have a copy compared with the parliament roll; for private ſtatutes do not concern the kingdom in general, and therefore no man is underſtood to be poſſeſſed of them, as he is of thoſe general laws which are ſet up as the regulation of his own actions, and, conſequently, the private ſtatutes are no intimation to what is already known, but they are the rules and decrees that relate to the private fortune of this or that particular man, which no one elſe is under any obligation to underſtand or take notice of, and therefore they ought to be proved with the ſame punctuality as the copies of all other records.

But my Lord Chief Juſtice *Parker*, in the caſe of the college of phyſicians and doctor *Weſt*, allowed the printed ſtatute to be evidence of the truth of a private act of parliament touching the inſtitutions of the college. 10 Mod. 353. But this matter does not appear there. Of evidence Ld. Raym. 472.

And a private act of parliament in print that concerns a whole country, as the act of *Bedford Levels*, for re-building *Tiverton*, &c. may be given in evidence without comparing it with the record. And theſe things are the rather admitted, becauſe they gain ſome authority by being printed by the king's printer; and beſides, from the notoriety of the ſubject of them, they are ſuppoſed not to be wholly unknown. And for this reaſon, printed copies of other things of as publick a nature have been admitted in evidence without being compared with the original; as the printed proclamation for a peace was admitted to be read without being examined by the record in Chancery. So, the Gazette is evidence of all acts of ſtate. So, the articles of war, as printed by the king's printer, are evidence of ſuch articles. Bull. N. P. 225. *Vide* Dougl. 594. n. R. v. Holt, 5 Term Rep. 436.

The next thing is the copies of all other records, and they are twofold; under ſeal, and not under ſeal.

10 Mod. 125, 126.

First, under ſeal, and theſe are called by a particular name, exemplifications, and are of better credit than any ſworn copy: for the courts of juſtice that put their ſeals to the copy, are ſuppoſed more capable to examine, and more exact and critical in their examinations, than any other perſon is or can be: and beſides, there is more credit to be given to their ſeal, than to the teſtimony of any private perſon; and therefore we are more ſure of a fair and perfect copy when it comes atteſted under their ſeals, than if it were a copy ſworn to by any private perſon whatſoever.

Exemplifications are twofold; under the broad ſeal, or under the ſeal of the court.

Sid. 145, 146. Hard. 118. Pl. Com. 411. a.

Under the broad ſeal; ſuch exemplifications are of themſelves records of the greateſt validity, to which the jury ought to give credit, under the penalty of an attaint.

3 Inſt. 173.

When a record is exemplified under the great ſeal, it muſt either be a record of the court of Chancery, or be ſent for into the Chancery by a *certiorari*, for the Chancery is the centre of all the courts, and thence the ſubjects receive a copy under the atteſtation of the great ſeal: for in the firſt diſtribution of the courts, the Chancery held the broad ſeal, whence the authority iſſued to all proceedings, and thoſe proceedings cannot be copied under the great ſeal, unleſs they come into the court where that ſeal is lodged.

Bull. N. P. 227.

Nothing but records may be given in evidence exemplified under the broad ſeal; for theſe being preſerved by the proper officer of every court from all raſure and corruption, are ſuppoſed to be ſo fair and unblotted, that there can be no danger in the exemplification. But the exemplification of deeds under the broad ſeal cannot be admitted in evidence, for theſe being in the cuſtody of the party and not of the law, are ſubject to raſures and interlineations, and therefore ought to be produced themſelves as the beſt evidence of the contract.

3 Inſt. 173. But this rule is to be taken with exceptions as ſee hereafter.

When any record is exemplified, the whole record muſt be exemplified, for the conſtruction muſt be taken from the view of the matter taken together.

The ſecond ſort of copies under ſeal are the exemplifications under the ſeal of the court, and theſe are of higher credit than a ſworn copy, for the reaſons formerly given.

Copies not under ſeal are of two ſorts, 1. Sworn copies, and 2. Office copies.

1. Sworn copies; theſe muſt be of the records brought into court in parchment, and not of a judgment in paper ſigned by the maſter, though upon ſuch judgment you may take out execution, for it does not become a permanent matter till it be delivered into court, and there fixed as memorandums or rolls of that court, and until it be a roll of that court it is transferable any where, and ſo doth not come under the reaſon of law, that permits us to give a copy in evidence.

Vent. 257. Styl. Pr. Reg. 205.

Where a record is loſt, a copy of it may be read without ſwearing it to be a true copy, for the record is in the cuſtody of the law, and not

not of the party, and therefore if loſt, there ought to be no injury ariſing to the party's private right; and, conſequently, if it be loſt, the copy muſt be admitted without ſwearing any examination concerning it, ſince there is nothing with which the copy can be compared, and therefore it muſt be preſumed true without examination. Mod. 117. Salk. 285. L. E. 89. pl. 18.

But in ſuch caſes as theſe, the inſtruments muſt be according to the rules required by the civil law: they muſt be *vetuſtate temporis, aut judiciariâ cognitione roborata*. Carvin. Dig. 292. Mod. 117.

So, the copy of the decree of tithes in *London*, has been often given in evidence without proving it a true copy, becauſe the original is loſt. Vent. 257.

So, a recovery of lands in ancient demeſne was given in evidence, where the original was loſt, and poſſeſſion had gone a long time according to the recovery. *Ibid.*

When a man gives in evidence the ſworn copy of a record, he muſt give the whole copy of the record in evidence, for the precedent and ſubſequent words and ſentence may vary the whole ſenſe and import of the thing produced, and give it quite another face; and therefore ſo much at leaſt ought to be produced as concerns the matter in queſtion. Tri. per Pais, 166. 3 Inſt. 173. Poſt. 27. Ante, 17.

Secondly, Office copies may be given in evidence.

Here the difference is to be taken between a copy authenticated by a perſon truſted to that purpoſe, for there that copy is evidence, and a copy given out by the officer of the court that is not truſted to that purpoſe, for that is not evidence, without proving it actually examined.

The reaſon of the difference is, that where the law hath appointed any perſon for any purpoſe, the law muſt truſt him as far as he acts under the authority that the law has lodged in him; otherwiſe it would be to give credit to another officer and not to him at the ſame time.

Therefore the chirograph of a fine is evidence to all perſons of ſuch a fine, for the chirographer is appointed to give out copies between the parties of thoſe agreements that are lodged of record, and therefore his copy muſt be admitted as evidence without further diſpute. Pl. Com. 110. b.

So, where a deed is enrolled, the indorſement of that enrolment is evidence, without further proof of the deed, becauſe the officer is intruſted to authenticate ſuch deeds by enrolment; and when ſuch officer indorſeth, that he hath done it purſuant to the law, then the law which intruſted him with the authority of doing it, ought to give credit to what he has done. See 10 Ann. c. 18. 8 Geo. 2. c. 6. § 21. In a duchy leaſe, the certificate of the auditor on the margin, is ſufficient evidence of the enrolment. Dougl. 56.

But if an officer of the court, who is not intruſted to that purpoſe, makes out a copy, they ought to prove it examined; the reaſon is, becauſe being no part of his office, he is but a private man, and a private man's mere writing or word ought not to be credited without his oath.

Therefore it is not enough to give in evidence a copy of a judgment, though it be indorſed to have been examined by the

clerk of the Treaſury, becauſe it is not part of the neceſſary office of ſuch clerk: for he is only intruſted to keep the records for the benefit of all men's peruſal, and not to make out copies of them.

So, if the deed enrolled be loſt, and the clerk of the aſſize make out a copy of the enrolment only, this is no evidence, without proving it examined, becauſe the clerk is intruſted to authenticate the deed itſelf by enrolment, and not to give out copies of the enrolment of that deed.

The office copies of depoſitions are evidence in Chancery, but not at common law, without examination with the roll; for the court of Chancery have for convenience allowed their office copies to be evidence in their own court, and have empowered their officers to make out ſuch copies as ſhould be evidence, but the particular rules of their court are not taken notice of by the courts of common law.

Chutel and Pound. Trin. Aſſ. 1700.

Where a fine with proclamations is to be a bar to a ſtranger, there the proclamations muſt be examined from the roll, for although the chirographer is authorized by the common law to make out copies to the parties of the fine itſelf, yet he is not appointed by the ſtatute to copy the proclamations, and therefore his indorſement on the back of the fine is not binding.

See Tri. per Pais, 209.

Having thus ſhewn how the record is to be given in evidence, by the proving of a copy, we muſt in the next place ſee in what manner, and in what caſes, they ought to be evidence.

And here, in the firſt place, it is regularly true, that when the record is pleaded and appears in the allegations, it muſt be tried on the iſſue *nul tiel record;* but where the iſſue is upon fact, the record may be given in evidence to ſupport that fact.

Style, 22. Sid. 145.

When the iſſue is *nul tiel record*, the record muſt be brought *ſub pede ſigilli;* but where the record is offered to a jury, any of the forementioned copies are evidence.

Sid. 145, 146.

But out of this rule there is an exception, that where the record is inducement, and not the giſt of the action, there, it is not of itſelf traverſable, but muſt be given in evidence on the proof of the action; for nothing can be of itſelf traverſable, that doth not make a full end of the matter in queſtion.

Tri. per Pais, 166. 3 Inſt. 173. Mod. 117. Ant. 23.

When any perſon produces a record, it muſt be ſo much at leaſt as concerns the matter in queſtion, for it is no evidence unleſs you ſhew the whole import of the matter; for the preceding or following words may give it quite another face.

Mod. 117.

Where a recovery is ancient, you need not prove any ſeiſin in the tenant to the *præcipe*, but otherwiſe it is in a modern recovery; for in an ancient recovery, the preſumption is for the recoveror, for the recoveror ſhall be ſuppoſed to be ſeiſed at the time of the recovery, ſince he hath been ſeiſed ever ſince; but in a modern recovery the ſeiſin muſt be proved, becauſe the *præcipe* doth not lie againſt the perſon that is ſeiſed of the freehold, and ſo the recovery wants a foundation, becauſe the action is not proſecuted againſt the tenant of the freehold.

Green v. Froud, Vent. 257.

Tenant for life, the remainder in fee; he in the remainder in fee ſuffers a common recovery with ſingle voucher, and this recovery

recovery is ancient: The court will preſume a ſurrender of the tenant, becauſe when there hath been a conſtant enjoyment under that recovery, it ſhall be ſuppoſed to be a lawful foundation, for unleſs there had been a lawful tenant to the *præcipe*, it muſt be ſuppoſed, that it would have been controverted and overthrown.

It is laid down in the caſe of Warren v. Grenville, 2 Str. 1129. that after a recovery of 40 years ſtanding, the court will, *without any other circumſtances*, preſume a ſurrender of the eſtate for life. But in that very caſe, the court did admit other evidence of the ſurrender, namely, the attorney's book, the attorney himſelf being dead, wherein, among his charges for ſuffering the recovery, were two *items* for drawing and engroſſing a ſurrender of the life-eſtate. Neither doth the above caſe of Green v. Froud, (for there poſſeſſion had accompanied the recovery,) nor what is ſaid in Pig. 41., warrant this general poſition. And therefore, in the caſe of Goodtitle v. Duke of Chandois, 2 Burr. 1065., where tenant in tail of a conſiderable eſtate, part in poſſeſſion, the reſidue held by a widow on whom it was ſettled for life, ſuffered a recovery of the whole, and ſettled it on the Duke of Chandois, and the duke on the death of the tenant in tail entered into that part of which he died in poſſeſſion, and on the death of the widow on the remainder; on which the reverſioner brought an ejectment to recover this remainder, on the ground that there was no ſurrender of the widow's life-eſtate; for that no actual ſurrender was proved, and no ſort of evidence having been offered to make ſuch ſurrender probable, it could not be preſumed; the court of K. B. held, that the length of time was not to be reckoned from the date of the recovery, but from the poſſeſſion going with the recovery: that in this caſe there was no poſſeſſion after the death of the tenant for life, for the reverſioner brought his ejectment immediately: that where the perſon ſuffering the recovery, has a right to ſuffer it, the court will preſume all things to have been regular, unleſs the contrary appear; but that, here, the recoveror, being only tenant in tail in remainder, and the life-eſtate under the ſame ſettlement ſtill ſubſiſting at the time of ſuffering the recovery, it was moſt clear he had no power to alien or bar.—And even where the perſon ſuffering the recovery, has a clear right to alien, yet the court will not, from mere length of time, preſume proper tenants to the *præcipes*, where it appears from the deeds that proper parties did not join, and the uſes are declared to have been warranted by thoſe deeds. Keen v. Earl of Effingham, 2 Str. 1267.

But if there be tenant for life, the remainder in fee, and he in remainder ſuffer a common recovery with ſingle voucher, and this recovery is modern, this record will not give a title, for the freehold is in tenant for life, and the *præcipe* ought to be brought againſt him; and ſo there is no lawful action commenced. Vent. 257.

If there be tenant for life, with remainder in tail, and they both join in a common recovery with ſingle voucher, this will not bar the tail, becauſe the remainder-man is not tenant to the *præcipe*; and in this caſe the *præcipe* is brought againſt them both as joint-tenants, and he in remainder hath no immediate eſtate of freehold in him, and the remainder-man is not bound by the recovery had againſt the tenant for life, unleſs he comes in upon the aid prayer, though the remainder is turned to a right by ſuch recovery. Moor, 256. pl 402. 2 Roll. Abr. 395. Pig. of Rec. 36.

But if there be tenant for life, the remainder in tail, and they ſuffer a recovery, and come in as vouchees on the double voucher, then he in remainder is barred, becauſe he in remainder is as properly called in as vouchee, as if he had been called in on the aid prayer of tenant for life, and then when he takes up the defence, and makes default, he muſt be barred by the judgment, as for the want of a title appearing; for where any perſon is properly in court, and doth not defend his title, he is as properly barred as he who hath no title at all; and when tenant in tail is barred for want of title, the iſſue can never after recover in his *formedon*. 2 Roll. Abr. 396.

Although, regularly, no recovery or judgment is to be admitted in evidence but againſt parties or privies, yet under ſome circumſtances they may; as in an information in nature of a *quo warranto*, a judgment of ouſter was allowed to be given in evidence Bull. N. P. 231. R. v. Hebden, 2 Str. 1109. Andr. 389.

evidence to prove the ouſter of a third perſon, the mayor, by whom the defendant was admitted. And ſuch evidence is concluſive, unleſs the judgment can be impeached as obtained by fraud.

5 Term Rep. 72.

As to verdicts; if a verdict be had on the ſame point, and between the ſame parties, it may be given in evidence, though the trial was not had for the ſame lands; for the verdict in ſuch caſes is a very perſuading evidence, becauſe what twelve men have already thought of the fact, may be ſuppoſed fit to direct the determination of the preſent jury; for to go contrary to what a former jury have decided in relation to any fact, is to arraign the honeſty and ſincerity of their judgment; and there is that common credit to be given to twelve men of the country, diſcerning of any fact upon their oaths, that no ſecond jury ought raſhly to depart from their judgment: Their verdict alſo further ſtands in credit, becauſe the jury muſt be ſuppoſed honeſt men, and men of clear reputation, their verdict not having been attainted by the party againſt whom it was given.

Lewis and Clerges, Term Paſch. 1700. Trial at bar.

But then the verdict ought to be between the ſame parties, becauſe otherwiſe a man would be bound by a deciſion, where he had not the liberty to croſs-examine, and nothing can be more contrary to natural juſtice, than that any body ſhould be injured by any determination that he was not at liberty to controvert; for that is to ſet up a deciſion unexamined, in prejudice of a cauſe that is under examination. Beſides, one that is not party to the trial has no redreſs for the injury if the verdict were falſe, for he cannot have an attaint, and therefore ought not to be injured by the verdict.

Lewis and Clerges.

But it is not neceſſary that the verdict ſhould be in relation to the ſame land, for the verdict is only ſet up to prove the point in queſtion; and if the verdict ariſe upon the ſame queſtion, then it is no doubt a good evidence; for every matter is evidence that amounts to proof of the point in queſtion.

Held. See Stra. 308. 2 Str. 1151. See Carth. 79. 181. 5 Mod. 386. 2 Jones, 221. 3 Mod. 142. 2 Sid. 325.

In an action of treſpaſs, the indictment for the ſame treſpaſs and verdict thereupon, ſhall not be given in evidence, if the indictment be only found on the party's own oath; for if the party's oath be no evidence in his own cauſe (as we ſhall hereafter ſhew that it is not) then cannot the verdict be any evidence that is founded only on the party's own oath; for what cannot be evidence directly, cannot be made evidence by any ſuch circuity.

But where the verdict on the indictment is founded on another evidence, beſides the party's own oath, there, the verdict may be given in evidence; for, there, this verdict ſeems to be under the ſame general rule with all others, and there the judgment of twelve men on the fact ought to ſway in determination of the ſame fact, whether the verdict be on indictment or action: But yet it may be objected, that the fact might find credit from the party's own oath, which ought not to ſupport the action, and ſince the evidence is ſo intermixed, that it doth not appear on what it was founded,

This is the practice *ex relatione* Mr. Phipps, 1700.

Objection.

founded, the verdict cannot be produced in corroboration of the evidence on the action.

It is true, this doth in part take off the force of ſuch evidence; for, as when a verdict is produced in evidence, it may be anſwered, that it did not ariſe from the merits of the cauſe, but from ſome formal defect of the proof, and that makes it no evidence, toward gaining the point in queſtion; ſo a verdict may be diminiſhed in point of authority, by ſhewing that it was in part founded on the oath of the party intereſted in the action; and the jury are to reſpect it no further than as they preſume it given, and ſupported by the credit of other teſtimony that are not concerned in the cauſe. Anſwer.

Yet others have ſaid the verdict given on the indictment cannot be given in evidence, becauſe on that proſecution there is no liberty left to the party to attaint the jury, as he hath power to do, if injured on a civil action; therefore *quære*.

A verdict in a criminal caſe, where the matter was capital, was denied to be given in evidence in a civil caſe; as where the father was acquitted on an indictment, for having two wives, this could not be given in evidence, in a civil caſe, where the validity of the ſecond marriage was controverted: the reaſon ſeems to be, becauſe much leſs evidence is neceſſary to maintain the action, than to attaint the criminal, and therefore his acquittal was no argument that the fact was not true.

If a verdict be given againſt the defendant on the ſame point, though another party were plaintiff, yet in ſome caſes it may be given in evidence; as if there be a trial of title between *A.* leſſee of *E.* and *B.*, and afterwards there be a trial of the ſame title between *C.* leſſee of *E.* and *B.*; *C.* may give the verdict found againſt *B.* in evidence upon the trial between him and *B.*, for this was the ſenſe of a former jury on the fact. In which trial *B.* had the liberty to croſs-examine, though the ſame fact had been already decided againſt *B.* Trin. Aſſ. 1701.

If there be ſeveral ejectments brought againſt ſeveral perſons, though for lands under the ſame title, and there be a verdict againſt one, that verdict cannot be given in evidence againſt the reſt, for it is the party againſt whom the verdict is given that can have relief by attaint, inaſmuch as the reſidue are not prejudiced; and theſe parties ſhall not be injured by a verdict they had not the power to controvert. 3 Mod. 142. Ld. Raym. 1292. Vern. 413. Ch. Pre. 212. 12 Mod. 319. 339. 10 Mod. 292. Gilb. L. E. 91.

Rep. 2. Stra. 1151. See Carth. 79. 181. 5 Mod. 386. 2 Jones, 221. 2 Mod. 142. pl. 23.

If a man has two wives, and be thereof convicted, and dies, and the ſecond wife claims dower, the verdict and conviction cannot be given in evidence, but in this caſe the writ muſt go to the biſhop; for whether the marriage be lawful or not, is the point in controverſy, and that is of eccleſiaſtical juriſdiction, and is not to be decided at common law. 3 Mod. 164. Ld. Raym. 68. 809. 850. 1101. 12 Mod. 35. 40. 319. 339. 432. 610.

11 Mod. 224. 10 Mod. 386. 8 Mod. 181. Gilb. Rep. 256., &c. Fitzgib. 164. 175. 276. &c. 204., &c. Stra. 79. 2 Stra. 960, 961.

But the verdict may be made an exhibit in the cauſe before the biſhop to induce him to believe there was a former marriage.

Ca. temp. Hardw. 312.

The record of a conviction in a civil cauſe, cannot be given in evidence in a criminal proſecution.

Lord Howard and Lady Inchiquin, 1700. Hard. 472.

But this rule of giving verdicts in evidence on the ſame point, is to be taken with great reſtriction; for no body can take benefit by a verdict that had not been prejudiced by it, had it gone contrary; and therefore if a termor for years had recovered againſt *B.* the reverſioner might give ſuch verdict in evidence, for *B.* has no prejudice, becauſe he hath the liberty to croſs-examine the witneſſes, and to attaint the jury, and it is fit the reverſioner ſhould make uſe of the verdict, and have benefit by it, ſince he had been diſpoſſeſſed by the verdict, if it had gone againſt the termor, and therefore he may offer it in evidence. So, if there were tenant for life, the reverſion in fee, and *B.* bring his action in ejectment againſt the tenant for life, and a verdict be given againſt the plaintiff, it ſeems that the reverſioner might have given this in evidence againſt *B.*, becauſe he would have been prejudiced in caſe *B.* had recovered, for his reverſion would have been turned to a naked right in him. *Quære, et vide infra.*

Hard. 472.

But a perſon that hath no prejudice by the verdict can never give it in evidence, though his title turns upon the ſame point, becauſe if he be an utter ſtranger to the fact, it is perfectly *res nova* between him and the defendant, and if it be no prejudice to the plaintiff, had the fate of the verdict been as it would, he cannot be entitled to reap a benefit; for it would be unequal, that ſince the cauſe is a new matter between the parties, the jury ſhould be ſwayed by any prejudice; for the letting in of prejudgments, ſuppoſes that the cauſe has been already decided, and that it is not tried and debated as a new matter, but as the effect of ſome litigiouſneſs in the defendant that holds out the poſſeſſion, when the cauſe has been decided againſt him, and this prejudice ought not to be thrown upon him on a new inquiry.

Ibid. Ruſhworth, Viſcounteſs of Pembroke and Courier. L. E. 108. pl. 622.

As if *A.* prefers a bill againſt *B.*, and *B.* exhibits his bill, in relation to the ſame matter againſt *A.* and *C.*, and a trial at law is directed, *C.* cannot give in evidence the depoſitions in the cauſe between *A.* and *B.*, but it muſt be tried entirely *ut res nova.*

A. leſſee of *B.* brings an ejectment againſt *D.* and the verdict goes for the defendant; this may at any time be given in evidence againſt *B.*, for the poſſeſſion of *B.*'s leſſee is his own poſſeſſion, inaſmuch as the leſſee *tenet in nomine alieno*, and *B.* might in this caſe give any thing in evidence, as well as the plaintiff himſelf, and challenges might have been made to the jury for conſanguinity to *B.* the reverſioner: now then ſince *A.* hath the poſſeſſion of *B.* as his bailiff, if there be a verdict againſt that poſſeſſion, it muſt conclude *B.*, ſince he hath in this caſe, all liberty to croſs-

examine

examine as well as *A.* himſelf, and by conſequence, this verdict muſt be evidence againſt any other leſſee of *B.*

But if there be a recovery againſt tenant for life, by verdict, this is no evidence againſt the reverſioner, for the tenant for life is ſeiſed in his own right, and the poſſeſſion is properly his own, and he is at liberty to pray in aid of the reverſioner or not, and the reverſioner cannot poſſibly controvert the matter where no aid was prayed, for he had no permiſſion to intereſt himſelf in the controverſy. Hard. 426. *per* Glynn.

If a verdict were given againſt *J. S.*, and then judgment were arreſted, and then *J. S.* alien to *J. N.*, it ſeems that the verdict given againſt *J. S.* may be given in evidence againſt *J. N.*, for the alienation of *J. S.* cannot put *J. N.* in a better condition than *J. S.* was, for the ſubſtitute of *J. S.* can but ſucceed into his place, and at the time of the alienation the verdict might have been given in evidence againſt *J. S.*, and *J. S.* cannot by alienation deſtroy the advantage that his adverſary ought to derive from the verdict; for though *J. N.* had not the liberty to croſs-examine upon his title, yet *J. S.* had, and *J. N.* has but his title, and therefore cannot be ſuppoſed to make the fact better on the examination. 2 Roll. Abr. 680. 3 Mod. 142. Ante, 33.

On an ancient verdict in prohibition, where the cuſtom of tithing is ſet out, whether it might be given in evidence againſt another pariſhioner that was not party to the verdict, nor had the lands in queſtion, was doubted; but by the better opinion it might be given in evidence, becauſe it could not be ſuppoſed to have been a contrivance to alter the cuſtom, it appearing to be ancient, and becauſe there can be no other proofs but of this ſort of what was then thought to be the cuſtom. *Per* opini. J. Dod. in the caſe of the Vicar of Rolvend.

The exception of its being *res inter alios acta* is not allowed againſt verdicts in caſe of cuſtoms and tolls; for the cuſtom or toll is *lex loci*, and facts tending to prove that may be given in evidence by any perſon, as well as thoſe who have been parties to ſuch facts or to ſuch verdicts as have found and determined them. And it is not material in this caſe whether ſuch verdicts be recent or ancient. Bull. N. P. 233. Carth. 181.

A commiſſion under the ſeal of the Exchequer, and the inquiſition taken thereupon, is admiſſible, though not concluſive evidence; and ſo are depoſitions taken thereon, though the parties to the cauſe had no notice of it, nor any opportunity of defending it. Tookes v. Duke of Beaufort, 1 Burr. 146.

Where the fact to be proved is ſuch, whereof hearſay and reputation are evidence, a ſpecial verdict between other parties stating a pedigree would be evidence to prove a deſcent; for in ſuch caſe, what any of the family, who are dead, have been heard to ſay, or the general reputation of the family, entries in family books, *&c.* are allowed. And of this opinion was Mr. Juſtice *Wright* in the Duke of *Athol*'s caſe; which opinion is generally approved, though the determination by the reſt of the court was contrary; perhaps founding themſelves on the caſe of Sir *William Clarges* Bull. N. P. 233. 2 Str. 1151.

Ca. K. B. 343. *Clarges* and *Sherwin*, where, in a trial at bar, the only queſtion was on the legitimacy of the Duke of *Albemarle*, and the court would not ſuffer a former verdict between other parties concerning other land depending upon the ſame queſtion and title to be read in evidence. But there, it did not appear, either from the iſſue or verdict, that the ſame queſtion was inquired into or determined. Beſides, the giving a verdict in evidence to prove a particular fact, *viz.* that *John* had a ſon *Thomas*, is very different from giving it in evidence to ſhew the opinion of a former jury, which is only their deduction from a variety of facts proved to them.

Bull. N. P. 243. A verdict, with the evidence given, in an action brought by the carrier for goods delivered to him to be carried, may be given in evidence in an action brought by the owner againſt the carrier for the ſame goods, for it is a ſtrong proof againſt him that he has the plaintiff's goods.

Id. 234. Montgomery v. Clarke, 1745, at the Delegates. But a verdict will not be admitted in evidence without likewiſe producing a copy of the judgment founded upon it, becauſe it may happen that the judgment was arreſted, or a new trial granted. This rule, however, does not hold in the caſe of a verdict on an iſſue directed out of Chancery, becauſe it is not uſual to enter up judgment in ſuch caſe; and the decree of the court of Chancery is equally proof, that the verdict was ſatisfactory and concluſive.

2 Roll. Abr. 679. pl. 10. Vent. 28. Raym. 84. 2 Str. 984. * Holt ſays it was the opinion of all the judges of England, that it muſt be by conſent. Carth. 465. 2 Keb. 507. In an information by the attorney general for the king, when the jury are ready to give a verdict, the attorney general may withdraw a juror, for this is part of the prerogative, and is in favour of the nonſuit of the ſubject, for the king cannot be nonſuited, being always in court, and this prerogative is derived out of the general reaſon of the king's employment for the publick ſafety, and therefore if he hath failed in any point of proof, ſo that the advantage may be expected from the verdict, it ſhall be at his election, whether he ſhall receive his verdict or not, and therefore in a ſecond information, none of the firſt jury ſhall be admitted to give in evidence, that they were agreed in their verdict, for ſuch evidence would be of the ſame weight, as if the verdict had been given, and thereby the king would be diſpoſſeſſed of the benefit of his prerogative.

2 Roll. Abr. 680. Trials per Pais, 213. But if the king aliens the eſtate on which the trial was had, ſo that it comes into private hands, there on a ſecond trial between private perſons, the agreement of the jury may be given in evidence, for the prerogative is annexed to the crown, and cannot extend to any private perſon, and therefore they take the eſtate with the diſadvantage of having a verdict againſt them.

2 Roll. Abr. 679. a. 3. But then on ſuch trial they muſt have the record of the proceedings, on the firſt information, becauſe as a verdict cannot be given in evidence, without the record, which gave authority to the jury to proceed, no more can they give in evidence the agreement of the jury without the record on which they were impannelled.

But a verdict cannot be thus avoided in criminal caſes: for there the party muſt conſent to the withdrawing of a juror;

he is in character and eſtimation ſo highly intereſted, and hath a right, if he ſo prefer, to entitle himſelf to a ſolemn acquittal by his peers.

As to writs, when a writ out of court is only inducement to the action, the taking out the writ may be proved without any copy of it, becauſe poſſibly it might not be returned, and then it is no record, and therefore the copy of it is not required; but where a writ itſelf is the giſt of the action, you muſt have a copy from the record, inaſmuch as you are to have the uttermoſt evidence the nature of the thing is capable of, and it cannot become the giſt of the action till it is returned. Tri. per Pais, 167.

In an action of treſpaſs againſt a bailiff for taking goods in execution, if it be brought by the party againſt whom the writ iſſued, it is ſufficient for the officer to give in evidence the writ of *fieri facias* without ſhewing a copy of the judgment. But if the plaintiff be not the party againſt whom the writ iſſued, but claim the goods by a prior execution (or ſale) that was fraudulent, there, the officer muſt produce not only the writ, but a copy of the judgment. For in the firſt caſe, by proving that he took the goods in obedience to a writ iſſued againſt the plaintiff, he has proved himſelf guilty of no treſpaſs: but in the other caſe, they are not the goods of the party againſt whom the writ iſſued, and therefore the officer is not juſtified by the writ in taking them, unleſs he can bring the caſe within 13 *Eliz.* for which purpoſe it is neceſſary to ſhew a judgment. 1 Ld. Raym. 733. 5 Burr. 2631. S. P. Dougl. 41. S. P. 2 Bl. Rep. 1104. S. P.

In *plene adminiſtravit*, the execution executed cannot be given in evidence, without the judgment, becauſe there appears to be no authority for ſuch execution without the judgment; for where the execution is of record, and the authority for ſuch execution is alſo of record, they muſt both appear to the jury, otherwiſe they have not the uttermoſt evidence of the fact in queſtion. Guildhall, *per* Holt. Tri. per Pais, 227.

In an action brought by an attorney for his fees, it is ſufficient to prove the taking out the writ by a warrant made by the coroners, for the writ may not be returned of record, and by conſequence is no record, and then the warrant made by the coroners is ſufficient to prove a title to his fees, for the attorney in this caſe is entitled to his fees, whether the writ be returned or not. Silby and Hinckly, Trin. Aſſ. 1701. *per* Gold.

Among the records of the kingdom are to be ranked the journals of the Houſe of Lords. And a copy of the minute book of the Houſe of Lords may be given in evidence; for as Lord *Mansfield* ſaid, "The minutes of the judgment are the ſolemn judgment itſelf;" not a word is added upon the journals, and a copy of them may certainly be read in evidence, for the inconvenience would be endleſs if the journals were to be carried all over the kingdom. Formerly a doubt was entertained whether the minutes of the Houſe of Commons were admiſſible; becauſe it is not a court of record; but that doubt ſeems now to be done away: and thoſe of the Houſe of Lords have always been admitted even in criminal caſes. Jones v. Randall, Cowp. 17. Dougl. 594.

The things that ſtand ſecond in point of probability are all public matters that are not of record.

The

The publick matters that are not of record all come under th general definition: they muſt be ſuch matters as have an evidenc in themſelves, and do not expect an illuſtration from any oth thing; ſuch are the copies of court rolls, and tranſactions Chancery, and the like; and the copies of ſuch matters may b given in evidence, inaſmuch as there is a plain and cohere proof; for the matters themſelves are ſuppoſed to be ſelf-eviden and by conſequence, when a copy of them is produced upon oat you have a full proof, becauſe you have proved upon oath a ma ter which when produced would carry its own light with it, an by conſequence, would need no proof.

Objection. But here it will be objected, that this is not the utmoſt ev dence that the nature of the thing is capable of, for theſe teſtim nies themſelves muſt be better than the copies of them.

To this the anſwer is, that the copy upon oath is reckoned as equivalent to the thing itſelf; and the teſtimony itſelf muſt n be rigidly required, becauſe ſince theſe matters lie for the public ſatisfaction, every man has a right to their evidence, and in ſever places they cannot be at the ſame time, and therefore the thing themſelves cannot be demanded but only the copies of them.

The firſt ſort of teſtimonies that are not of record are the pr ceedings of the court of Chancery on the *Engliſh* ſide.

Co. Lit. 260. a. The reaſon why the proceedings in Chancery and the rolls the court are not records is this, becauſe they are not the prec dents of juſtice; for the proceedings in Chancery are founded on on the circumſtances of each private caſe, and they cannot b rules to any other; and the judgment there is *ſecundum æquum bonum*, and not *ſecundum leges & conſuetudines*: and the reaſon wh any record is of validity and authority is, becauſe it is declarati of the ſenſe of the law, and is a memorial of what is the law of th nation: now Chancery proceedings are no memorials of the law

But ſee 3 Bl. Com. c. 27. of *England*, becauſe the chancellor is not bound to proceed accor ing to law.

Now becauſe theſe ſeveral proceedings before-mentioned a not records, they are by conſequence, not ſuch memorials as a lodged inſeparably in any certain place, but are transferable fro one place to another, and therefore may be themſelves given i evidence.

Chan. Caſ. 64, 65. 2 Sid. 221. Eq. Abr. 227. pl. 1. Nelſ. Ch. Rep. 102. The bill in Chancery is evidence againſt the complainant, f the allegations of every man's bill ſhall be ſuppoſed to be true nor ſhall it be ſuppoſed to be preferred by the counſel or ſolicit without the party's privity, and therefore is evidence as to th confeſſion and admittance of the truth of any fact by the par himſelf; and if the counſel hath mingled in it what is not tru the party may have his action: but where a bill is exhibited, an there are no proceedings upon it, then it cannot be given in ev dence, unleſs they prove a privity in the party, for a man may fi

Chan. Caſ. 64, 65. a bill in another's name to rob him of his evidence by a ſham co feſſion; and therefore a bill filed without any proceedings upon has not the force of an evidence, for no man can ſuppoſe that th party did himſelf file the bill, for the bill, without any proceedings bri

ing the adverſary to anſwer it, is of no uſe to the party, and erefore it muſt be ſuppoſed rather to be filed by a ſtranger to do m an injury. This is accounted to ſtand in point of credibility the ſame circumſtances, as a confeſſion by letter under the party's wn hand where no body ſaw the writing of it, though ſome have nged it in an inferior degree, becauſe the one is the party's own mediate confeſſion, and the other is only the counſel's draught; t it ſeems the allegation in a court of juſtice, that amounts to the nfeſſion of any fact, ought to have more weight and authority ith it than any private owning. 2 Sid. 221. Keb. 780. L. E. 105. pl. 55.

But a mere general ſuggeſtion of facts, in order to a diſcovery, all not be read in evidence; for this is no more than a ſurmiſe the counſel, in order to come at facts: otherwiſe, of a fact ted in the bill on which the plaintiff founds his prayer for relief. Bull. N. P. 235.

If a patron ſues a ſimoniacal bond, and the parſon prefers a bill Chancery to be relieved, the bill and proceedings upon it ſhall given in evidence on ejectment to make void the parſon's ing. Keb. 780. 2 Sid. 221.

And if the bill be evidence againſt the complainant, much more the anſwer againſt the defendant, and carries ſtill a higher ight of probability along with it, becauſe this is delivered in on oath, and therefore over and above the ſingle confeſſion it s an authority from the ſanction of an oath. Godb. 326. L. E. 106. pl. 57.

But when you read an anſwer, the confeſſion muſt be all taken gether, and you ſhall not take only what makes againſt him, and ve out what makes for him: for the anſwer is read as the ſenſe the party himſelf, and if it is to be taken in this manner, you uſt take it entire and unbroken. Brochman's caſe, Trin. Aſſ. 1701. *per* Gold. 2 Vern. 194. 288. 5 Mod. 10. See Ch. Caſ. 154.

An infant's anſwer by his guardian ſhall never be admitted in idence againſt him on a trial at law, for the law has that tender- ſs for the affairs of infants, that it will not ſuffer them to be ejudiced by the guardian's oath, for the authority the law gives the guardian is for the infant's benefit, and not to his prejudice, d therefore the infant cannot be hurt by the guardian's oath. 2 Vent. 72. 3 Mod. 259. Carth. 79. 3 Will. Rep. 237. L. E. 106. pl. 59. Anſwer of a feme covert, ſee 3 Will. Rep. 238. Salk. 350. Vern. 60. 109, 110.

The anſwer of the truſtee can in no caſe be admitted as evidence ainſt the *ceſtuy que truſt*. Bull. N. P. 237.

A bill was brought by creditors againſt an executor, to have an count of the perſonal eſtate, the executor ſets forth by anſwer, t there was 1100 *l.* left by the teſtator in his hands, and that ming afterwards to make up his accounts with the teſtator, he ve bond for 1000 *l.*, and the other 100 *l.* was given him as a gift his trouble and pains taken in the teſtator's buſineſs, and there s no other evidence in the caſe, that the 1100 *l.* was depoſited merely by the executor's own oath; and it was argued that the wer, though it was put in iſſue, ſhould be allowed, ſince there is ſame rule of evidence in equity as at law; and therefore if a n was ſo honeſt as to charge himſelf when he might roundly ve denied it, and no teſtimony could have appeared, he ought to d credit where he ſwears in his own diſcharge. Anon. Hil. Vacat. 1707. *per* Cowper.

But it was anſwered and reſolved by the court, that when
anſwer was put in iſſue, what was confeſſed and admitted need
be proved, but it behoved the defendant to make out by pro
what was inſiſted upon by way of avoidance: but this was h
under this diſtinction; where the defendant admitted a fact,
inſiſted on a diſtinct fact by way of avoidance, there, he ought
prove the matter of his defence, becauſe it may be probable t
he admitted it out of apprehenſion that it might be proved,
therefore ſuch admittance ought not to proſit him ſo far as to p
for truth, whatever he ſays in avoidance; but if it had been
fact, as if the defendant had ſaid the teſtator had given h
100*l.* it ought to have been allowed unleſs diſproved, becauſe
thing of the fact charged is admitted, and the plaintiff may
prove the whole fact as ſworn, if he can do it; but it was urg
that here the probability was on the defendant's ſide, becauſe
did not take a bond for this ſum as for the reſidue, but the Ch
cellor ſaid there was ſome preſumption in that, but not enough
carry ſo large a ſum without better atteſtation.

3 Mod. 116, 117. See Ld. Raym. 451. 2 Ld. Raym. 894. 936. 1221. 12 Mod. 511. 10 Mod. 74. 108, 109. 194, 195.

In an information for perjury, an anſwer may be given in e
dence without any perſon to prove that the defendant ſwore it,
the identity may be proved by many things out of the anſwer
ſelf: beſides, the party is obliged to ſign his anſwer; and the p
jury may be further illuſtrated by the compariſon of hands, wh
poſſibly may be evidence in concurrence with other proof, t
out of the anſwer itſelf evince the identity of the perſon.

3 Will. Rep. 196. Stra. 545.

Bull. N. P. 237, 8.

Although an anſwer is good evidence againſt a defendant, ye
is not againſt his alienee: nor is it any evidence for the defend
in a court of law (except ſo ordered on an iſſue out of Chance

Bourn v. Sir Thomas Whitmore. Salop. 1747.

unleſs the plaintiff make it evidence by producing it firſt.
where on an iſſue out of Chancery to try the terms of an agr
ment, which was proved by one witneſs, but denied by the
fendant, the witneſs being dead before the trial, the plaintiff
under the neceſſity of producing the bill and anſwer in order to r
his depoſition, and by that means made the whole anſwer eviden

Sparin v. Drax, M. 27 Car. 2. C.B. at bar.

which was accordingly read by the defendant. But where an anſ
in Chancery of the witneſs was produced to ſhew him incompete
he having there ſworn that he had an annuity out of the land
queſtion, and Serjeant *Maynard* inſiſted to have the anſwer r
through, the court refuſed it, as it was produced only to ſhew tha
was not a competent witneſs in the cauſe, and not to prove the iſ

Brochman's caſe, Trin. Aſſ. 1701. *per* Gold.

Analogous to this is a man's own voluntary affidavit, which m
alſo be given in evidence againſt him.

Str. 35. Will. Rep. 675.

But there is a very great difference between the evidence of
anſwer, and that of a voluntary affidavit.

Michaelmas Term, 1714, in Canc. Inter Roch

An anſwer cannot be given in evidence without producing
bill, becauſe without the bill there does not appear to be a ca
depending. But if there be proof by the proper officer that the

has been ſearched for diligently in the office, and cannot be found, & Rix, Adminiſtrators of Howard & al.
there, the anſwer hath been allowed to be read without a ſight of the bill; and this Lord Chancellor *Broderick* allowed, though the loſs of the bill was not proved by the proper officer, but by the clerk only who wrote in the office, and ſwore he ſearched carefully with the officer and could not find the bill.

An anſwer is proved by ſhewing the allegations in the court, viz. by ſhewing the bill which is the charge, and the anſwer which is as it were the defence to the bill; and this in civil caſes ſhall be intended to be ſworn, becauſe the proceedings upon ſuch defence are upon oath. And ſince the proceedings of any court of judicature within the kingdom are good evidence in other courts, and the proceedings in this caſe are upon oath, it follows of conſequence, that in all civil caſes the anſwer is to be taken as on oath, without any further proof but from the proceedings in the cauſe. Hil. Aſſ. 1700.

But a voluntary affidavit is not part of any cauſe in a court of juſtice, and therefore it muſt be proved to be ſworn; for if you only prove it ſigned by the party, the proof goes no farther than to ſuppoſe it as a note or letter, and as ſuch you may not give it in evidence without more proof, for a note or letter is a bare acknowledgment under the hand of the party, and this is no more unleſs you prove it to be ſworn alſo, for it cannot be preſumed to be ſworn, being not filed as an oath in a court of juſtice. Vern. 53. 413. Ld. Raym. 311. 734. 2 Ld. Raym. 893. 936. 2 Vern. 471. 547. 555. 591. 603. Ch. Pre. 59. 116. 212.

3 Mod. 36. 9 Mod. 66. 11 Mod. 210. 262. 12 Mod. 136. 231. 305. 310. 319. 339. 342. 375. 394. 414. 494. 500. 521. 555. 565. 579. 607. L. E. 121. pl. 92.

Such are the affidavits made before a Maſter in Chancery by the vendor of the eſtate, in ſatisfaction of the purchaſer, that the eſtate is free from all charges and incumbrances.

In an action of covenant brought againſt two, the affidavit of one of them was given in evidence as an acknowledgment of them both, becauſe the acknowledgment of one of them where they had a joint intereſt was to be looked upon as a truth relating to them both, and the conſideration of the matter is to be left to the jury how far it is evidence againſt the other. Vicary's caſe in the Exch.

The ſecond difference between them is, that the copy of an anſwer may be given in evidence, but the copy of a voluntary affidavit cannot; the reaſon is, becauſe the anſwer is an allegation in a court of judicature, and being matter of publick credit, the copies of it may be given in evidence for the reaſon formerly mentioned. But a voluntary affidavit hath no relation to any court of juſtice, and therefore is not entitled to publick credit, and being a private matter, the affidavit itſelf muſt be produced as the beſt evidence. Beſides, it muſt be proved to be ſworn, which it cannot be unleſs it be produced. Therefore, where in an action for a malicious proſecution, the plaintiff to increaſe damages offered the office copy of an affidavit made by the defendant in Chancery of his being worth 2,500 *l.*; Lord *Raymond* refuſed to let it be read, and the plaintiff was obliged to ſend for the original which was filed in Chancery. And notwithſtanding the office copy 3 Mod. 116. *Ante*, 54. Bull. N. P. 238-9. Chambers v. Robinſon, Tr. 12 G. 2.

copy of an anſwer may be given in evidence in a civil ſuit, yet it will not be ſufficient on an indictment for perjury, though perhaps ſuch copy would be ſufficient for the grand jury to find the bill: but upon the trial the original muſt be produced, and poſitive proof made that the defendant was ſworn by a witneſs acquainted with him. But proof that a perſon calling himſelf *J. S.* was ſworn, and that he ſigned the anſwer (or affidavit), and proof alſo by another witneſs of the hand-writing, would be ſufficient. So, an anſwer being brought out of the proper office, and *jurat* under the maſter's hand, and proof of its being ſigned by the defendant by proof of his hand-writing, is ſufficient to prove it ſworn by him even on an indictment for perjury. But no return of commiſſioners (or of a Maſter in Chancery) of the party's ſwearing will be ſufficient, without ſome other proof of the identity of the perſon.

3 Mod. 116.

2 Burr. 1189.

3 Mod. 117.

Style, 446. But the voluntary affidavit of a ſtranger can by no means be given in evidence, becauſe the oppoſite party had not the liberty to croſs-examine.

The next thing is the depoſitions; and here we muſt in the firſt place conſider what rank they ſtand in, in point of credibility. To enlighten this matter we muſt give an account of their original uſe. They evidently came over to us from the civil law. It is very plain that the parties exhibited their interrogatories upon their ſeveral allegations, but that the witneſſes were privately examined upon theſe interrogatories by the ſame judge that tried the cauſe; ſo that the courſe anciently among the *Romans* is very different from the modern pleadings of the Chancery, where the ſenſe of the witneſs is ſtated by the examiner, on which the Chancellor is to judge.

Dig. lib. 22. tit. 5. § 3. de Teſt. That this which I have mentioned was the ancient courſe of the civil law, is very plain from *Adrian*'s epiſtle to *Varus* the legate of *Cilicia*, *Tu magis ſcire potes quanta fides habenda ſit teſtibus, qui & cujus dignitatis, & cujus æſtimationis ſint, & qui ſimpliciter viſi ſint dicere, utrum unum eundemque meditatum ſermonem attulerint, an ad ea quæ interrogaveras, ex tempore veriſimilia reſponderint.*

Now theſe examinations were firſt made privately, that the judge might in the firſt place be poſſeſſed of the naked fact, and the ſenſe of theſe witneſſes was after taken in writing, and then publication paſſed, that the judges might have all due aſſiſtance from the obſervation of the advocate, if he had not ſufficiently compared and weighed the examination. As the trials of the civil law thus ſtood when the judges viewed the behaviour of the witneſſes, there is very little difference between this trial and that by the jury, ſave only that this ſort of trial by jury is much more ſpeedy, and the evidence is more entire, whilſt in the other way the judges take up the evidence at one time and the gloſs at the other, and ſuch breaking of the evidence may be dangerous to a weak and leſs conſidering judge: beſides, the judge not being of the neighbourhood cannot ſo eaſily diſtinguiſh the credit of the witneſſes, and upon this account alſo the trial by jury is preferable to the examination of the civil law when under the beſt regulation.

An

And, no doubt, in our Chancery proceedings the witneſſes were formerly examined by the maſters, who ſat in the court to inform the Chancellor of their credibility, till cauſes ſo multiplied, that the maſters were employed in other affairs, and ſo the examination of witneſſes was left to the examiners.

Now, ſince this practice has been uſed, no doubt, but that the credit of depoſitions *cæteris paribus* falls much below the credibility of a preſent examination *vivâ voce*, for the examiners and commiſſioners in ſuch caſes often dreſs up ſecret examinations, and give a quite different air to them from what they would have, if the ſame teſtimony had been plainly delivered under the ſtrict and open examination of the judge at the aſſizes.

But though the depoſitions fall ſhort of examinations *vivâ voce*, yet they ſeem ſuperior to what a witneſs ſaid at a former trial; for what is reduced to writing by an officer ſworn to that purpoſe from the very mouth of the witneſs, is of more credit than what a ſtander-by retains in memory of the ſame oath; for the images of things decay in the memory, by the perpetual change of appearances; but what is reduced to writing continues conſtantly the ſame; ſo that we cannot be certain on a verbal atteſtation, but that ſome circumſtances of the fact may be loſt in the recollection. We muſt in the next place ſee in what caſes depoſitions may be read.

1ſt, They may be read where the witneſſes are dead, for where the witneſs is living, they are not the beſt evidence the nature of the thing is capable of, and therefore cannot be read, but where the witneſs is dead, the depoſition is allowable: for as records are the invention that perpetuate the deciſions of law, ſo are depoſitions the only method to perpetuate the memory of the fact, and therefore they muſt be truſted where the witneſs is not in being. Godb. 193. 326. 2 Stra. 920. Barnard. K. B. 348. 2 Bac. Abr. 305. Gilb. Chan. 140. Salk. 278. 281. 286. 4 Mod. 146.

S. C. Show. 363. 2 Salk. 555. 691. T. Raym. 170. See Hob. 112. 2 Ro. Rep. 679. Hardr. 232. 315. T. Raym. 335, 336. Lil. Abr 388. 554. 5 Mod. 9. 163. 277.

2dly, Where a witneſs is ſought and cannot be found, you may, upon oath of the matter, uſe his depoſitions; for when it appears by oath that he cannot be found, it is the beſt evidence that poſſibly can be had of the matter; for when a witneſs is ſought and cannot be found, he is in the ſame circumſtances as to the party that is to uſe him, as if he were dead. Godb. 326. L. E. 106. pl. 27.

3dly, If it be proved that a witneſs was ſubpœnaed and fell ſick by the way, his depoſition may be allowed to be read, for in this caſe the depoſition is the beſt evidence that poſſibly can be had, and that anſwers what the law requires. Mod. 283, 284. 11 Mod. 210. 225, 226. 263. Fitzgib. 197.

12 Mod. 215. 231. 305. 319. 339. 375. 403. 607. Will. Rep. 288, 289. 414, 415. 557. 2 Wil. Rep. 563. Ld. Raym. 729, 730. 734, 735. 2 Ld. Raym. 873. 1166. 1371. Vern. 331. 413. Pre. Ch. 64. Eq. Abr. 227. 2 Stra. 920. L. E. 180. pl. 13.

But depoſitions taken thirty years ſince were admitted to be read in Chancery, though the parties were not the ſame, inaſmuch as the cauſe related to the ſame land, and the tertenants were parties to it, and thoſe witneſſes were ſince dead, the plaintiff's title then Chan. Caſ. 73. Eq. Abr. 227. pl. 2.

not appearing. And this is an indulgence of the Chancery beyond the ſtrict rules of the common law, and is admitted for the pure neceſſity, becauſe evidence ſhould not be loſt: beſides, Chancery hath great faith in its own examiners, who are ſuppoſed indifferent perſons that by themſelves take the ſenſe of the parties ſtrictly, ſo that by that means the depoſitions ſtand the fairer to be read at any time. *Quære.*

Hard. 472. 4thly, A depoſition cannot be given in evidence againſt any perſon that was not party to the ſuit, and the reaſon is, becauſe he had not liberty to croſs-examine the witneſſes, and it is againſt natural juſtice that a man ſhould be concluded in a cauſe to which he never was a party.

Ibid. But in caſes of cuſtoms and tolls, and, in general, in all caſes where hearſay and reputation are evidence, depoſitions, under theſe circumſtances, may be given in evidence. 5thly, A man ſhall never take advantage of a depoſition that was not party to the ſuit; for if he cannot be prejudiced by the depoſition, he ſhall never receive any advantage from it, for this would create the greateſt miſchief that could be; for then a man that never was party to the Chancery proceedings, might uſe againſt his adverſary all the depoſitions that made againſt him, and he in his own advantage could not uſe the depoſitions that made for him, becauſe the other party not being concerned in the ſuit had not the liberty to croſs-examine, and therefore cannot be encountered with any depoſitions out of the cauſe.

Raym. 335. L. E. 114. pl. 76. 6thly, Depoſitions before an anſwer put in are not admitted to be read, unleſs the defendant appears to be in contempt, for if a cauſe do not appear to be depending, then, are the depoſitions conſidered as voluntary affidavits; for unleſs a ſuit is ſhewn to be commenced, it doth not appear that the adverſe party had liberty to croſs-examine: but if the adverſe party be in contempt, then the depoſitions of the witneſſes ſhall be admitted, for then it is the fault of the objector that he did not croſs-examine the witneſſes, ſince he would not join the examination of the witneſſes.

Ch. Caſ. 175. Ld. Raym. 735. Backhouſe and Middleton. When the bill is diſmiſſed, the rule as to the reading of the depoſitions is this: where the bill is diſmiſſed becauſe the matter is not proper for equity to decree, yet the depoſitions on the fact in the cauſe may be read afterwards in a new cauſe between the ſame parties: for though the matter is not proper for equity to decree, yet there was a cauſe properly before the court; for it is proper for the juriſdiction of equity to conſider how far the law ought to be relaxed and moderated; and where there is a cauſe properly before the court, for whomſoever that cauſe be decided, yet the depoſitions in that cauſe muſt be evidence, as well as in all others.

Cha. Caſ. 275. But if a cauſe in equity be diſmiſſed, for the irregularity of the complaint, the depoſitions in that cauſe can never be read; as where a deviſee, on a ſuit pending by his deviſor, brings a bill of revivor, and ſeveral depoſitions are taken, and then the cauſe on the hearing is diſmiſſed, becauſe a deviſee claiming as a purchaſer, and not by repreſentation, cannot bring a bill of revivor; in this caſe, and in a new original bill exhibited, the deviſee cannot uſe the

the former depoſitions; for in the firſt cauſe, miſtaking the bill that he ought to bring, there was no complaint before the court, ſince the court doth not allow any deviſee to complain in that manner by right of repreſentation, and there being no cauſe regularly before the court, there could be no depoſitions in it.

In croſs cauſes in equity, an agreement was proved in one of the cauſes, and in that cauſe it was not ſet forth in the allegations of the bill or anſwer: in the other cauſe the agreement was ſet forth in the bill, and not proved in the cauſe; and an order was obtained before publication, that the ſame depoſitions ſhould be read in both cauſes: and by the better opinion this might be, but ſince the order was before publication in the ſecond cauſe, the defendant had liberty to croſs-examine the witneſſes on which particulars he pleaſed, and the ſight of the depoſitions was to his advantage. *Ibid.* 236.

If a witneſs, after his depoſition taken, become intereſted, his depoſition ſhall not be read; for the intent of taking ſuch depoſition is only to perpetuate his teſtimony in caſe the witneſs die. 1 Salk. 286.

If a witneſs be examined *de bene eſſe*, and before the coming in of the anſwer, the defendant not being in contempt, the witneſs die, yet his depoſition ſhall not be read, becauſe the oppoſite party had not the power to croſs-examine him, and the rule of the common law is ſtrict to this, that no evidence ſhall be admitted, but what is or might be under the examination of both parties. Hard. 315. 2 Jon. 164. Will. Rep. 414, 415. 2 Will. Rep. 563. L. E. 111. pl. 72.

But in ſuch caſes as theſe, the way is to move the court of Chancery, that ſuch a witneſs's depoſitions ſhould be read, and if the court ſee cauſe, they will order it, and this order will bind the parties, to aſſent to the reading of ſuch depoſitions, though it doth not bind the court of *niſi prius*: and this is thought juſt, becauſe the witneſſes are examined by the officers of the court, who are ſuppoſed to favour neither party. 2 Jon. 164. L. E. 113. pl. 74.

Formerly, they did not enrol their bill and anſwer, but as it ſeems the bill was left looſe in the office with the clerks of the office, and was thereby ſubject to be loſt; and therefore ancient depoſitions may be given in evidence without the bill and anſwer. So, depoſitions taken by the command of Queen *Elizabeth*, upon petition, without bill and anſwer, were, upon a ſolemn hearing in Chancery, allowed to be read. 2 Keb. 31. L. E. 113. pl. 75. Hob. 112.

The ancient practice was alſo, that they never publiſhed the depoſitions in the lifetime of the witneſſes, becauſe the depoſitions *in perpetuam rei memoriam* were of no uſe till after the death of the witneſſes; but this practice was found very inconvenient, becauſe witneſſes became thereby ſecure in ſwearing whatſoever they pleaſed, inaſmuch as they could never be proſecuted for perjury, the effect of their oaths not being known till after their deaths. Practice of Chan. 7.

On an information for perjury, the depoſitions in Chancery ſigned by the commiſſioners are not ſufficient evidence, without proof, that the party ſwore them; for there is no proof of the 3 Mod. 116, 117.

identity of the perſon, but by the compariſon of hands, which is not a ſufficient evidence in a criminal caſe (*a*), for another man might perſonate me, and thereby ſubject me to the penalty of perjury.

(*a*) *Sed vide infra.*

Styl. 446. Sacheverel and Sacheverel, 5 Mar. 1716, at Delegates. May and May, K. B. at bar.

From what has been ſaid, it is evident, that a voluntary affidavit before a maſter in Chancery is no evidence between ſtrangers, becauſe here is no croſs-examination, ſince there appears to be no cauſe depending; and therefore ſuch evidence cannot be admitted, except in thoſe caſes where a confeſſion of the perſon making the affidavit would be evidence, as, where a widow came for adminiſtration, the marriage being conteſted, an affidavit of the man himſelf was read. So, on an iſſue directed out of Chancery to try the legitimacy of the plaintiff, the father's oath before the judges on a private bill was allowed to be evidence.

Bull. N. P. 242. 2 Roll. Abr. 679. Lit. Rep. 167.

As the ſpiritual courts are not of record, depoſitions taken in them cannot be read in evidence, though the witneſſes be dead.

1 Lev. 180. Sir T. Jones, 53. J. Anſon v. Wilſon, Dougl. 244. Bowles v. Langworthy, 5 Term Rep. 366.

Depoſitions taken before commiſſioners of bankrupts cannot be read in evidence, becauſe there cannot be a croſs-examination. However, by the ſtatute 5 *G.* 2. *c.* 30. § 41. which directs proceedings on commiſſions of bankrupt and the certificates to be entered of record, true copies ſigned and atteſted as therein required are to be given in evidence. Therefore an office copy of the depoſition of the witneſs who ſwore to the act of bankruptcy was admitted after the witneſs's death, to be evidence to prove the preciſe time when the act of bankruptcy was committed. And where an examinant produces a deed before the commiſſioners, under which he claims a title to the bankrupt's goods, the examination may be uſed afterwards in a queſtion between him and the aſſignees as evidence againſt him to prove the execution of the deed, without calling the ſubſcribing witneſs.

If witneſſes examined on a coroner's inqueſt be dead, or beyond ſea, their depoſitions may be read; for the coroner is an officer appointed on behalf of the publick, to make inquiry about the matters within his juriſdiction; and therefore the law will preſume the depoſitions before him to be fairly and impartially taken. And by 1 *P. & M. c.* 13. and *P. & M. c.* 10. juſtices of the peace ſhall examine of perſons brought before them for felony, and of thoſe who brought them, and certify ſuch examination to the next gaol-delivery; but the examination of the priſoner ſhall be without oath, and the others upon oath, and thoſe examinations ſhall be read againſt the offender upon an indictment, if the witneſſes be dead. However, if the offender be not preſent at the time when the witneſſes are examined againſt him, the examinations cannot be received in evidence.

Woodcock's caſe, Leach's Caſes, 397. 12 Mod. 318. See Stra. 162. Barnard. K. B. 243.

Another way of perpetuating the teſtimony of a perſon deceaſed is by giving the verdict in evidence, and the oath of the party deceaſed. Where you give in evidence any matter ſworn at a former trial, it muſt be between the ſame parties, becauſe otherwiſe

wiſe you diſpoſſeſs your adverſary of the liberty to croſs-examine: beſides, otherwiſe you cannot regularly give the verdict in evidence, and where you cannot give the verdict in evidence, you cannot give the oath on which it was founded, for if you cannot ſhew there was ſuch a cauſe, you cannot ſhew that any perſon was examined in that cauſe, and without ſhewing there was a cauſe, no man's oath can be given in evidence, inaſmuch as it appears to be merely a voluntary affidavit.

What a man himſelf that is living has ſworn at one trial, can never be given in evidence at another trial to ſupport him; though what the witneſs has ſaid in diſcourſe may be given in evidence to ſupport him; becauſe the ſame oath at another trial is no evidence of the truth of any man's ſwearing; for if a man be of that ill mind to ſwear falſely at one trial, he may do the ſame on the other on the ſame inducements; but what a man ſays in diſcourſe, without premeditation or expectation of the cauſe in queſtion, is good evidence to ſupport him: but if a man hath ſworn at one trial different from what he hath at another, this is good evidence as to his diſcredit. 12 Mod. 318. 4 St. Tri. 265 to 272. 2 Hawk. P. C. 430. § 9. 12. 2 Keb. 384.

A witneſs was ſworn in a trial at bar in *C. B.* between the ſame parties on the ſame iſſue, and he was ſubpœnaed by the defendant to appear at a ſecond trial in *K. B.* and his charges were given him; but he not appearing, perſons were admitted to give evidence of what he ſwore in *C. B.*, for the court ſaid, they would preſume he was kept away by the plaintiff's practice. This preſumption was ſtrengthened by his having been produced by the plaintiff at the former trial. Green v. Gatewicke, Mich. 24 Car. 2. Bull. N. P. 243.

On an appeal of murder, the appellant cannot give in evidence the indictment, and what a perſon deceaſed ſwore at the trial; for in this caſe we have already ſhewn that the indictment cannot be given in evidence againſt the defendant, and, by conſequence, the oath cannot be given in evidence on the indictment: beſides, the appeal is tried as a new cauſe, and therefore it is neceſſary to have his accuſers face to face. 2 Sid. 325. 2 Hawk. P. C. 430. § 8. L. E. 31. pl. 66. 2 Roll. Rep. 460, 461. See 2 Keb. 384.

If the indictment be given in evidence for the priſoner, and the oath of a perſon deceaſed, the account of that oath muſt be upon oath; for nothing can be given in evidence as an oath but upon oath. Sid. 325. L. E. 31. pl. 66.

A decree in Chancery may be given in evidence between the ſame parties, or any claiming under them, for their judgments muſt be of authority in thoſe caſes where the law gives them a juriſdiction; for it were very abſurd that the law ſhould give them a juriſdiction, and yet not ſuffer what is done by force of that juriſdiction, to be a full proof, for that were to ſuppoſe they were incompetent judges, where they had juriſdiction. 2 Mod. 231. 2 Str. 960, 961. Eq. Abr. 227, &c. Ch. Pre. 59. 64. 116. 212. 10 Mod. 42, 43, 44. 74. 108, 109. 126. Vern. 53. 413. 2 Vern. 471. 591. 547. 555. 603. Fitzgib. 197. Ld. Raym. 734. 893. 936. Will. Rep. 414, 415. 8 Mod. 75. 181. 322. 9 Mod. 66. 11 Mod. 210 to 212. Gilb. Eq. Rep. 203. &c. 12 Mod. 24. 85. 136. 215. 231. 305. 310. 319. 339. 342, 343. 375. 394. 414. 494. 500. 521. 555. 565. 579. 607. Stra. 95. 162. 308. See Barnard. K. B. 243. 2 Stra. 960. 1151 1242. 2 Roll. Abr. 679. L. E. 125. pl. 101.

1 Keb. 31. So, a decretal order in paper with proof of the bill and anſwer, or without ſuch proof (if they are recited in the order) may be read.

Bull. N. P. 244. Ambl. 756. Wherever a matter comes to be tried in a collateral way, the decree, ſentence, or judgment of any court, eccleſiaſtical or civil, having competent juriſdiction, is concluſive evidence of ſuch matter; and in the caſe the determination be final in the court of which it is a decree, ſentence, or judgment, ſuch decree, ſentence, or judgment will be concluſive in any other court having concurrent juriſdiction. But here the following diſtinctions muſt be attended to.—The judgment of a court of concurrent juriſdiction *directly upon the point*, is as a plea, a bar, or as evidence concluſive *between the ſame parties, upon the ſame matter directly in point* in another court. And the judgment of a court of excluſive juriſdiction *directly on the point* is in like manner concluſive *upon the ſame matter, between the ſame parties* coming *incidentally* in queſtion in another court for a different purpoſe. But neither the judgment of a court of concurrent or excluſive juriſdiction is evidence of any matter which came *collaterally* in queſtion, though within their juriſdiction; nor of any matter incidentally cogniſable, nor of any matter to be inferred by argument from the judgment.

Per De Grey, C. J. 11 St. Tr. 261. Carth. 225. Lane v. Degberg, H. 11 W. 3. Bull. N. P. 244. 2 Show. 232. Carth. 32. Cowp. 315. Bull. N. P. 244, 5. 1 Salk. 290. 1 Show. 6.

As to the proceedings in the ſpiritual court, theſe are in caſes matrimonial and teſtamentary, and all other eccleſiaſtical cauſes. How theſe courts gained the juriſdiction in cauſes teſtamentary, which was originally of temporal conuſance, is not here to be conſidered further than is neceſſary to determine the weight of credibility that is to be given to their ſentences. The way of authenticating teſtaments by the civil law was this: The teſtator and his witneſſes ſubſcribed the will, bound it up and ſealed it with their ſeals: after the deceaſe of the teſtator it was opened in the preſence of the prætor, and he delivered copies of it, and kept the original in a public treaſury; and hence it is, that the ſpiritual court keeps the original will, and gives out the probate, which is but a copy of the will under their ſeals.

But originally among the *Germans*, the goods as well as the feud itſelf belonged to the lord: afterwards it was thought fit that the feudary ſhould diſpoſe of them, and then the will was proved in the country courts before the alderman and biſhop, and if any man died inteſtate, they were diſtributed among his kindred: but after the Conqueſt, the probate of the will and the commiſſion of adminiſtration was indulged to the biſhop, who never had it in the times of the empire, under pretence that the proviſion would be better made for the ſouls of the deceaſed. If the ſpiritual courts exceed their commiſſion, they have plainly no authority, and therefore they muſt confine themſelves to the bequeſt of the perſonal eſtate: for the feud was not deviſable until the 32 *H.* 8. for reaſons mentioned in another place.

Roll. Abr. 678. Nor will an exemplification of the Therefore, if a man deviſe lands by force of the ſtatute of wills, or by cuſtom, the probate of the will in the ſpiritual court cannot be given in evidence, for all their proceedings, ſo far as they relate to the lands, are plainly *coram non judice*, for they have no

power

power to authenticate any ſuch deviſe, and therefore a copy produced under their ſeals is no evidence of a true copy.

will under the great ſeal be evidence of it: Comb. 46. in queſtions relative to lands deviſed, the original will ought always to be produced.

But the probates of wills are good evidence as to the perſonal eſtate, and they are the records of that court, and therefore a copy of them under the ſeal of that court muſt be good evidence: and this is ſtill the more reaſonable, becauſe it is the uſe of the court to preſerve the original will, and only to give back to the party the copy of that will under the ſeal of the court.

Roll. Abr. 678. 4 Term Rep. 258.

The eccleſiaſtical court never grants an exemplification of letters of adminiſtration, but only a certificate that adminiſtration was granted: therefore, when a leſſee pleads an aſſignment of a term from an adminiſtrator, ſuch certificate is good evidence. So, would the book of the eccleſiaſtical court, wherein was entered the order for granting adminiſtration. So, would the copy of the probate of the will be evidence of *J. S.* being executor, but a copy of the will would not be evidence of it.

Kempton v. Croſs, E. 8 G. 2. K. B. 1 Lev. 25.

Smartle v. Williams, Bull. N. P. 246.

Where a perſon in ejectment would prove the relation of father and ſon by his father's will, he muſt have the original will, and not the probate only, for where the original is in being, the copy is no evidence, and the probate is no more than a true copy under the ſeal of the court of a private inſtrument, and the law which ſeeks the beſt evidence, will not allow of the copy only: beſides, this is not proved to be a true copy, for the ſeal doth not prove the truth of the copy, unleſs the ſuit relate to the perſonal eſtate only.

Polhill and Polhill, Hil. 1701.

But the ledger-book is evidence in ſuch caſe, becauſe theſe are not conſidered merely as copies, but they are the rolls of the court itſelf; and though the law doth not allow theſe rolls to prove a deviſe of lands where the claim is by the words of the deviſe, for the reaſons already given, yet when the will is only to prove a relation, the rolls of the ſpiritual court, that have authority to enrol all wills, are ſufficient proofs of ſuch teſtament.

Polhill and Polhill, Hil. Aſſ. 1701. Under particular circumſtances the ledger-book may be evidence even in the deviſe of a real eſtate: as, where in an avowry for a rent-charge, the avowant could not produce the will under which he claimed, that belonging to the deviſee of the land; but producing the ordinary's regiſter of the will, and proving former payments, it was holden to be ſufficient evidence againſt the plaintiff, who was deviſee of the land charged. Caſ. K. B. 375.

But the copy of the ledger-book was not allowed to be read in this caſe, becauſe common practice had prevailed that it ſhould not; though my Lord *Holt* ſaid that ſince the original would have been read as a roll of the court without further atteſtation, it was fit the copies ſhould be read, and that the practice ſhould be altered. And the practice ſeems to be founded on the miſtake, that the ledger-book is read as a copy, and ſo the copy of that is but the copy of a copy, whereas the ledger-book is read as a roll of the Prerogative Court.

In a ſuit relating to a perſonal eſtate, the probate of the will under the ſeal of the court is ſufficient evidence, and no evidence contrary to it can be given, that ſuch will was not the laſt will

Raym. 404 to 406. 2 Sid. 359. Lev. 235.

2 Keb. 337. 343. 641. Comyns, 150. Anon. Ld. Raym. 262. Stra. 481. Will. Rep. 388. L. E. 125. pl. 103.

and teſtament of the party deceaſed, for the ſpiritual court are the proper judges of what is, and what is not the will of the teſtator; and ſince the authority of judging is committed to them, the temporal courts are bound by their judgments.

Raym. 404 to 406. 2 Sid. 359.

But the adverſe party may give in evidence, that the probate is forged, becauſe ſuch evidence ſuppoſeth that the ſpiritual court hath given no judgment, and ſo there is no reaſon for the temporal court to be concluded, ſince the ſpiritual court hath made no judgment in this matter, for a forged probate is none at all.

Raym. 404 to 406. 2 Sid. 359.

So, they may alſo give in evidence, that ſuch probate was obtained by ſurpriſe, for that is as much as to ſay, that the ſpiritual court hath made no legal deciſion in the matter, and therefore that the temporal court ought not to be concluded by their authority.

2 Sid. 359.

So, if letters of adminiſtration be ſhewed under ſeal, you may give in evidence, that they were revoked; for this is in affirmance of the proceedings in the ſpiritual court, and doth not at all controvert the righteouſneſs of their deciſions.

Mod. 227. Vent. 257. 3 Keb. 310. See 2 Danv. Abr. 539. L. E. 89. pl. 18.

A will that hath partly the form of a will, and partly the form of a deed, may be given in evidence as a will, for if the intent of the party ſufficiently appear to make a diſpoſition after his deceaſe, the informality of the words ſhall not vitiate it.

Keb. 40. 117. See L. E. 276. pl. 106.

Where a will remains in Chancery, by order of that court, a copy may be given in evidence, for then it becomes a roll of that court, and, by conſequence, a copy of it is ſufficient evidence. See more of wills after.

Hil. Aſſ. 1701.

The rolls of a court-baron are evidence, for they are the publick rolls, by which the inheritance of every tenant is preſerved, and they are the rolls of the manor court, which was anciently a court of juſtice relating to all property within the diſtrict.

1 Keb. 567. 720. Comb. 138.

A copy of a court-roll under the ſteward's hand is good evidence to prove the copyholder's eſtate.

Comb. 337. 12 Mod. 24.

So, an examined copy of the court-roll is good evidence, if ſworn to be a true one.

Jenkins v. Barker, *per* Tracy, 1705.

If copyhold-rolls make mention of a ſurrender to the uſe of the tenant's laſt will, and then admit *A.* as deviſee under the will, yet this is no evidence of the ſeiſin or title of *A.* without the will itſelf; becauſe the land doth not paſs by the ſurrender without the will, and therefore the will muſt be ſhewn as the beſt evidence of *A.*'s poſſeſſion and title.

Roe v. Parker, 5 Term Rep. 26.

An entry in the court-rolls of a manor is admiſſible evidence of the mode of deſcent of lands in the manor, although no inſtances of any perſon having taken according to it be proved.

Denn v. Spray, 1 Term Rep. 466.

A cuſtomary of a manor, which appeared to be of great antiquity, and had been delivered down with the court-rolls from ſteward to ſteward, was admitted to be good evidence to prove the courſe of deſcent within the manor, notwithſtanding it was not ſigned by any one.

Ibid. 1700. Sid. 71. Godol. 145.

The regiſter of chriſtenings, marriages, and burials is good evidence, or a copy of it. The regiſter began in the 30 of *H.* 8. by

by the inſtigation of the Lord *Cromwell*, who at that time was veſted with all the authority that the pope's legates formerly had, under the title of vicar general to the king, and all wills that were above the value of two hundred pounds, were to be proved in this court; and therefore it ſerved his purpoſe to ſet on foot a regiſtry of all perſons that were chriſtened and buried. And this might be very well appointed by the king's authority, as ſupreme head of the church, ſince chriſtening and burying are eccleſiaſtical acts: and when a book was appointed by publick authority, it muſt be a publick evidence. This was afterwards confirmed by the injunction of *Edward* 6. and the particular manner of regiſtering appointed; as that the regiſtering ſhould be in the preſence of the parſon and churchwardens on *Sunday*, and that the book ſhould be kept locked in the church, to which the vicar and churchwardens ſhould have keys. Noy, 146. Brownl. 207. 2 Roll. Abr. 115. pl. 11. Cro. Eliz. 411. Moor, 451. Salk. 281. 12 Mod. 86. L. E. 81. pl. 2. Godol. 164. 2 Str. 1073.

Though it appear in evidence that the regiſter was made from a day-book kept by the miniſter for that purpoſe, yet the day-book will not be admitted to contradict the entry in the regiſter, e. g. to prove a child baſe-born, where no notice is taken of it in the regiſter, which would therefore be evidence to prove him legitimate. 2 Str. 1073.

On an indictment for entering a falſe marriage in the regiſter book, the defendant was fined two hundred marks; for ſince the regiſter is publick evidence, it muſt be guarded by the law, that it be not conterfeited. 2 Sid. 71, 72. The ſtat. 21 Geo. 2. c. 33. § 16. makes this a capital offence.

The pope's licence without the king's has been held good evidence of an impropriation, becauſe anciently the pope was held to be ſupreme head of the church, and therefore was held to have a diſpoſition of all ſpiritual benefices with the concurrence of the patron, without any leave of the prince of the country; and theſe ancient matters muſt be admitted according to the error of the times in which they were tranſacted. A pope's bull is no evidence on a general preſcription to be diſcharged of tithes, becauſe that ſhews the commencement of ſuch a cuſtom, and a general preſcription ſhews that there was no time or memory of things to the contrary, ſo that the bull doth itſelf contradict ſuch preſcription. Palm. 427. See L. E. 6. pl. 20. Palm. 38.

But the pope's bull is evidence on a ſpiritual preſcription, when you only lay the lands belonged to ſuch a monaſtery as was diſcharged of tithe at the time of the diſſolution, for then they continue diſcharged by act of parliament. Palm. 38.

But the copy of the bull will not be allowed in evidence; the bull itſelf muſt be produced. Brett v. Ward, Winch. 70.

If the queſtion be, whether a certain manor be ancient demeſne or not, the trial ſhall be by *Domes-day* book, which ſhall be inſpected by the court. Ancient demeſnes are the ſocage tenures that were in the hands of *Edward* the Confeſſor, which *William* the Conqueror, in honour of him, endowed with ſeveral privileges: *Domes-day* book was a terrier or ſurvey of the king's lands, which Hob. 188. Tri. per Pais, 342.

was

was made in the time of the Conqueror, and which aſcertains th particular manors which had this privilege.

Term. Paſch. 1701. in Scaccario. To know whether any thing be done in or out of the port there lies in the *Exchequer* a particular ſurvey of the king's port which aſcertains their extent.

An old terrier or ſurvey of a manor, whether eccleſiaſtical o temporal, may be given in evidence, for there can be no other wa of aſcertaining old tenures or boundaries.

Bull. N. P. 248. A terrier of glebe is not evidence for the parſon, unleſs ſigne by the churchwardens as well as the parſon; nor even then i they be of his nomination: and though it be ſigned by them, ye it ſeems to deſerve very little credit, unleſs it be likewiſe ſigned b the ſubſtantial inhabitants. But in all caſes it is ſtrong evidenc againſt the parſon.

1 Wilſ. 170. A ſurvey of religious houſes taken in 1563, upon the diſſolution of monaſteries, was allowed to be good evidence to prove a vicar' right to ſmall tithes.

Yates and Harris, Hil. Aſſ. 1702. An old map of lands was allowed to be evidence, where it cam along with the writings and agreed with the boundaries adjuſte in an ancient purchaſe.]

Skin. 623. pl. 17. Salk. 281. pl. 9. A publick hiſtory or chronicle may be given in evidence to prov a matter relating to the kingdom in (*a*) general, becauſe the natur of the thing requires it.

(*a*) So, a year book may be evidence to prove the courſe of the court. Salk. 281. pl. 9.—So, Speed' Chronicle was given in evidence to prove the death of Iſabel, Queen Dowager to E. 2. Skin. 15.

Salk. 281. pl. 9. Stainer v. Burgeſſes of Droitwich. Skin. 623. pl. 17. S. C. ſo ruled. But theſe will not be admitted as evidence to prove a particula right; and therefore where the queſtion was, Whether, by th cuſtom of *Droitwich*, ſalt-pits could be ſunk in any part of th town, or in a certain place only? and on a trial at bar, *Camden' Britannia* was offered in evidence, it was refuſed.

But for this *vide* 2 Roll. Abr. 686. Yelv. 34. 2 Jon. 164. 224. But the books of heralds are admitted as evidence to prove pe digrees, becauſe the nature of the thing will not admit of bette evidence; alſo, this is their proper buſineſs, and about which the are converſant, and therefore deſerve the more credit.

Salk. 281. pl. 9. Comb. 63. and Skin. 623. pl. 17. where it is ſaid, that, from the negligent manne of keeping them, they deſerve but little credit *.——* This is certainly true, yet there are exceptions as a viſitation made by heralds, entered in their books, and kept in their office, has been admitted evidence of a pedigree. Pitton v. Walter, H. 5 G. Stra. 162.——So, the minute-book of a former viſitation, ſigned by the heads of the ſeveral families, and found in a private library (Lord Oxford's). *Ibid.*

Cro. Eliz. 227. Leon. 242. S. C. and S. P. Sid. 300. 6 Mod. 41. S. P. An (*b*) almanack is ſufficient evidence to prove a day *Sunday*, *&c.*

(*b*) That the almanack to go by is that annexed to the Common Prayer-book. 6 Mod. 81.

Raym. 84. Herbert and Tuckal. So, an almanack, in which the father wrote the nativity of his ſon, was admitted and allowed to be ſtrong evidence at a trial at bar, to prove the nonage of the ſon.

[So

[So, an entry in a father's family bible, an inſcription on a tomb-ſtone, a pedigree hung up in the family manſion, are evidence in queſtions of pedigree. Cowp. 594.

The regiſter of the Navy-Office, with proof of the method there uſed to return all perſons dead, with the mark Dd. is ſufficient evidence of a death.] *Ex dim.* Whitcomb, P. 6 Ann. C. B. B. N. P. 249.

So, books belonging to a publick company are good evidence; and therefore a party concerned in intereſt may, on motion, have copies of them to be made uſe of as evidence; for, being tranſactions of a publick nature, the publick is concerned in them. 7 Mod. 129. Ld. Raym. 744. Geery and Hopkins, on a motion for copies of the books of the East India Company, *& vide* 5 Mod. 395. Ld. Raym. 337. [It is eſſential in motions of this kind, that the party applying ſhould be concerned in intereſt. He muſt therefore be a member of the company, or tenant of the manor, the books of which he applies to inſpect. Hodges v. Atkis, 3 Wilſ. 398. 2 Bl. Rep. 877. S. C. Mayor, &c. of Exeter v. Coleman, Barnes, 228. Anon. 2 Vez. 620. Shelling v. Farmer, 1 Str. 646. Murray v. Thornhill, 2 Str. 717. Rex v. Dr. Bridgman, *Id.* 1203. Allan v. Tap, 2 Bl. Rep. 850. Biſhop of Hereford v. Duke of Bridgewater, Bunb. 269. Smith v. Davis, 1 Wilſ. 104. Smith v. Tillebois, cited 3 Term Rep. 142. But in Mayor of Lynn v. Denton, 1 Term Rep. 689., Corporation of Barnſtaple v. Lathey, 3 Term Rep. 303., and Mayor, &c. of London v. Mayor, &c. of Lynn, 1 H. Bl. 211., the courts ſeem to have over-ruled the caſes of Hodges v. Atkis, 3 Wilſ. 398. and Mayor, &c. of Exeter, &c. v. Coleman, Barnes, 228., and to have holden, that in ſuch actions as are brought to ſupport claims of duties made by a corporation upon the publick, of the validity of which the beſt evidence muſt be in the documents of the corporation, and of which documents equity would grant an inſpection; ſuch, for inſtance, as claims of tolls; that, in theſe caſes, individuals who are intereſted to diſpute the claims have an intereſt in the books which will entitle them, upon motion, to an inſpection of the entries relating to the ſubject-matter of the diſpute.—Or, if the party applying be not a member, the books muſt be the common evidence of the tranſactions between him and the body in whoſe cuſtody they are, ſo as to be for this purpoſe the books of both. Such are the caſes of entries in the cuſtom-houſe books, of the India Company, Bank ſtock, and transfer books. Geery v. Hopkins, 2 Ld. Raym. 851. Warriner v. Giles, 2 Str. 954. Crew v. Saunders, *Id.* 1005. But the courts will not grant theſe motions unleſs the evidence contained in the books be directly material in the cauſe, nor will they permit the party applying to inſpect and copy any more than what relates to himſelf. Benſon v. Port, cited 1 Wilſ. 240. 1 Bl. Rep. 40. S. C. Mayor, &c. of London v. Swinland, 1 Barnard. 455. Crew v. Saunders, 2 Str. 1005. Rex v. Fraternity of Hoſtmen, &c. *Id.* 1223. Tenants of a manor ſeem to have a right to a general inſpection of the court-rolls. Rex v. Shelly, 3 Term Rep. 141. How far corporaters have ſuch right with reſpect to the corporation-books ſeems doubtful. Rex v. Babb, 3 Term Rep. 581. Nor will the courts permit an inſpection for the purpoſe of collecting evidence to ſupport a criminal proſecution. Rex v. Worſenham, 1 Ld. Raym. 705. Crew v. Saunders, 2 Str. 1005. Rex v. Cornelius, *Id.* 1210. Rex v. Mead, 2 Ld. Raym. 927. Rex v. Dr. Parnell, 1 Wilſ. 329. 1 Bl. Rep. 37. S. C. Rex v. Heydon, 1 Bl. Rep. 351. Roe v. Hanway, 4 Burr. 2489.]

By the 7 *Jac.* 1. *c.* 12. reciting, That whereas divers men of trades and handicraftſmen, keeping ſhop-books, do demand debts of their cuſtomers upon their ſhop-books, long time after the ſame hath been due, and when, as they ſuppoſed the particulars and certainty of the wares delivered to be forgotten, then either they themſelves, or their ſervants, have inſerted into their ſaid ſhop-books divers other wares ſuppoſed to be delivered to the ſame parties, or to their uſe, which in truth never were delivered; and this of purpoſe to increaſe, by ſuch undue means, the ſaid debt; and whereas divers of the ſaid tradeſmen and handicraftſmen, having received all the juſt debt due upon their ſaid ſhop-books, do oftentimes leave the ſame books uncroſſed, or any way diſcharged, ſo as the debtors, their executors, or adminiſtrators, are often by ſuit of law enforced to pay the ſame debts again to the party that truſted the ſaid wares, or to his executors or adminiſtrators, unleſs he or they can produce ſufficient proofs, by writing or witneſſes, of the ſaid payment, that may countervail the credit of the ſaid ſhop-

Although the ſtatute ſays a ſhop-book ſhall not be evidence after the year, yet this does not make it evidence of itſelf within the year, without ſome circumſtances. 2 Salk. 690. As in an action by a brewer, his manner of dealing was proved to

ſhop-books, which few or none can do in any long time after the ſaid payment; it is therefore enacted, "That no tradeſman, or "handicraftſman keeping a ſhop-book as aforeſaid, his or their "executors or adminiſtrators, ſhall be allowed, admitted, or "received to give his ſhop-book in evidence in any action "for any money due for wares hereafter to be delivered, "or for work hereafter to be done, above one year before the "ſame action brought, except he or they, their executors or ad- "miniſtrators, ſhall have obtained or gotten a bill of debt or ob- "ligation of the debtor for the ſaid debt, or ſhall have brought or "purſued againſt the ſaid debtor, his executors or adminiſtrators, "ſome action for the ſaid debt, wares, or work done, within one "year next after the ſame wares delivered, money due for wares "delivered, or work done."

be, that the draymen came every night to the clerk of the brewhouſe, and gave him an account of the beer they had delivered out, which he ſet down in a book kept for that purpoſe, to which the draymen ſet their hands, and that the drayman, who had ſo ſet his hand, was dead; but that this was his hand which was ſet to the book; and this was held good evidence of a delivery; otherwiſe of the ſhop-book itſelf ſingly, without more. Salk. 285. pl. 18. 2 Ld. Raym. 873. 6 Mod. 264. Price v. the Earl of Torrington.—So, in an *indebitatus aſſumpſit* on a taylor's bill, a ſhop-book was allowed for evidence, it being proved that the ſervant who wrote the book was dead, and that this was his hand, and he accuſtomed to make the entries therein. 2 Salk. 690. Pitman and Madox, ruled by Holt, C. J.——[But when the plaintiff to prove delivery, produced a book which belonged to his cooper, who was dead, but his name ſet to ſeveral articles, as wine delivered to the defendant, and a witneſs was ready to prove his hand-writing; Lord C. J. Raymond would not allow it, ſaying, it differed from Lord Torrington's caſe, becauſe, there, the witneſs ſaw the drayman ſign the book every night. Clerk and Bedford, M. 5 G. 2 Bull. N. P. 281.—Upon an iſſue out of Chancery to try whether eight parcels of Hudſon's Bay ſtock, bought in the name of Mr. Lake, were in truſt for Sir Stephen Evans, his aſſignees (the plaintiffs) ſhewed, firſt, that there was no entry in Mr. Lake's books relating to this tranſaction. Secondly, ſix of the receipts were in the hands of Sir Stephen Evans, and there was a reference on the back of them by Jeremy Thomas (Sir Stephen's book-keeper) to the book B. B. of Sir Stephen Evans. Thirdly, Jeremy Thomas was proved to be dead, and upon this the queſtion was, Whether the book of Sir Stephen Evans referred to, in which was an entry of the payment of the money, ſhould be read? And the court of K. B. at a trial at bar, admitted it not only as to the ſix, but likewiſe as to the other two in the hands of Sir Biby Lake, the ſon of Mr. Lake.]

"Provided that this act ſhall not extend to any intercourſe of "traffic, merchandizing, buying, ſelling, or other trading or "dealing for wares delivered, or to be delivered, money due, or "work done, or to be done, between merchant and merchant, "merchant and tradeſman, or between tradeſman and tradeſman, "for any thing directly falling within the circuit or compaſs of "their *mutual* trades and merchandize; but that for ſuch things "only they and every of them ſhall be in caſe as if this act had "never been made; any thing herein contained to the contrary "thereof notwithſtanding."

[Beſides the caſe of ſhop-keepers' books, there are other caſes where entries in private books or memorials are admitted in evidence to affect the rights of third perſons, upon proof that the writer is dead, and that they are in his hand-writing. Any entry under ſuch circumſtances is admiſſible, when it is in reſtraint, not in advancement of the right of the party who made it; as where the party charges himſelf by the entry with the receipt of money, for the entry in this caſe derives its authority from the improbability that he would commit a falſehood to writing which muſt operate to his diſadvantage. An entry again is admiſſible in thoſe caſes where hearſay evidence of the writer's declarations reſpecting the ſame fact would be received in evidence (*a*). And in the caſe

Smartle v. Williams, Bull. N. P. 283. Comb. 249. S. C. 1 Ld. Raym. 745. Barry v. Bebbington, 4 Term Rep. 514. Stead v. Heaton, *Id.* 669. 5 Term Rep. 123. In the caſe of Searle

caſe of eccleſiaſtical dues, it is every day's practice to admit entries in the parſon's books as evidence for his ſucceſſor (*b*). v. Lord Barrington, 2 Str. 826.

the indorſement of the payment of intereſt made under the hand of the obligee within the twenty years from the date of the bond, was admitted as evidence in an action on the bond by the repreſentative of the obligee to repel the preſumption ariſing from length of time of its being ſatisfied. 2 Vez. 43.——

(*a*) Lill Pr. Reg. 552. Woodnoth v. Lord Cobham, Bunb. 180. Glyn v. Bank of England, 2 Vez. 40. Outram v. Morewood, 5 Term Rep. 123. In a recent caſe in the Exchequer, the effect of this kind of evidence was very attentively conſidered. The plaintiff claimed the lands in queſtion as part of old incloſures demiſed for ninety-nine years under a rent reſerved to the lord of the manor, which term was alleged to be expired. In ſupport of his title, he produced the rental of the family of fifty years date, which charged the ſteward with the receipt of ſuch and ſuch ſums, and expreſſed that thirteen ſhillings and fourpence had been annually received for theſe premiſes by the name of incloſure on leaſe. The defendants contended, that the rentals were evidence only of the receipt of ſo much money, but were not admiſſible to prove in what right it was received, whether as a conventionary or a quit-rent. And it was urged, that if they were admitted to that extent, a ſteward of a manor, by ſuch inſertions in his rentals, might convert all the quit-rents in the manor into conventionary rents on terms for years, and might even expreſs when ſuch terms would expire, and ſo get all the freeholds into the poſſeſſion of the lord. But the court, *viz.* Smythe, Chief Baron, Perrott, Eyre, and Burland, barons, ſaid, fraud is not to be preſumed; and the rentals are admiſſible not only to prove the receipt of the money, (which was agreed on all hands,) but alſo to ſhew in what right it was received. For otherwiſe the receipt of a groſs ſum of money proves nothing; it muſt be allowed to ſhew, that it was in reſpect of certain lands, which is evidence of tenure; and therefore it may ſhew the particular kind of tenure. The rentals in the hands of executors are evidence to charge or diſcharge them, which they could not do, unleſs they were allowed to ſhew the particular right in which the money was received. The ſteward, if living, would be a competent witneſs: as he is dead, this is the next beſt evidence, and therefore admiſſible. Harpur v. Brook, Tr. 14 G. 3. on a motion for a new trial. 3 Wooddes, 332.——(*b*) 2 Vez. 43. Bunb. 46.

If *A.* be ſeiſed of the manors of *B.* and *C.*, and during his ſeiſin of both, he cauſe a ſurvey to be taken of the manor of *B.*, and afterwards the manor of *B.* be conveyed to *E.*, and after a long time there be diſputes between the lords of the manor of *B.* and *C.*, about their boundaries; this old ſurvey may be given in evidence. *Secùs*, if the two manors had not been in the hands of the ſame perſon at the time the ſurvey was taken.] Bridgman v. Jennings, 1 Ld. Raym. 734.

On a conteſt in Chancery concerning a promiſe made by the Lord *Abigney*, to ſettle lands on the Lord *Clifton* and his lady, who was the daughter of the Lord *Abigney*; the king's certificate under his ſign manual, ſignifying the purport of the ſaid promiſe, was held ſufficient evidence of it. Hob. 213. Lord Abigney v. Clifton, Godb. 199. S. P. but 2 Roll. Abr. 686. ſeems contrary.

[With reſpect to deeds, the general rule is, that where any perſon claims by a deed in the pleadings, there, he ought to make a profert of it to the court; and where he would prove any fact in iſſue by a deed, the deed itſelf muſt be ſhewn.

The deed conſiſts of three things: 1ſt, Of ſealing by the parties. 2dly, Of delivery to the party to whom the deed is made. 3dly, Of a right transferred, or obligation created.

1ſt, The ſeal was very ancient in the *Roman* and *Grecian* governments, and from them it came to the northern nations, who anciently paſſed all manner of right, by the actual tradition of the thing itſelf; the ſeal followed from the invention of coins, and is a derivation from the ſame convenience; for as coins were invented as tickets, to facilitate the exchange of all manner of commodities, ſo when coin was wanting, or not ready for payment, tickets were given by impreſſion in wax, and theſe paſſed inſtead of the coin itſelf, and theſe impreſſions were made with great diſtinc-

tion, for they contained the arms or ſome notorious ſymbol of the perſon contracting; now when ſuch diſtinctions were taken up and found of uſe, they were at laſt required in the authenticating of all manner of written contracts, and from hence the law grew, that there could be no ſolemn contract without the diſtinction of the ſeal.

2dly, The delivery was always a ſolemn ſign uſed by the northern nations, in the transferring of right, and as they anciently delivered the thing itſelf, and by that delivery made the alienation; ſo, when contracts took the place of the things themſelves that were to be delivered, they annexed the ſolemnity to the contract, and the contract was completed by the delivery, and from thence it became neceſſary that a delivery ſhould be made of all contracts.

3dly, In every contract there muſt be ſome right transferred, or obligation created, and therefore there muſt be apt words to ſhew what right was transferred, and to whom, to ſhew what obligation was created, and to whom: and the ſenſe and ſignification of the words muſt be expounded by the law, ſince it is the province of the law to determine the forms and ſolemnities, and operation of all manner of contracts; for the operation and effect of a contract cannot be determined but by the rules of law that are appointed as the meaſures of transferring right, and of creating obligations; and without ſuch ſtated rules in every ſociety, no man could be certain of any property, for then the ſenſe of the contract muſt be at the mercy of the judge or jury, who might conſtrue or refine upon it at pleaſure.

There muſt therefore be a profert made of all ſolemn contracts in any action founded on ſuch contracts,

1ſt, For the ſecurity of the ſubject, that what right is transferred, or what obligation is created, may be judged of according to the rules of law.

2dly, Becauſe all allegations in a court of juſtice, muſt ſet forth the thing demanded: now the thing demanded cannot be ſet forth without the inſtrument ſhewn, upon which the demand ariſes, for ſince the demand is by the inſtrument, there can be no demand at all without ſhewing that from which it ariſes.

Co. Lit. 226. Therefore parties to a deed cannot found any claim without ſhewing a deed to the court.

Ibid. 267. 10 Co. 92. Nor can privies in eſtate take any advantage of a deed without ſhewing it.

Ibid. 93. As, if there be tenant for life, remainder in fee, and there be releaſe to him in remainder, tenant for life cannot take advantage of it without ſhewing the deed, for ſince the right paſſed merely by the deed, to ſay any perſon releaſed without deed will not be a good plea.

6 Co. 38. a. When a man ſhews a title in himſelf, every thing collateral to that title ſhall be intended whether it be ſhewn or not, for though the law requires an exactneſs in the derivation of the title, yet when that title is ſhewn, the law will preſume all collateral circumſtances in favour of right; for when lawful conveyances, which

are made with care, and on conſideration, are brought forward, it would create too great nicety to require an exactneſs in the ſhewing of every collateral matter, and would tend to the entangling of right with too many difficulties, and therefore by the benignity of juſtice, they ſhall be intended: beſides, a matter collateral to a title is what doth not enter into the eſſence or being of a title, but ariſes *aliundé*, ſo that there muſt be a good derivation of your right without it.

As, when a man declares of a grant or feoffment of a manor, the attornment ſhall be intended; for when a title is ſhewn to the manor, attornment of the tenant which is collateral to that title, ſhall be intended till the contrary is ſhewn on the other ſide *. Co. Lit. 310. Cro. Eliz. 401. * See 4 An. c. 16. § 9. whereby all attornments of tenants are taken away.

So in treſpaſs, the defendant conveys the houſe in which, *&c.* by feoffment from *J. S.* and juſtifies damage feaſant; the plaintiff replies, that *J. S.* before the feoffment made a leaſe to *J. N.* who aſſigned to him; the defendant rejoins, that the leaſe was made on condition, that if *J. N.* aſſigned over without licence, by deed from *J. S.*, that then *J. S.* ſhould re-enter; the plaintiff ſurrejoins, that *J. S.* did give licence by deed, without any profert of the deed, and yet this ſurrejoinder was good, becauſe the plaintiff's title was by aſſignment of the leaſe from *J. N.*, and, conſequently, the licence from *J. S.* is but a matter collateral to the aſſignment, and, by conſequence, the deed muſt be intended to be well and legally made, though it be not ſhewn to the court. 6 Co. 38. Cro. Jac. 102.

But if the matter be collateral to the plaintiff's title, then there is another difference, and that is where the deed is neceſſary *ex proviſione hominis*, and where it is neceſſary *ex inſtitutione legis*; for where the deed is neceſſary *ex inſtitutione legis*, there, you muſt ſhew it, for it is repugnant that the law ſhould require a deed, and not put you to ſhew that deed when it is made; as if you are obliged to ſhew the attornment of a corporation, there you muſt ſhew a deed, inaſmuch as corporeal bodies, by the rules of the law, cannot act but by corporeal inſtruments; for the body conſiſts in agreement and union, by creation of law, by patents or inſtruments under ſeal, and there is no act of the aggregate body but in the ſame manner, ſo that there can be no attornment without a deed, and the law cannot allow the attornment of ſuch a body without it; therefore no attornment is ſhewn, unleſs a deed is ſhewn alſo. 6 Co. 38.

But when a deed is neceſſary *ex proviſione hominis*, there, when it is collateral, as in caſe of the licence before mentioned, it need not be ſhewn, for the private act of the parties ſhall not controul the judgment of the law, that intends all ſuch collateral matters without ſhewing. *Ibid.*

There is a difference to be taken between things that lie in livery, and things that lie in grant; for things that lie in livery may be pleaded without deed, but for a thing that lies in grant, regularly, a deed muſt be ſhewn.

1ſt, Of things in livery; it is well known that livery was the ancient conveyance, which was a ſolemn delivery of land in ſight of

of the inhabitants; and becauſe this was done *coram paribus curiæ*, and the tenant ever after reſided in the poſſeſſion, it was reckoned the moſt notorious way of conveyance; and ſince this was the ancient *Gothick* way, and becauſe they reckoned it of itſelf moſt manifeſt, the ſolemnities of a deed were not neceſſary.

2 Roll. Abr. 682. And therefore a man may plead that *J. S.* infeoffed him without ſaying *per indenturam*, and yet give the indenture in evidence, becauſe the indenture is not the feoffment, but the feoffment is made by the livery, and by that only the party is inveſted with the feud, and the indenture is only evidence of ſuch feoffment.

Ibid. But if a man pleads, that *J. S.* hath infeoffed him *per fait*, whether a man may give a parol feoffment in evidence, hath been reaſonably doubted, becauſe he has bound himſelf up to a feoffment by deed, and if the jury have only evidence of a parol feoffment, and yet find the iſſue, the deed may be uſed by way of eſtoppel ever after, where in truth there was no ſuch deed.

2 Roll. Abr. 682. So, a demiſe may be had without deed, as well as a feoffment, for here the party reſides in the poſſeſſion, and therefore the old way of contracting governs in this caſe; and ſo a man may plead a demiſe without deed, and give the indenture in evidence, for the indenture may be uſed as an evidence of the contract that would be good, whether there were any indenture or not; but if the demiſe were laid by indenture, it ſeems that they could not give a parol demiſe in evidence.

Co. Lit. 352. Livery alſo is an eſtoppel, and is by *Coke* called an *eſtoppel in pais*, becauſe it is a fact a man cannot impeach or deny, and this is from the notoriety of the ceremony; for when ſolemnities are ſettled for transferring a poſſeſſion, they ought to be held as ſacred by the law; and therefore a man is concluded from deſtroying that of which he himſelf is the author, or from impeaching that which is held as ſacred to transfer all poſſeſſions.

Ibid. 225. Lit. § 365. Therefore, if the defendant pleads the livery and ſeiſin of the plaintiff, the plaintiff cannot reply that the livery was conditional without ſhewing the deed, inaſmuch as the plaintiff is eſtopped to defeat his own livery by a naked averment and parol evidence only.

Co. Lit. 226. Lit. § 366. But the jury are not eſtopped on the general iſſue, from finding ſuch a conditional feoffment, for the jury are men of the neighbourhood that are ſuppoſed to be preſent at the ſolemnity, and they are ſworn *ad veritatem dicendam*, and therefore they cannot be eſtopped from finding the truth of the matter, and, by conſequence, may exhibit the condition on the feoffment.

But ſince the uſe of the ſolemnities before the men of the country had ceaſed, by allowing ſecret liveries only in the preſence of two witneſſes, therefore the ſtatute of frauds and perjuries hath enacted, that no leaſes, eſtates, or intereſts of freehold, or for a term of years, or uncertain intereſt (not being copyhold) ſhall be aſſigned, granted, or ſurrendered, unleſs it be by deed or note in writing, under the hand of the party or his agent thereunto lawfully authorized in writing, or by act and operation of law, ſo that by this ſtatute the ceremony of livery only is not ſufficient

Buck's caſe, Trin. 1701.

ficient to paſs eſtates of freehold or terms for years; but it is not neceſſary to ſet forth ſuch contract on the pleadings, for they are, as they were formerly, *feoffavit et demiſit*.

A man may plead a condition to determine an eſtate for years, without deed; for this begins without any livery, and therefore the party is not eſtopped by any notorious ceremony from averring the condition. Co. Lit. 223. Lit. § 365.

But where a man ſets out a feoffment, the other party may reply, that it was by deed, and ſhew the condition, for then there is an eſtoppel; and ſo the matter is in equal balance, and therefore muſt be determined according to truth.

2dly, Of things lying in grant,—and theſe are all rights, as fairs, markets, advowſons, and rights to lands, where the owner is out of poſſeſſion; and theſe being rights, they cannot poſſibly paſs by inveſtiture of the poſſeſſion, becauſe they cannot poſſibly be delivered over, or poſſeſſed, and therefore they muſt paſs by the next ſort of grants that holds the ſecond place, in point of ſolemnity, and that is by grant under the hand and ſeal of the party.

Now a perſon that claims any thing lying in grant, muſt ſhew his deed from the party that had the original grant, or otherwiſe he muſt preſcribe in the thing he pretends to, and the preſcription being immemorial and ſuppoſing a grant, ſupplies the place of the grant.

He alſo that has a particular eſtate, by the agreement of the parties, muſt ſhew not only his own conveyance, but the deeds paramount, for there can be no title made to a thing in agreement, but by ſhewing ſuch agreement, and the particular tenant ought to covenant to have the power of the deeds, inaſmuch as he has no title, unleſs he can derive the eſtate that ariſes in agreement, up to the firſt original grant. 10 Co. 94.

But where any perſon claims any eſtate, by particular act in law, there, he may make his claim without ſhewing the deeds; as tenant in dower, or by elegit, or the guardian in chivalry, may claim an eſtate in a thing lying in grant without the deed; for when the law creates an eſtate, and yet doth not give the particular tenant the property of the deeds, it muſt be allowed that the eſtate be defended without them, otherwiſe the creation of the eſtate were altogether in vain. 10 Co. 93, 94.

So, they may plead a condition without ſhewing the deeds, becauſe they claim an eſtate by the act of the law, and therefore are not eſtopped by the livery; ſo that they may claim an eſtate defeated by the condition without a deed: alſo, they are not ſuppoſed to have the deeds and muniments of the eſtate, and therefore for the reaſon formerly given, may do it without deed. Co. Lit. 225.

Note; 10 *Co.* 94. does not warrant this diſtinction, between tenant in dower, and tenant by the curteſy generally, but only in the caſe of a releaſe made to the wife.

But tenant by the curteſy cannot claim an eſtate lying in grant, without deed, becauſe he has the property in and cuſtody of the deeds, in right of his wife, and that property cannot be deveſted out of him, during the continuance of his eſtate. 10 Co. 94. Co. Lit. 226. a.

10 Co. 94. Co. Lit. 226. a. So alſo he cannot defeat an eſtate of freehold without ſhewing the deed, nor can the lord by eſcheat do it without ſhewing the deed; for the act of livery is an eſtoppel that runs with the land, and bars all perſons to claim it, by virtue of any condition without the condition appears in a deed, for the notoriety and ſolemnity of the act is that which makes it obligatory to all perſons, ſo that they cannot impeach it, without ſhewing a precedent title, for that livery cannot be defeated, but by ſhewing ſomething equally notorious; and ſince in both theſe caſes the cuſtody of the deeds reſides with them, they muſt ſhew the condition.

Co. Lit. 267. 10 Co. 94. b. So that the general rule is, where any perſon ought to have the cuſtody of the deeds, there, where ſuch perſon is compelled to ſhew his title, he ought to make a profert of thoſe deeds to the court, for every man ought to have his deeds, and cannot take advantage of his own negligence in loſing them; therefore in the caſe formerly put, of tenant for life, the remainder in fee, and a releaſe is made to him in remainder, in ſuch caſe tenant for life ought to make a profert of the deed, for in this caſe they have both parts of the ſame feud, and therefore tenant for life is ſuppoſed to be equally entitled to the deeds as he in remainder.

Co. Lit. 226. Styl. Regr. 205. But where a perſon is an utter ſtranger to any deed, there, in pleading, he is not compelled to ſhew it; for where he is not ſuppoſed by the law to have the cuſtody of the deeds, he cannot be compelled in pleading to ſhew ſuch deeds to the court, for that were to compel the party to impoſſibilities.

Co. Lit. 226. a. As, if a man mortgageth his land, and the mortgagee leaſeth the land for years, reſerving a rent, and then the condition is performed, the mortgagor re-enters; the leſſee in bar of an action of debt ſhall plead the condition and re-entry, without ſhewing the deed, for the leſſee was never, nor could be, entitled to the cuſtody of the deed, and therefore it were altogther unjuſt to compel him to produce it.

Co. Lit. 226. So, if a man bring a *præcipe* againſt *A.*, he ſhall plead that he was only a mortgagee, and that the mortgage was performed, ſo that he hath no longer ſeiſin of the eſtate, and this without ſhewing the deed; for upon performance of the condition, the property of the deed was no longer in the mortgagee, but it ought to be re-bailed to the mortgagor, and having no longer any title to the deed, he may plead the condition, without ſhewing it.

10 Co. 94. So, in an action of waſte, or in diſcharge of the arrears of rent, the tenant pleads a grant of the reverſion and attornment, after ſuch waſte committed, or ſuch arrear due, the tenant cannot ſhew the grant, *cauſa qua ſupra.*

5 Co. 74. b. A deed enrolled muſt be offered to the court in pleading, though the deed be enrolled in the ſame court in which the plea is depending, for this is no record but a deed recorded; for a record muſt be the act of the court, and therefore the deciſions of juſtice by the court, that lie as precedents for future obſervation, are the record of the court, and letters patent, which are the king's

king's acts, are the higheſt ſort of records; but a deed enrolled is only a private act of the party authenticated in court; and from thence this difference is drawn, that letters patent enrolled in the ſame court, or records of the ſame court, need not be profered to the court, but a deed enrolled muſt; for all records that are publick acts, and that lie for the direction of the court, in matters of judicature, muſt be taken notice of, and therefore they need but refer to it with a *prout patet per recordum*, for the court will take notice of the courſe and orders of court, upon reference to them; but deeds are no more than the private act of the parties authenticated by the court, and they do not lie for the direction of the court, but take hold of the authority of it to give them credit; and therefore the court doth not take notice of them, unleſs they be pleaded. But the letters patent of another court the court doth not take notice of, unleſs they be offered, for ſince they are none of the records that are directed to this court of juſtice, it is not the office of the court to take notice of them, and therefore it is their duty to offer them as they do all other allegations. 10 Co. 92. Stra. 520.

To a deed acknowledged in court, a man cannot plead *non eſt factum*, for being done in the court, the truth of the fact is ſo far to be credited, that he ſhall never deny the deed, but he may avoid the operation of the deed by pleading *reins paſſa par le fait*, for that doth not impeach the credit of the court, in which it was acknowledged.

Since the term, to avoid the entering up the ſeveral continuances of buſineſs, is reckoned as one continued law day, therefore deeds pleaded ſhall be in the cuſtody of the law during the whole term, this being conſidered as the day wherein they are pleaded; and being then before the court, any body may take advantage of them. But ſince they belong to the cuſtody of the party, if the deed be not denied, it ſhall go back to the party, after the term is over, and then nobody can take advantage of it, without a new profert; for then it is not before the court; and therefore the plaintiff in the King's Bench may take the advantage of a condition in a deed in his replication, becauſe it is *et prædictus A. dicit*, as of the ſame term; but he cannot take advantage in a replication of a deed in the Common Pleas, becauſe they enter an imparlance to another term: but where the deed comes in, and is denied, it remains in court for ever, becauſe that is the only point in debate on which the deciſion of the court is founded, and therefore like all other deciſions, it muſt remain among the other records of the court; and becauſe it is tied up to this court, and is impoſſible to be removed, it ſhall be pleaded in another court without ſhewing. 5 Co. 74. 75.

As no party ſhall take advantage of his own negligence, in not keeping his deeds, which in all caſes ought to be fairly produced to the court; ſo his adverſary ſhall not take any advantage in his violent detaining of them; for the one by a violent taking away of the deeds gives a juſt excuſe to the other for not having them at command, and no man can ever make any advantage of his own injury; and therefore it is a good plea for one party to Co. Lit. 226. 2 Stra. 1186. 1198.

ſay, that the other entered and took away the cheſt wherein the deeds were.

Cro. Jac. 32. In an action of debt upon a bond, it is matter of ſubſtance to make a profert of the deed, becauſe this is the contract on which the court ought to found their judgment, and therefore it ought to be exhibited to the court.

2 Saund. 402. 3 Keb. 61. 2 Stra. 1261. It is not matter of ſubſtance to ſhew letters of adminiſtration, for whether they are legally granted or not belongs to the ſpiritual courts, who are governed by the rules of the civil law, and therefore their legality cannot be weighed at common law, ſince it has different meaſures of judicature.

Evidence of Deeds.

10 Co. 92. b. 93. Secondly, of giving deeds in evidence to the jury—and here the general rule is, that where any thing is to be proved, the deed itſelf muſt be given in evidence, and not the copy of it; and the deed muſt regularly be proved by one witneſs at leaſt.

Mich. 1718. in the Exch. *per Curiam.* This is now to be underſtood where the deed is of a late date, for if the deed be of thirty years ſtanding, which now makes an ancient deed, and the perſon to whom the deed was made, or thoſe deriving under him, have been in poſſeſſion under the deed, ſuch ancient deed ſhall be read, without proof, though the witneſs to it be alive; and this the Lord Chief Baron *Gilbert* declared to be the rule of evidence at *niſi prius:* and if the perſon to whom the deed was made hath been in poſſeſſion of the lands contained in the deed, ſuch poſſeſſion ſhall be preſumed to be under the ancient deed, unleſs the contrary be proved.

Firſt, the deed ought to be given in evidence, and not the copy only, for though in records the copy was admitted in evidence, yet the law will not regularly allow it in private deeds, for they are not within the ſame reaſon as copies of records, for a record is fixed in a certain place, and therefore the original cannot be had, and, by conſequence, the copy is the beſt evidence.

But deeds are only private evidences, and not fixed or confined to a certain place, but are lodged in the cuſtody of the party, and not of the law, and therefore they muſt be produced in evidence; for the law requires the beſt evidence that the nature of the thing is capable of, and the deed is much better evidence than the copy of it; for the raſure and interlineation that might vacate the deed, might appear in the deed itſelf, and the very offering a copy carries a preſumption, as if the original were defective, and therefore the copy is not to be admitted: beſides, ſince the deeds are in the cuſtody of the party, the deeds themſelves muſt be produced, for a man cannot make his own fault in loſing the deeds, any part of his excuſe.

But there are ſome Exceptions out of this General Rule.

10 Co. 92. b. 93. Mod. 4. 94. 114. 266. 1. E. 99. pl. 31. 1ſt, And that is where they prove the deeds themſelves to be burned with fire, for the proof of this matter will excuſe the deed from being produced to the jury: but notwithſtanding a profert is neceſſary to the court, for there is that conveniency in keeping

keeping to known rules, that they cannot be broken, though they tend to the miſchief of particular perſons; and there cannot be a more convenient rule, than that the cauſe of every complaint ought to be ſhewed to the court, but the jury muſt go according to the evidence of the fact.

It hath been lately determined by the court of K. B. that a deed may be pleaded as loſt and deſtroyed by time and accident without a profert. Read v. Brookman, 3 Term Rep. 151.

Now to prove the import of the deed, that it was in ſuch an houſe, and that the houſe was burned, is the beſt evidence that can be had of ſuch deed, and gives reaſonable grounds for the jury to find it.

2dly, A copy of a deed is good evidence, where the deed is in the defendant's hands, and he will not produce it; for when the original is in the defendant's hands, the copy is the beſt evidence; for the preſumption that oppoſes the copy is, becauſe the original deed is, or ought to be, in the party's hands that would produce the copy; now that preſumption is deſtroyed where the plaintiff proves the deed itſelf to be in the hands of the defendant, for then it cannot be preſumed, that there was any better evidence, or that there was any interlineation that obliged the plaintiff to cover it, for if the copy were not perfect and exact, it would be overthrown by the defendant's producing the original. Mod. 265.

A copy of an agreement between the abbot of *Quarrer* and the monks of *Lyra* was produced in evidence; to which it was objected, that it could not be read, being neither a record, nor a publick inſtrument. But a copy of the *Oxford* ſtatute (*a*) was exhibited, forbidding any book to be taken out of the *Bodleian* Library: and then the court allowed the copy of this agreement, though they conſidered it as not within the general rules of evidence, but received it on the very particular circumſtances of this caſe. Bunb. 191.

(*a*) This ſtatute, it ſeems, ſhould have been proved by a ſworn copy.

But the copy of a deed muſt be proved by a witneſs that compared it with the orignal, for there is no proof of the truth of the copy, or that it hath any relation to the deed, unleſs there be ſomebody to prove its compariſon with the original. See Mod. 4. 94. 114. 266. 2 Keb. 31. 546. 3 Keb. 1, 2. 477.

5 Mod. 211. 386. 6 Mod. 225. 248. 10 Co. 92. b. 93. 2 Vern. 471. 591. 603. Eq. Abr. 228. Stra. 401. 526. See L. E. 104. pl. 51.

Where the effect or contents of a deed are proved, and where the deed is afterwards given in evidence, and they diſagree, there, the deed itſelf ſhall control the other evidence. So it is, where the jury on a ſpecial verdict collect the contents of a deed, and yet afterwards find the deed *in hæc verba*, the court, there, is not to regard the collection they have made of the ſubſtance of the deed, but the deed itſelf, for that collection derives its authority from the deed, and therefore muſt of itſelf fail and come to nothing, when it is oppoſite to the deed of which it is a collection. Vaugh. 77.

3dly, Where the poſſeſſion has gone along with any deed for many years, there, a very old copy of the deed may be given in evidence, with proof alſo that the original is loſt; and that is according to the rule of the civil law, *Si vetuſtate temporis et judiciariâ cognitione*

ſint roboratæ, for poſſeſſion could not be ſuppoſed to go along in the ſame manner, unleſs there had been originally ſuch a deed, and ſo executed as the copy mentions, and the copy cannot be ſuppoſed to be only offered in evidence, to avoid ſight of the original, ſince it is ſo ancient, that the antiquity alone prevents all ſuſpicion of its being counterfeit, and the antiquity is known from the ancientneſs of the poſſeſſion. But,

Qu. Whether ſuch a copy ſhall be required without the proof of its being a true copy, by compariſon with the deed itſelf?

5 Co. 54. Style, 445. Keb. 117. Tri. per Pais, 355. Salk. 280. Notwithſtanding that deeds of bargain and ſale enrolled have frequently in trials at *Niſi Prius* been given in evidence without being proved; yet the law may well be doubted. In ſupport of the practice, the caſe of Smartle and Williams in Salk. 280. is much relied on; but that caſe is wrong reported; for it appears by 3 Lev. 387. that the acknowledgment was by the bargainor, and ſo it is ſtated in Salk. MSS. Beſides, it appears from both the books that it was only a term that paſſed, and, conſequently, it was no enrolment within the ſtatute. Bull. N. P. 255-6.

4thly, The inſpection of a deed enrolled, ſhall be given in evidence, and where the deed needs enrolment, there, the enrolment is the ſign of the lawful execution of ſuch deed, and the officer appointed to authenticate ſuch deeds by enrolment is alſo empowered to take care of the fairneſs and legibility of ſuch deeds, and therefore a copy of ſuch enrolment muſt be ſufficient; for when the law hath appointed them to be made publick acts, the copy of ſuch publick acts ſhall be, like all other publick acts, a ſufficient atteſtation.

5 Co. 54. Style, 445. Keb. 117. Tri. per Pais, 355. Salk. 280. 2 Vern 471. 591. However, though the deed needs no enrolment, yet if it be enrolled, it is now the practice to admit it in evidence without proof of its execution. 1 Ventr. 296-7. In the caſe of Smartle and Williams, Salk. 280. the deed did not need enrolment, yet being enrolled on the acknowledgment of the bargainor, it was read againſt him without being proved. Bull. N. P. 256.

But where a deed needs no enrolment, there, though it be enrolled, the *inſpeximus* of ſuch enrolment is no evidence, becauſe ſince the officer hath no authority to enrol them, ſuch enrolment cannot make them publick acts, and, conſequently, cannot entitle the copy of them to be given in evidence, becauſe ſuch practices may be improved to very ill purpoſes; for then if the deed were doubtful, it were but to enrol it, and bring the copy or inſpection of it in evidence, and thereby avoid the giving in evidence a deed that was anyway ſuſpicious.

Style, 445.

But the *inſpeximus* on an ancient deed may be given in evidence, though the deeds need no enrolment; for an ancient deed may be eaſily ſuppoſed to be worn out or loſt, and the offering the *inſpeximus* in evidence induces no ſuſpicion that the deed is doubtful, for it hath a ſanction from antiquity, and if it had been ill executed, it muſt be ſuppoſed to be detected when it was newly made.

5thly, The recital of one deed in another is no evidence of the deed recited, though the deed containing the recital be well proved, becauſe there ſtill wants an atteſtation of the firſt deed; but if the perſon objecting to the evidence of the recited deed, claims under the perſon who executed the deed that recites the former deed, the reciting deed is evidence againſt him of the reality of the recited deed, becauſe he that claims under me ſtands in my place, and therefore what is evidence againſt me, muſt be evidence againſt him.

Thus

Thus in the caſe of *Fitz-Gerald* and *Euſtace*; *Euſtace* the plaintiff claimed in equity a debt on the defendant's eſtate, by virtue of a power reſerved in the grandfather's ſettlement on the defendant's father, to charge the eſtate for payment of debts and younger children's portions; there, defendant objected that there were not proper parties, becauſe the grandfather had made a mortgage, purſuant to that power, to one *Cox* who was not party to the bill, and did not produce the original mortgage, but only an aſſignment thereof to *Wybrants*, to which the grandfather was party; yet the court allowed it to be evidence of the original mortgage, becauſe the plaintiffs claimed under the grandfather who was party to the aſſignment. Mich 1718. in the Exchequer, *per* Gilbert, Chief Baron.

And in the following caſe, the recital of a bond in a deed executed by the ſame party who was the obligor in the bond, was allowed to be ſufficient evidence of the bond. *A.* gave a bond to *B.* for payment of 2000 *l.* within a year after his death, he having ſeduced her and had a child by her, and afterwards *A.* by deed-poll reciting that he had given ſuch bond, agreed the 2000*l.* ſhould be laid out in an annuity for the uſe of *B.* and the child for their lives. *A.* died. *B.* ſued the adminiſtratrix on the bond, but there being only one witneſs to it, and (though his hand-writing was proved, yet) he ſwearing that he did not ſee the bond ſealed and delivered, *B.* was nonſuited, upon which ſhe brought her bill to be paid out of the aſſets. Lord Chan. *King* held, that the recital in the deed that *A.* had given ſuch a bond was ſufficient evidence of there having been ſuch, that it was a confeſſion by the obligor himſelf, and ſtronger than a verbal confeſſion, being under his hand and ſeal; and his lordſhip decreed accordingly. Marchioneſs of Annandale v. Harris, 2 P. Wms. 432.

2dly, As to the ſecond part of the rule, the deed muſt be proved to the jury by one witneſs at leaſt, for though the deed be produced under hand and ſeal, and the hand of the party that executes the deed be proved, yet this is no full proof of the deed, for the delivery is neceſſary to the eſſence of the deed, and the deed takes effect from the delivery, ſo that unleſs the delivery be proved, there is no perfect proof of the deed, and there is no proof of the delivery but by a witneſs who ſaw the delivery.

But to this Rule there are ſeveral Exceptions.

Firſt, if the deed be (*a*) forty years old, that deed may be given in evidence, without any proof of the execution of it, for the witneſſes cannot be ſuppoſed to live above forty years, and forty years is proof ſufficient of a preſcription; for the age of a man is no more than ſixty years, and a man is ſuppoſed to be twenty years before he is of age ſufficient to underſtand the nature of right and wrong, and the general forms of contracting; ſo that after forty years, the witneſs muſt be ſuppoſed to be dead, and therefore ſince no perſon living can be ſuppoſed to be coeval with ſuch deeds, therefore they may be offered in evidence without proof. Trin. Aſſ. in Kent, 1700. Tri. per Pais, 339. 346. L. E. 101. pl. 40. Sid. 146. Co. Lit. 6. b. Keb. 877. 2 Keb. 826. Skin. 239. 2 Mod. 320. 323. 3 Salk. 154. See Lev. 25.

(*a*) Now reduced to thirty years. An ancient writing likewiſe (not being a deed) proved to have been found amongſt deeds and muniments of an eſtate, may be given in evidence, although the due making of it cannot be aſcertained; for it is difficult to develop ancient

facts, and finding these inſtruments and memorials in ſuch a place, affords a preſumption, that they were fairly obtained, and preſerved for uſe. Tr. per Pais, 370. But an admittance into a tenement, holden of a manor, purporting to be under the ſteward's hand, though above forty years old, was rejected in evidence, becauſe they could not proye the ſteward's hand. Fort. 43.

Aſſ. 1702. *per* Haſſet.

But it has been ruled, that if a deed be forty years old, and poſſeſſion have not gone along with the deed, they ought to give ſome account of the deed, becauſe the preſumption fails that was eſtabliſhed in behalf of ſuch deeds, where there is no poſſeſſion, for it is no more than old parchment, if they give no account of its execution.

Trin. Aſſ. 1700, in Kent.

But if there be any blemiſh in the deed, by raſure or interlineation, then the deed ought to be proved, though it be forty years old: if the witneſſes be living, they ought to prove it by the witneſſes, but if the witneſſes be dead, they ought to prove the hands of the witneſſes, for though there muſt be (as is ſaid) a preſumption in favour of the deed when it was worn out of the memory of the witneſſes, yet that preſumption is encountered by another preſumption from the blemiſhes of the deed itſelf, and therefore the credit of the deed ought to be reſtored by the proof of the execution of it.

Chattle and Pound, Hill. Aſſ. 1701, in Kent.

So that if the deed imports a fraud, as where a man conveys a reverſion to one, and afterwards conveys it to another, and the ſecond purchaſer proves his title, there, the firſt deed muſt be proved, though forty years old; for the preſumption from the antiquity of the deed is deſtroyed by an oppoſite preſumption, for no man ſhall be ſuppoſed to be guilty of ſo manifeſt a fraud, and therefore here alſo the credit of the firſt deed muſt be reſtored, by proving a fair execution of it.

Roll. Rep. 192. 227. Tri. per Pais, 209. Cro. Jac. 463.

If a deed of feoffment be proved, and the poſſeſſion have gone along with the deed, there, the livery ſhall be preſumed, though it be not proved; for when there has been poſſeſſion in the manner that the deed ſets forth, it founds a very ſtrong preſumption, that the poſſeſſion was delivered in the manner that the deed ſets forth; for that there ſhould be a contract, to transfer poſſeſſion, and that poſſeſſion ſhould go according to that contract, are ſuch concurring circumſtances as cannot be accounted for, unleſs the poſſeſſion was transferred according to the contract, and, conſequently, the livery and ſeiſin muſt be ſuppoſed by the jury.

Pl. Com. 6, 7.

But if poſſeſſion have not gone along with the deed, then the livery muſt be proved upon the feoffment; for ſince the livery is to give the poſſeſſion on the deed, where no poſſeſſion is, the preſumption is, that there was no livery, and, conſequently, the livery muſt be proved to encounter that preſumption.

Roll. Rep. 132. Tri. per Pais, 339.

But if the jury find the deed of feoffment, and that the poſſeſſion hath gone along with the deed, yet the judges upon ſuch finding, cannot adjudge it a good conveyance, for the jury are judges of the fact, and what is probable, and what is improbable; the court is only judge of what is law, and have nothing to do with any probabilities of fact; therefore it is the jury only that are to make the concluſions and deductions as to the truth of the fact; the court cannot make any concluſions or deductions of the truth

truth of facts, if they are not drawn by neceſſary conſequence out of the words of the verdict; for to the court the rule is *De non apparentibus et non exiſtentibus eadem eſt ratio*, therefore they cannot conclude that there was a lawful conveyance, unleſs the jury find the delivery of the deed.

A deed of feoffment may be given in evidence as a releaſe, for where the party is in poſſeſſion already, the deed only will be a ſufficient contract to transfer a right. Tri. per Pais, 209.

Secondly, A deed may be given in evidence, on a rule of court without proving ſuch deed, for if the party conſent, that ſhall be looked upon as a good deed, and that rule is evidence of the validity of ſuch deed, for the conſent of parties concerned muſt be ſufficient and concluding evidence of the truth of ſuch fact, for the jury are only to try the truth of ſuch facts wherein the parties differ. 2 Sid. 269. Tri. per Pais, 347.

A deed which comes out of the hands of the oppoſite party after notice to produce it, muſt *primâ facie* be taken to be duly executed, and will be received in evidence without proof of the execution; for the other party not knowing who are the ſubſcribing witneſſes, cannot come prepared at the trial to prove the execution. Rex v. Inhabitants of Middlezoy, 2 Term Rep. 41. and the caſes there cited.

As to Razure, Interlineation, and Addition.

Formerly, if there were any razure or interlineation, the judges determined upon the profert of the deed and view of it, whether the deed was good or not; for the very contrivance of the ſolemn contracts, ſuch as deeds are, and their preference to verbal contracts, was founded on this, that the intent of the parties is there manifeſtly ſettled in expreſs words, and notoriouſly authenticated, and, there, ſuch contracts are totally referred to the court, if the truth of the ſolemnities, *viz.* of the ſeal, and of the delivery, be admitted, and therefore muſt be diſſolved by a contract of equal ſolemnity, becauſe how they are deſtroyed and avoided, muſt appear to the ſame judges that are by the law to determine of them: From hence alſo it came to paſs, that if a deed was razed or interlined, they adjudged it a void deed, becauſe it did not certainly appear to the court, who were the judges of thoſe ſolemn contracts, whether the mind of the party was contained in ſuch a mangled contract or not. 10 Co. 92.

But as the manner of conveyancing ſwelled from the ſhort little deeds to large and voluminous ones, ſo vaſt room was left to the miſpriſions of the clerks, that muſt be altered and amended, or with greater labour and expence of time written over again; from thence the court thought it neceſſary not to diſcharge the deeds razed or interlined as void, upon the demurrer; but they referred to the jury upon the iſſue of *non eſt factum*, whether this deed, thus razed and interlined, was the individual contract delivered by the parties. *Ibid.*

If a deed be altered by a ſtranger without the conſent of the obligee, in a point not material, this doth not avoid the deed; but otherwiſe it is, if it be altered by a ſtranger in a point material, for 11 Co. 27. 2 Str. 1160.

for the witneſſes cannot prove it to be the act of the party that ſealed and delivered it when there is any material difference from the ſenſe of the contract; but if the contract contain the ſenſe of the parties, the witneſſes may well ſwear it to be their act, for an immaterial alteration doth not change the deed, and, conſequently, the witneſſes may atteſt that very deed without danger of perjury.

11 Co. 27. But if the deed be altered by the party himſelf, though in a point not material, yet it will avoid the deed; for when the party himſelf makes any alteration in his own deed, it diſcharges the contract, for the contract hath the whole form from the words of the obligor: now when the obligee undertakes to ſupply it with new words, and to alter thoſe the party hath fixed upon, this is, according to the rules of law, which takes every man's own act moſt ſtrongly againſt himſelf, a new making and a new framing of the contract, and for a man to contract with himſelf is utterly void and ineffectual.

Another reaſon of this interpretation of law might be, to add a ſanction to deeds, that perſons, who had them in their cuſtody, might not alter them for fear of deſtroying their own ſecurities.

11 Co. 28. b. If there be ſeveral covenants in the deed, and one of them be altered, this deſtroys the whole deed, for the deed is but a complication of all the covenants, ſo that the deed, which is the whole, cannot be the ſame, unleſs every covenant of which it conſiſts be the ſame alſo.

2 Roll. Abr. 29. (a) *Quere*, whether that be not afterwards vacated by an interlineation?

All intereſts that paſs without deed, would paſs, though the deed was afterwards interlined or altered (a): yet the intereſt once veſted did not thereby return back again, ſince the deed is not abſolutely neceſſary to the paſſing of the intereſt, but is only evidence that it was paſſed. But by the ſtatute, it is neceſſary to ſhew a writing under the hands of the parties.

Roll. Rep. 39, 40. 2 Roll. Abr. 29. If there be blanks left in an obligation in places material, and filled up afterwards by the aſſent of the parties, yet the obligation is void; for where there is a material part of the contract added after the ſealing and delivery, it is not the ſame contract that was ſealed and delivered: But if there be a blank left in an obligation, and filled up afterwards with ſomething immaterial, this doth not avoid the contract.

Roll Rep. 39, 40. As, if a bond was made to *C.* with a blank left for Chriſtian names and addition, which is afterwards filled up by the aſſent of the parties, yet this is a void bond.

Vent. 185. But if any immaterial part of the contract be added after ſealing and delivery, yet it is in effect the ſame contract, and therefore it ſhall not be avoided by theſe additions.

Ibid. 2 Lev. 35. 2 Keb. 872. 881. Moor, 547. 619. Cro. Eliz. 627. As if *A.* with a blank left after his name, be bound to *B.* and after *C.* be added as a joint obligor, yet this does not avoid the bond, becauſe this does not alter the contract of *A.* for he was bound to pay the whole money without ſuch addition.

Where

Where a thing lies in livery, a deed formerly ſealed, may be given in evidence relating to it, though the ſeal be afterwards torn off, for the intereſt paſſed by the act of livery that inveſts the party with the poſſeſſion, and the poſſeſſion that was once transferred by the livery doth not return back again, though the deed was cancelled, and the deed is only an evidence of transferring poſſeſſion, for by the act of livery the poſſeſſion paſſes, and the deed without the ſeal (the livery being indorſed) is an evidence of ſuch poſſeſſion: ſo, if the conveyance was made by leaſe and releaſe, the uſes were once executed by the ſtatute, and do not return back again by cancelling the deed.

Palm. 403. Mod. 11. Vent. 14. 2 Keb. 556. 2 Lev. 220. 2 Show. 28. But ſee now the ſtatute of frauds.

But, if a man ſhews a title to a thing lying in grant, there he fails, if the ſeal be torn off from his deed; for a man cannot ſhew a title to a thing lying in ſolemn agreement, but by ſolemn agreement, and there can be no ſolemn agreement without a ſeal; ſo that poſſeſſion alone is no good title, ſince the thing itſelf doth not lie in poſſeſſion but in agreement; therefore a man cannot claim a title to a water-courſe, but by deed and under ſeal.

2 Bulſt. 79. Roll. Rep. 188.

Where a contract creates an obligation, it cannot be pleaded, if the ſeal be taken off, for the ſeal is the eſſential part of the deed, and without a ſeal it is no longer a deed, nor to be pleaded, nor given in evidence as a deed, unleſs in the caſe above mentioned, where the intereſt veſts, though the deed hath no continuance: but where the deed is neceſſary to be ſhewn, in order to acquire the intereſt, there, it muſt have the eſſentials of a deed, when it is ſhewn as ſuch.

Ibid. 39, 40. 2 Bulſt. 246. 2 Roll. Abr. 28, 29, 30.

If an obligation were ſealed when pleaded, and after iſſue joined, the ſeal be torn off, yet ſhall the plaintiff recover his debt, becauſe the deed when profered to the court was in the cuſtody of the law, and therefore the law ought to defend it: beſides, the truth of the plea, which is to be proved, muſt have relation to the time when the iſſue was taken, and at the time of the iſſue it had the eſſentials of a good deed, and therefore that is ſufficient to maintain the iſſue.

Owen, 8. Cro. Eliz. 120. 5 Co. 119. b. 2 Bulſt. 247. Dyer, 59. pl. 12, 13. Co. Lit. 283. a. Doct. Placit. 262. Roll. Rep. 39, 40. 2 Roll. Abr. 29.

Alſo, if the ſeal of a deed be broken off in court, it ſhall there be enrolled for the benefit of the parties, becauſe where any thing is impaired under the cuſtody of the law, it ſhall be reſtored by the benignity of the law as far as poſſible.

2 Inſt. 676.

If there be a joint contract or obligation, and one of the obligor's ſeals be torn off, it deſtroys the obligation, becauſe they are both bound as one perſon, and if one be diſcharged, the other cannot ſtand obliged, becauſe they both make up but one obligor.

Noy, 112. 2 Roll. Rep. 30. 40. 5 Co. 23. a. Cro. Eliz. 546. Doct. Placit. 260. 262, 263. Poph. 161.

But if two perſons be bound ſeverally, there, if the ſeal of one of the obligors be broken off, yet the obligation continues in the other, becauſe there are ſeveral contractors, and ſeveral contracts, and therefore by deſtroying the obligation of one of them, the obligation of the other is not taken away.

5 Co. 23. a. Cro. Eliz. 546. Roll. Rep. 40. 2 Roll. Rep. 30. 149. Cro. Eliz. 408. 546. 576. 11 Co. 28. b. Doct. Placit. 260. 262, 263.

But

March, 125. 2 Show. 29.

But if two men are bound jointly and ſeverally, and the ſeal of one of them is torn off, this is a diſcharge of the other, for the manner of the obligation is diſcharged by the act of the obligee, and therefore that is (according to the rule of law, that conſtrues every man's own act moſt ſtrongly againſt himſelf) a diſcharge of the obligation itſelf: beſides, ſince both are jointly bound as one perſon, the diſcharge of one of them is a diſcharge of both; a ſatisfaction is ſuppoſed by the very cancelling of it to be given for the whole debt, and no obligation can reſt upon the other.]

(G) Whether Parol Evidence is to be admitted to explain what appears on the Face of a Deed or Will.

5 Co. 68. a. b. 8 Co. 155. a. Keilw. 49. (a) For this *vide* tit. Agreements. (b) As to

IT ſeems to have been agreed as a general rule, even before (a) the ſtatute of frauds and perjuries, that no parol evidence could be admitted to control what appeared on the face of (b) a deed or will, not only from the danger of perjury, but from a (c) preſumption, that whatever the parties at that time had in contemplation, was all reduced into writing.

records it ſeems a general rule, that nothing can be admitted, though ſworn by witneſſes of the beſt credit, that contradicts them; for being things of the greateſt credit, they can only be queſtioned by matters of equal notoriety with themſelves. Roll. Abr. 757. (c) *Vide* Vern. 369.

2 Vern. 98. 337. 625.

But this rule has received a relaxation, eſpecially in the courts of equity, where a diſtinction has been taken between evidence, that may be offered to a jury, and evidence to inform the conſcience of the court, *viz.* that in the firſt caſe no ſuch evidence ſhould be admitted, becauſe the jury might be inveigled thereby; but that in the ſecond it could do no hurt, becauſe the court were judges of the whole matter, and could diſtinguiſh what weight and ſtreſs ought to be laid on ſuch evidence.

5 Co. 68. Lord Cheyney's caſe. [(d) Here, there is a *latent* ambiguity; the words themſelves *primâ facie* do not im-

Alſo, to aſcertain a fact, parol evidence hath been admitted to explain the intent of the teſtator: as where the teſtator had two ſons both named *John*, and he deviſed lands to his ſon *John* (d), here parol evidence was admitted, to ſhew which of his ſons he meant; and it being proved, that one of his ſons of that name had been abſent ſeveral years beyond ſea, and that the teſtator apprehended that he was dead, the deviſe was held good, and that the other ſhould take; for without ſuch evidence the will muſt be void.

port an ambiguity; but the ambiguity ariſeth from ſomething *debors*, ſome collateral matter out of the inſtrument itſelf. And as ſuch ambiguity is made to appear by parol evidence, parol evidence muſt be admitted to explain it, as well as to raiſe it. See Bac. Max Reg. 23. But where there is an abſolute omiſſion of the deviſee, it cannot be ſupplied by parol evidence. Caſtledon v. Turner, 3 Atk. 257.]

Abr. Eq. 230, 231. Mich. 1705. Pendleton and Grant. 2 Vern. 517.

So, where *J. S.* deviſed all his houſehold goods, as woollen, linen, pewter, and braſs whatſoever, except a trunk under the chamber-window; and the queſtion was, whether the parol proof of the perſon who drew the will ſhould be admitted to explain theſe

theſe words? my Lord Keeper thought it might, notwithſtanding the ſtatute of frauds and perjuries; for here, it neither adds to, nor alters, the will, but only explains which of the meanings ſhall be taken; as in caſe of a deviſe to ſon *John*, when the teſtator had two of the ſame name; and here the word *as* may be a reſtiction; or if the following words be as particular inſtances, it may not reſtrain the word *whatſoever*; and he thought the words imported to carry all the houſehold goods; and of that opinion was the maſter of the rolls; and the proof was read accordingly.

[So, where *J. S.* being ſeiſed in fee of a real eſtate as heir on the part of his mother's mother, and being alſo ſeiſed in fee of a ſmall eſtate as heir to his own father, deviſed all theſe lands to truſtees and their heirs in truſt to pay ſeveral annuities and charities; after payment of which he deviſed the reſidue of the rents and profits of the premiſes to his own right heirs of his mother's ſide for ever; and the queſtion was, whether the heir of the mother's father, or the heir of the mother's mother was entitled to the reſidue of the rents and profits? parol evidence was admitted to ſhew, which heir of the mother's ſide was intended. Harris v. Biſhop of Lincoln, 2 P. Wms. 135.

Again, *R. H.* deviſed to the defendant ſeveral cloſes of the value of 60 *l. per annum*, paying 100 *l.* he owed to *J. S.*, and 100 *l.* he owed by bond to one *Shaw*; and deviſed ſome ſmall legacies, and gave all the reſt of his perſonal eſtate to the plaintiffs, his nieces. It happened that the 100 *l.* due on bond was not due to *Shaw*, but was the money of *Alice Beck*, then the wife of one *F.* By reaſon of this miſtake, the deviſee of the land refuſed to pay the 100*l.* The plaintiff examined *Harvey* who drew the will, and depoſed that the teſtator declared, he meant the 100 *l.* due to the perſon who married Mrs. *Beck* of *Lincoln*; and another witneſs depoſed, that he meant the bond for which *C.* was bound as his ſurety: Decreed for the plaintiff, firſt at the rolls, and afterwards on a bill of review before the Lord Chancellor, and heard on the merits, and again decreed on the merits; his lordſhip declaring he ſaw no hurt in admitting collateral evidence to make certain the perſon or the thing deſcribed. And Lord *Thurlow* in a late caſe (*a*) ſaid it was a clear propoſition, that every evidence as to the deſcription of the ſubject the teſtator had deſcribed, muſt be admitted. As in the caſe of a ſpecifick legacy, you muſt hear evidence concerning the ſubject to which the will applies, in order to ſee whether the deſcription applies aptly or not. Hodgſon v. Hodgſon, 2 Vern. 593. Pr. Ch. 229. S. C.

(*a*) Fonnereau v. Poyntz, 1 Br. Ch. Rep. 477.

So, parol proof hath been admitted as to the intention of a teſtator, where the queſtion hath been, whether a legacy ſhould go in ſatisfaction of a debt due from the teſtator to the legatee, or whether a ſum advanced on the marriage of a child ſhould go in ſatisfaction of a legacy? Cuthbert v. Peacock, 2 Vern. 593. Debeze v. Man, 2 Br. Ch. Rep. 165. In Fowler v. Fowler, 3 P. Wms. 354. Lord Talbot ſaid, his opinion was againſt the admiſſion of ſuch evidence.

It alſo hath been admitted in equity, to prove a variation between the agreement executed and the agreement intended, upon a ſuggeſtion that ſuch variance hath happened through miſtake, fraud, &c. Henkle v. Royal Exchange Aſſurance Company, 1 Vez. 317. Baker v. Paine, *Id.* 456. South Sea Company v. D'Oliffe, 2 Vez. 376. Pitcairne

Fitcairne v. Ogbourne, *Ibid.* Lady Shelburne v. Lord Inchiquin, 1 Br. Ch. Ca. 338. Harvey v. Harvey, 2 Ch. Ca. 180. *Per* Reynolds C. B. in Fitzgerald v. Lord Fauconberg, Fitzg. 213. But in Hardwood v. Wallis, cited in 2 Vez. 195. parol evidence for this purpoſe was rejected. In that caſe, an eſtate was agreed to be ſettled prior to marriage on the intended huſband for life; remainder to wife for life; remainder to the firſt, &c. ſon in tail-male; remainder to all and every the daughters of that marriage. Inſtructions were given to an attorney to draw the ſettlement, who drew it as far as the limitation to the ſons in tail-male; where he ſtopped, and wrote, *then go on as in Pippin* v. *Ekins*; which was a precedent he delivered to his clerk to go on from that limitation, and was a right ſettlement on the iſſue male and daughters by that wife; but the clerk drew the ſettlement to all the daughters of the huſband without reſtraining it to that marriage. It was executed with this miſtake. The plaintiff was the only daughter of that marriage: the huſband by a ſecond wife left a ſon and four daughters, the defendants. It was inſiſted, that letting in the daughters of the ſecond marriage would make the firſt wife a purchaſer for them, or the children of other ſucceſſive wives, to the deſtruction of the intereſt of her only child: the draft of the attorney was proved, and the ſettlement in Pippin v. Ekins. But the Maſter of the Rolls, Sir Wm. Forteſcue, would not admit the parol evidence of the attorney to be read; and held, that the other evidence would not do: that nothing appearing in writing under the hands of the parties, the ſettlement could not be altered.—Evidence of this kind, it muſt be obſerved, ſeems to be more readily admitted to rebut an equity, than to obtain a decree upon. Legal v. Miller, 2 Vez. 299. Jones v. Statham, 3 Atk. 388. Eden v. Lord Bute, 7 Br. P. C. 204. 445.

Doe v. Burt, 1 Term Rep. 701. Rex v. Inhabitants of Sambourn, 3 Term Rep. 609.

So, parol evidence is admiſſible to ſhew whether a thing be parcel or not of the eſtate demiſed by a deed. So, to ſhew that perſons deſcribing themſelves in a certificate as officers of the pariſh at large, were the officers of the hamlet where the pauper was ſettled. In explanation of mercantile contracts it is every day's practice to reſort to it.]

Per Lord Hardwicke in Baker v. Paine, 1 Vez. 459. and Blunt v. Cumyns, 2 Vez. 331.

Vern. 366. [Parol evidence offered to raiſe an equity, that a penſion granted by the crown to the defendant abſolutely and without any terms, was in truſt for the plaintiff, the defendant by his anſwer denying it, was rejected by Lord Thurlow, after much argument and long deliberation. Lady Margaret Fordyce v. Willis, 3 Br. Ch. Rep. 577.]

It has been held, that if *A.* purchaſes land in the name of *B.*, that *A.* may be admitted to prove that he paid the purchaſe money, and ſo make it a reſulting truſt, or truſt by implication of law for himſelf.

Rex v. Inhabitants of Scammonden, 3 Term Rep. 474. Filmer v. Gott, 7 Br. P. C. 70. But in Clarkſon v. Hanway, 2 P. Wms. 203. it was holden, that the grantee could not

[So, it is competent to a party to aver other conſiderations than thoſe expreſſed in a deed. Thus, where the conſideration expreſſed in the deed was 28*l.*, parol evidence was admitted to prove, that the real conſideration was 30*l.* So, where the conſiderations mentioned in the deed were 10,000*l.* *and natural love and affection*, the lords commiſſioners of the great ſeal directed an iſſue to try whether natural love and affection formed any part of the conſideration, the eſtates which were conveyed by the deed being worth 30,000*l.* On an appeal this was confirmed; and the jury on the trial of this iſſue, finding that *natural love and affection* conſtituted no part of the conſideration, the deed was afterwards ſet aſide by the Lord Chancellor.]

give parol evidence to prove blood and kindred to have been the conſideration of a conveyance, the conſideration expreſſed in the deed being an annuity to be paid to the grantor. And in Peacock v. Monk, 1 Vez. 128. Lord Hardwicke ſaid, "where any conſideration is mentioned, as of love and affection only, if it is not ſaid alſo, *and for other conſiderations*, you cannot enter into proof of any other: the reaſon is, becauſe it would be contrary to the deed; for when the deed ſays, it is in conſideration of ſuch a particular thing, that imports the whole conſideration, and is negative to any other. It is otherwiſe, where there is no conſideration at all in the deed.

An

An entry in the ſteward's book, and parol proof by the foreman of a jury was admitted as good evidence, to ſhew that a feme covert ſurrendered her whole eſtate, although the ſurrender upon the roll, and the admiſſion thereon, was but of a moiety. 2 Vern. 547. Hill and Wigget.

Alſo, to ouſt an implication, and rebut an equity, parol evidence has been admitted to explain the intention of the teſtator; as where a man deviſes particular legacies to his executors, and makes no diſpoſition of the ſurplus of his eſtate; in this caſe, according to the notions of the courts of equity, the executors ſhall be only truſtees for the next of kin; but to rebut this equity which ariſes by implication only, the executors have been allowed to prove by parol evidence, that the teſtator deſigned them the ſurplus. To this purpoſe are the caſes in Vern. 473. Foſter and Munt. Chan. Ca. 19. b. Crompton and North, 2 Vern. 99. Pring and Pring, 2 Vern. 648. Lady Granville and Ducheſs of Beaufort, 2 Vern. 736. [Batchelor and Searl, Eq. Ca. Abr. 246. S. C. Gilb. Eq. Rep. S. C. *Infra* vol. 3. 69. S. C. Duke of Rutland v. Ducheſs of Rutland, 2 P. Wms. 210. Petit v. Smith, 1 P. Wms. 7. Braſsbridge v. Woodroffe, 2 Atk. 68. Lake v. Lake, 1 Wilſ. 313. Ambl. 126. S. C. But in Blinkhorne v. Feaſt, 2 Vez. 28. Oct. 1750. Lord Hardwicke expreſſes himſelf to be very tender in admitting parol evidence in caſes of this kind; and it ſhould be reſtricted to what paſſed at the time of making the will. Nourſe v. Finch, 1 Vez. jun. 358. And Lake v. Lake, Nov. 1751. is the laſt caſe (in print) which has been decided ſince that time on parol evidence.]

So, where the Earl of *Gainſborough* made his will, and thereby deviſed ſeveral legacies, and charged his real eſtate with the payment of them and his debts, and deviſed his eſtate, ſo charged, to the defendant, his nephew, and made the plaintiff, his wife, executrix; and the bill was brought to have the perſonal eſtate diſcharged from the debts and legacies, ſuggeſting that the creditors threatened to come upon and exhauſt the perſonal eſtate; and that it was the intent of the teſtator, that ſhe ſhould have the perſonal eſtate clear to herſelf, and that the directions for making the will were ſo; but that, either by the miſtake or contrivance of the perſon who drew the will, it was not ſo expreſſed; and on demurrer, becauſe no ſuch averment could be admitted againſt a will in writing, the demurrer was over-ruled; it was held by *Rawlinſon* and *Hutchins*, that though ſuch an averment could not be admitted where it was to make the party a title; yet where it was only to rebut an equity, as in this caſe, it might. 2 Vern. 252. Counteſs and Earl of Gainſborough, Abr. Eq. 230. S. C. and affirmed in the Houſe of Lords.

So, where one not of kin, but a ſtranger, was made executor, and had conſiderable legacies given him, although it was decreed by ſir *Peter King*, in the mayor's court, in favour of the teſtator's brothers, that the ſurplus ſhould be diſtributed; yet, upon appeal to the Houſe of Peers, that decree was reverſed, not barely as it ſtood upon the will, but that parol proof ought to be received in favour of the executor's title, conſiſtent with the will; and the proof being full as to the teſtator's frequent declarations, that his executor, though a ſtranger, ſhould have the ſurplus, it was decreed accordingly. Abr. Eq. 245. Littlebury and Buckley, affirmed in the Houſe of Lords.

[And as parol evidence is admiſſible in favour of the executor to ſhew no reſulting truſt for the next of kin, ſo it hath alſo been admitted in favour of the next of kin, to take off the effect of the parol evidence adduced by the executor. And it ſeems from ſome caſes (*a*) that it may be read by the next of kin originally and in the firſt inſtance. Biſhop of Cloyne v. Young, 2 Vez. 95. Coote v. Bond, 2 Br. Ch. Rep. 526.

(*a*) Fane v. Fane, 1 Vern. 30. Rackfield v. Careleſs, 2 P. Wms. 158.

Coote v. Boyd, 2 Br. Ch. Rep. 522.

Where a teſtator gave legacies of the ſame amount in two different inſtruments, parol evidence was admitted to ſhew that he intended them to be accumulative.

Roe v. Popham, Dougl. 24.

Where a fine is levied, if no uſes are declared, the reſulting uſes ſhall be to the conuſor, but parol evidence is admiſſible to rebut the preſumption of ſuch reſulting uſes.]

Vide 2 Vern. 98. 337. 625. and Salk. 234. pl. 13. 2 Ld. Raym. 831. where, in the caſe of Cole and Rawlinſon, it is laid down by my Lord Chief Juſtice Holt, that the teſtator's intent muſt be collected from the words of the will, and not from his circumſtances, or any matters *debors*, and that to ravel into the affairs of the teſtator, would render property precarious, and introduce uncertainty and confuſion in the law itſelf.

But notwithſtanding theſe caſes, the courts have been very unwilling to admit of parol evidence in relation to any thing that appears on the face of a will; and it is certain that too much caution cannot well be uſed in this particular, eſpecially when it is conſidered that the ſtatute of frauds and perjuries, which was made to prevent perjury, contrariety of evidence and uncertainty, binds the courts of equity as well as the common law courts; as alſo that little regard ought in many caſes to be had to the expreſſions of the teſtator, either before or after the making of his will, becauſe, poſſibly, theſe expreſſions might be uſed by him, on purpoſe to control or diſguiſe what he was doing, or to keep the family quiet, or for other ſecret motives and inducements which cannot after his death be found out.

Selwin and Brown, 21ſt March 1734, *in domo procerum*. Note; This cauſe was firſt heard before his honour the maſter of the rolls, who admitted the parol evidence, and on the ſtrength thereof decreed, that the 3000 *l.* ſhould not be taken as part of the ſurplus of the teſtator's perſonal eſtate; but that it was extinguiſhed for the benefit of the obligee, and accordingly ordered the bond to be cancelled; but this decree was re-

Hence, in a late caſe in the Houſe of Lords, where the teſtator deviſed ſeveral legacies, and amongſt the reſt gave conſiderable legacies to his two executors, to whom alſo he deviſed the ſurplus of his eſtate; and there being a debt of 3000 *l.* due by bond to the teſtator from one of the executors, he inſiſted, that, there being ſufficient aſſets to ſatisfy all the legacies, this 3000 *l.* ſhould not be brought into the ſurplus of the teſtator's eſtate, but that the ſame was extinguiſhed for his benefit, by his being made co-executor; and that though the ſurplus of the eſtate was deviſed to them both, yet that this debt could not be taken to be part of that ſurplus, being before extinguiſhed; and, by the evidence of the perſon who drew the will, fully proved, that this was the teſtator's intention; which evidence, it was urged, ought to be admitted, being only to rebut an equity, and ouſt an implication of law ariſing from the notions of the courts of equity, which revives the debt in theſe caſes, and gives equal benefit to both the executors; but the lords refuſed going into this parol evidence, and decreed that the 3000 *l.* ſhould be taken as part of the ſurplus of the teſtator's perſonal eſtate, which both the executors were equally entitled unto; for though in ſome books the teſtator's making a debtor executor is ſaid to be an extinguiſhment of the debt, becauſe an executor cannot ſue himſelf; yet it was never doubted but that ſuch a debt remained aſſets to ſatisfy other creditors: alſo it has been (*a*) reſolved to be aſſets to ſatisfy legacies; and this deviſe of the ſurplus and reſidue of the teſtator's eſtate being as much a legacy, and as well recoverable in the ſpiritual court as any particular legacy, it was but fitting, that ſince the courts of equity claim now a concurrent juriſdiction with the eccleſiaſtical

courts in matters of this nature, that there ſhould be the ſame meaſure of juſtice in both theſe courts.

reverſed by my Lord Chancellor,

though he admitted the parol proof to be read, as not thinking the teſtimony of a ſingle witneſs, according to the circumſtances of this caſe, ſufficient to control what appeared on the face of the will. Ca. temp. Talb. 240. S. C. 4 Br. P. C. 179. S. C. (*a*) For this *vide* Yelv. 160. Plow. 186. a. Co. Lit. 264. 8 Co. 136 a. Cro. Eliz. 373. Hob. 10. Leon. 320.

[A teſtatrix bequeathed her real and perſonal eſtate to *E. T.* and *J. U.* equally between them for life; and upon the death of *E. T.* ſhe gave the whole eſtate to *J. U.* in tail general, and for want of ſuch iſſue to *R. U.* in fee, with a few pecuniary legacies; and charged the real eſtate with the payment of theſe legacies, if her perſonal eſtate ſhould not be ſufficient; and by her will declared, ſhe gave all the reſt and reſidue of her perſonal eſtate to her uncle *L. C.*'s three daughters; and particularly gave to Mrs. *S. L.* 10*l.* and made her executrix. For the reſiduary legatees it was inſiſted, that *reſt* and *reſidue* of her perſonal eſtate muſt mean the reſidue after the particular legacies are paid off; and could not refer to the beginning of the will, becauſe there is a fee deviſed, and, conſequently, the teſtatrix has diſpoſed of the whole: that parol evidence of the attorney who drew the will, that he had expreſs directions to give the perſonal eſtate to the three daughters of *L. C.*, might be admitted in this caſe; that (to be ſure) things which are quite contrary to the will ſhall not be proved by parol evidence, but that it may be allowed to explain words in a will, eſpecially in this caſe, where it appears to be a mere blunder of the drawer: that this doth not intrench upon any of the rules with regard to parol evidence, but only clears up who was intended to have the perſonal eſtate, where the whole is deviſed to two different perſons; and that it ſeems clearly to be a blunder in the drawer of the will, becauſe the deviſe in the firſt part of it is proper only in the diſpoſing of real eſtate. Lord *Hardwicke*—As to the queſtion, whether I ought to admit parol evidence to explain the intention of the teſtator, I am of opinion, that this is not a caſe in which parol evidence can be read, and that it would be of dangerous conſequence. It is true, there are ſome things here which would make a judge wiſh to admit it; but I muſt not follow my inclinations only; for I do not know that upon the conſtruction of a will, courts of law or equity admit parol evidence, except in two caſes: firſt, to aſcertain the perſon, where there are two of the ſame name, or there has been a miſtake in a chriſtian or ſurname, and this upon abſolute neceſſity; where if ſuch evidence were not let in, it would make the will void. The other caſe is, with regard to reſulting truſts relating to perſonal eſtate; where a man makes a will, and appoints an executor with a ſmall legacy, and the next of kin claim the reſidue; in order to rebut the reſulting truſt for the next of kin, parol proof has been admitted to aſcertain the perſon who was to have the reſidue. It is very true, caſes may be cited, where Lord *Cowper* has admitted ſuch evidence; for he went upon this ground, that it was by way of aſſiſting his judgment in caſes extremely dark and doubtful. I have the greateſt deference for his judgment, but muſt own, I was never ſatisfied

Ulrich v. Litchfield, 2 Atk. 372.

Dowſet v. Sweet, Ambl. 175. Bradwin v. Harpur, *Id.* 374.

with this rule of Lord *Cowper*'s of admitting parol evidence in
2 Vern. 621. doubtful wills: beſides, he went further in the great caſe of *Strode* and *Ruſſel*, in which there was an appeal to the Houſe of Lords: Mr. Juſtice *Tracy*, who aſſiſted Lord *Cowper* in that caſe, was at firſt of the ſame opinion with him; but on conſidering it more, he diſavowed his former opinion, and was clear that it could not be admitted, and this alteration in his judgment was mentioned in the Houſe of Lords. In the caſe of *Selwin* and *Brown*, I was of opinion that it ought to have been admitted; and even Lord *Talbot*, when he had heard the cauſe, had a remorſe of judgment at the ſame time that he rejected the parol evidence: but the Houſe of Lords refuſed it as of moſt miſchievous conſequence, and affirmed his decree.

Lowſie'd v. Stoneham, 2 Str. 1261. Upon *plenè adminiſtravit* pleaded, the queſtion was, whether 1000*l.* received by the defendant was due to her in her own right, or as executrix to her huſband, and, conſequently, aſſets? It aroſe upon the following deviſe:—"I give to my loving brother *John* "*Stoneham* 1000*l.*, and in caſe of his death, to his wife *Suſanna*," who was the defendant. It appeared that *John Stoneham* ſurvived the teſtator: the plaintiff therefore inſiſted, that this legacy, which the defendant admitted that ſhe had received, veſted abſolutely in him, and was aſſets in her hands. On the part of the defendant, it was offered to give in evidence, that the teſtator *in extremis* declared, he meant to give his brother only the intereſt of the 1000*l.*, and that the defendant ſhould have the principal in caſe ſhe ſurvived him. The parol evidence was oppoſed by the plaintiff's counſel, as being contradictory to the plain words of the will. And *Lee*, Chief Juſtice, ſaid, it could not be allowed, and that in the caſe of *Selwin* and *Brown*, the Houſe of Lords had refuſed it, even where it was to ſupport the legal interpretation of the will; and Lord *Hardwicke* about two years ago held it in the ſame manner in the caſe of the Earl of *Inchiquin* and *O'Brien*.

Meres v. Anſell, 3 Wilſ 275. Preſton v. Morceau, 2 Bl. Rep. 1249. Although parol evidence may be received to explain, yet it can never be admitted to annul or ſubſtantially to vary a written inſtrument. An action on the caſe was brought for the uſe and occupation of a houſe, of which, it was agreed in writing, that a leaſe ſhould be let by *Chriſtiana Preſton* to *Abraham Gamage* for twenty-one years, at 26*l.* *per ann.* to commence from *Michaelmas* then next. *Gamage* died and made *Merceau* his executor, who paid 26*l.* into court for one year's rent. On the trial, the plaintiff offered to ſhew by parol evidence, that beſides the 26*l.* *per ann.* the defendant had agreed to pay 2*l.* 12*s.* 6*d.* a year, being the ground-rent of the premiſes to the ground landlord; but no evidence was offered of the actual payment of ſuch ground-rent during the teſtator's life; without which *De Grey*, Chief Juſtice, thought ſuch parol evidence inadmiſſible, and nonſuited the plaintiff. On a motion to ſet aſide this nonſuit, it was alleged, that this was evidence not to alter or vary, but to explain the agreement. That this was not a ſolemn deed or will, but a mere executory act; and had a bill in Chancery been brought to carry this into execution, parol evidence would have been admitted to prove the agree-

ment to pay the ground-rent. For in *Joynes* v. *Statham*, 3 *Atk.* 388. parol evidence was admitted to ſhew, that the agreement for a leaſe at 9*l.* a year was to *be clear of taxes*. But by *Blackſtone*, J. I am clearly of opinion that the lord chief juſtice did right in rejecting this evidence. Courts ſhould be very cautious in admitting any evidence to ſupply or explain written agreements; elſe the ſtatute of frauds would be eluded, and the ſame uncertainty introduced by ſuppletory or explanatory evidence, which that ſtatute has ſuppreſſed in reſpect to the principal object. It never ought to be ſuffered ſo as to contradict or explain away an explicit agreement, for that is in effect to vary it. Here is a poſitive agreement that the tenant ſhall pay 26*l.* Shall we admit proof that this means 28*l.* 12*s.* 6*d.*? What is it to the tenant to whom the rent is to be paid, ſo as he is obliged to pay more than his contract expreſſes? we can neither alter the rent nor the term, the two things expreſſed in this agreement. With reſpect to collateral matters, it might be otherwiſe. He might ſhew who is to put the houſe in repair, or the like, concerning which nothing is ſaid; but he cannot by parol evidence ſhorten the term to fourteen years, or extend it to twenty-five years, or make the rent other than 26*l. per ann.* The caſe in *Atkins* is of a mere executory act, in which the maſter was to ſettle the proper covenants, and therefore had a right to inquire who was to pay the taxes. Beſides, there were ſtrong ſuggeſtions of fraud in making the written agreement, as one party could neither read nor write.

In a debt upon a bond payable at a certain day, the defendant pleaded, that by agreement between the defendant and the plaintiff's teſtator, the bond only ſtood as an indemnity. To this plea the plaintiff demurred, and the queſtion was, whether the agreement pleaded could be given in evidence, contrary to the expreſs tenor of the bond, purporting to be abſolute, for payment on the day? The plaintiff contended, that the office of parol evidence extended no farther than to explain a deed conſiſtently with its general purport, and by no means to change the nature of the ſpecial obligation; and that even on a will, the uncertainty to be removed by evidence muſt ariſe from ſomething extrinſick to the inſtrument. The court agreed the plea to be bad, and the objection deciſive againſt admitting collateral evidence to change the nature of the deed. Meaſe v. Meaſe, Cowp. 47.

In no caſe can parol evidence of a parol communication between the parties be received, to add a term not inſerted in the ſpecifick agreement which they have executed; for what has paſſed between them may have been altered and ſhifted in a variety of ways, but what they have ſigned and ſealed was fully ſettled. And my Lord *Thurlowe* laid it down as a rule of law, which it was impoſſible to break in upon, that nothing could be added to the written agreement, unleſs in caſes where there is a clear, ſubſequent, independent agreement varying the former, not where it is of matter paſſing at the ſame time with the written agreement. Haynes v. Hare, 1 H. Bl. 664. Lord Portmore v. Morris, 2 Br. Ch. Rep. 249. Rich v. Jackſon, 4 Br. Ch. Rep. 519.

The verbal declarations of an auctioneer cannot be admitted to contradict the printed conditions.] Gunnis v. Erhart, 1 H. Bl. 289.

(H) Of Preſumptive Proof.

Gilb. L. E. 303.

[A Preſumption, as defined by the *civilians*, is *conjectura ex certo ſigno proveniens quæ alio adducto pro veritate habetur.* For when the fact itſelf cannot be proved, that which comes neareſt to the proof of the fact is, the proof of the circumſtances that neceſſarily and uſually attend ſuch facts, and theſe are called preſumptions, and not proofs, for they ſtand inſtead of the proofs of the fact till the contrary be proved.]

Co. Lit. 6.

My Lord *Coke* diſtinguiſhes preſumptive proof, by which he ſays juries are often induced, into, 1. Violent preſumption, which amounts to *plena probatio*; as if one be ſtabbed in a houſe, and a man be ſeen running out of it with a knife bloody, and none elſe in the houſe. 2. *Præſumptio probabilis*, which moves a little. 3. *Præſumptio levis*, which moves not at all.

Co. Lit. 6. (*a*) Where from their antiquity things receive a credit. Mod. 117. Lev. 25. *& vide* Palm. 427.

Alſo, in caſe of a feoffment, if all the witneſſes to the deed are dead, then a continual and quiet poſſeſſion for any (*a*) length of time will make a ſtrong or violent preſumption, which ſtands for proof; and here the rule is, that *ex diuturnitate temporis omnia præſumuntur ſolemniter eſſe acta*: alſo, the deed may receive credit by comparing the ſeals, the hand-writing, and other circumſtances, all which muſt be left to the jury.

[If a man gives a receipt for the laſt rent, the former is preſumed to be paid, becauſe a man is ſuppoſed firſt to receive and take in the debts of the longeſt ſtanding; eſpecially if the receipt be in full of all demands, then it is plain there were no debts ſtanding out; and if this be under hand and ſeal, the preſumption is ſo violent, that the law admits of no proof to the contrary; becauſe that were to let a man invalidate his own deed, which our law doth not permit; for here, though the payment of the money is not proved, yet the acquittance is proved, which could not be without ſuch payment.

Per Cur. in Harpur v. Brock, &c. Tr. 14 G. 3. 3 Wooddeſ. 333.

Where a leaſe is proved, and it is alſo ſhewn, that the claimant hath received rent within twenty years, this infers a ſeiſin in fee, and throws it upon the adverſe party to ſhew that the leaſe is ſubſiſting. And *Eyre*, Baron, held, that where rent is received without any proof of a leaſe, this alſo *primâ facie* is evidence for the plaintiff, and obliges the defendant to ſhew, that it is either a quit-rent, or that the term is unexpired.

Denn v. Barnard, Cowp. 595.

Poſſeſſion, and rent received, for twenty years, were holden to be admiſſible evidence of a fee, to be left to a jury; though the title, ſo far as it was developed, appeared to be a long term of years; for it might be a term attendant on the inheritance, and the leaſe one of the muniments of the eſtate.

Oſwald v. Legh, 1 Term Rep. 270.

The circumſtance of twenty years having elapſed without any demand made, is of itſelf a preſumption that a bond has been paid. And ſatisfaction of a bond may be preſumed within a leſs period, if any evidence be given in aid of the preſumption, as an account ſettled between the parties in the intermediate time without any notice being taken of ſuch a demand.

If

If a perſon claiming a toll for paſſing over a highway, can ſhew that the liberty of paſſing over the ſoil and the taking of a toll for ſuch paſſage, are both immemorial, and that the ſoil and the tolls were before the time of legal memory in the ſame hands, though ſerved ſince, it will be preſumed, that the ſoil was originally granted to the publick in conſideration of the tolls. Lord Pelham v. Pickerſgill, 1 Term Rep. 660.

If a ſhip has been miſſing, and no intelligence received of her within a reaſonable time after ſhe ſailed, it ſhall be preſumed that ſhe is loſt.] Green v. Brown, 2 Str. 1191. Newby v. Read, Sittings after Mich. 3 Geo. 3.

Perſons once in being ſhall be intended ſtill living, if the contrary is not proved *. 2 Roll. Rep. 461.

* Therefore in ejectments, &c. great caution is required in making out a pedigree, &c. not to prove the birth of any perſon, through whom the title is not deduced, and who might be heir, &c. if living; and to be prepared with proof of the death of ſuch perſon, if ſet up by the adverſe party.

But now by 19 *Car.* 2. *c.* 6. it is enacted, "That if any perſon "or perſons, for whoſe life or lives, eſtates have been or ſhall be "granted, ſhall remain beyond the ſeas, or elſewhere abſent them- "ſelves in this realm, by the ſpace of ſeven years together, and "no ſufficient and evident proof made of the life or lives of ſuch "perſon or perſons reſpectively, in any action commenced for the "recovery of ſuch tenements by the leſſors or reverſioners; in "every ſuch caſe the perſon or perſons, upon whoſe life or lives "ſuch eſtate depended, ſhall be accounted as naturally dead; and "in every action brought for the recovery of the ſaid tenements "by the leſſors or reverſioners, their heirs or aſſigns, the judges, "before whom ſuch action ſhall be brought, ſhall direct the jury "to give their verdict, as if the perſon ſo remaining beyond the "ſeas, or otherwiſe abſenting himſelf, were dead."

[In ejectment the caſe was as follows: John Gifford was ſeiſed in fee of the lands in queſtion, and made a leaſe in reverſion to Lewis Davells for 99 years, to commence after the deaths, or other ſooner determination of the eſtates of John Davells the father, and John Davells the ſon, who had then a leaſe in poſſeſſion for 99 years, if they or either of them ſo long lived. The plaintiff poſitively proved the death of John Davells the ſon; but as to the father, the proof was, that he had been reputed dead, and nobody had heard of him for 15 years laſt paſt. Upon an objection, that this laſt proof was inſufficient, it was holden clearly by *Holt*, C. J. upon the peruſal of the above ſtatute, that this caſe was within it, becauſe Lewis Davells, the leſſor of the plaintiff, had a term in reverſion in the lands, and ſo was a reverſioner within the very letter of the ſtatute; and he held, that a remainder man was within the equity of that law. Holman v. Exton, Carth 246.]

[By the 6 *Ann c.* 18. reciting that divers perſons, as guardians and truſtees for infants, huſbands in right of their wives, and other perſons having eſtates or intereſts determinable upon a life or lives, have continued to receive the rents and profits of ſuch lands after the determination of their ſaid particular eſtates or intereſts, it is enacted, "That any perſon claiming any eſtate in remainder, "reverſion, or expectancy after the death of any perſon within "age, married woman, or any other perſon whomſoever, may, "upon affidavit that he hath cauſe to believe that ſuch perſon "within age, &c. is dead, and that his or her death is concealed "by ſuch guardian, truſtee, huſband, or any other perſon, once "a year have an order from the great ſeal for the production of "ſuch perſon within age, &c., and upon the guardian, truſtee, "&c. refuſing or neglecting to produce ſuch infant, &c. agree- "ably to ſuch order, the ſaid infant, &c. ſhall be taken to be "dead, and the remainder-man or reverſioner ſhall enter upon

" the eſtate in like manner as if ſuch infant, *&c.* were actually " dead."]

Gilb. Evid. 271. H. P. C. 266. 2 H. H. P. C. 288. Law of Evid. 278. pl. 41.

By the 21 *Jac.* 1. *c.* 27. it is enacted, "That if any woman be " delivered of an iſſue, which being born alive ſhould, by the laws " of this realm, be a baſtard, and endeavour privately, either by " drowning or ſecret burying, or any other way, either by herſelf " or the procuring of others, ſo to (*a*) conceal the death thereof, " as that it may not come to light, whether it were born alive, or " not, but be concealed; in every (*b*) ſuch caſe the mother ſo " offending ſhall ſuffer death, as in caſe of murder, unleſs ſhe " can prove, by one witneſs at leaſt, that ſuch child was born " dead."

(*a*) If the woman appear to have endeavoured to conceal the death of ſuch child,

there is no need of any proof, that it was born alive, or that there were any ſigns of hurt, for it ſhall be taken undeniably, that the child was born alive, and murdered. Kelynge, 32. —— But where a woman lay in a chamber by herſelf, and went to bed without pain, and waked in the night, and knocked for help, but could get none, and was delivered of a child, and put it in a trunk, and did not diſcover it till the night following, ſhe was adjudged not to be within the ſtatute, becauſe ſhe knocked for help. Kelynge, 32. Neither is a woman within the ſtatute, who, having confeſſed herſelf with child beforehand, is afterwards ſurpriſed and delivered, nobody being with her; and therefore in theſe caſes it muſt appear by ſigns of hurt, or ſome other way, that the child was born alive. Kelynge, 33. 2 Hawk. P. C. c. 46. § 43. (*b*) But there is no need, in order to convict a woman by force of this ſtatute, to draw the indictment ſpecially, or to conclude it *contra formam ſtatuti*; but it is the better way to ſet forth, that the defendant *infantem maſculum vivum parturiit, qui quidem infans maſculus adtunc & ibidem vivus exiſtens natus per leges hujus regni Angliæ ſpurius fuit, Anglice* a baſtard, and then to go on in the ordinary form, to ſhew that ſhe murdered him, *&c. contra pacem, &c.* for the ſtatute doth not make a new offence, but only makes ſuch a concealment an undeniable evidence of murder. Kelynge, 32. 2 Hawk. P. C. c. 46. § 43. See Obſerv. on the Statutes, 424, 425. 2d ed.

(I) Where the Law requires the higheſt Proof the Nature of the Thing is capable of.

Show. Rep. 397. Carth. 220. Holt, 284. pl. 4. Salk. 281. pl. 9.

IT ſeems in regard to evidence to be an inconteſtible rule, that the party, who is to prove any fact, muſt do it by the higheſt evidence the nature of the thing is capable of.

As where the queſtion was, whether the abbey *de Sentibus* was an inferior abbey, or not, *Dugdale's Monaſticon Anglicanum* being produced for evidence was refuſed, becauſe the original records might be had in the Augmentation-office.

2 Show. Rep. 163. pl. 152.

So, if a witneſs be to teſtify what another ſwore on a former trial, the record (*c*) of ſuch trial muſt be produced, or his evidence is not to be admitted, *&c.*

[(*c*) But in ſuch caſe it is not neceſſary to produce the original record, for copies of records, the journals of the Houſe of Commons, the journals of parliament, pariſh regiſters, and the transfer-books of the Eaſt India Company, &c. are ſufficient. Wherever an original is of a publick nature, and would be evidence if produced, an immediate ſworn copy thereof will be evidence. Dougl. 171. 593. 3 Salk. 154. By 5 G. 2. c. 30. § 41. which directs proceedings on commiſſions of bankrupt to be entered on record, true copies ſigned and atteſted as therein required, may be given in evidence.]

(K) Of Hearſay Evidence.

Mod. 183. Skin. 402. pl. 37.

IT ſeems agreed, that what another has been heard to ſay is no evidence, becauſe the party was not on oath; alſo, becauſe the party, who is affected thereby, had not an opportunity of croſs-examining;

examining; but ſuch ſpeeches or diſcourſes may be made uſe of by way of inducement or illuſtration of what is properly evidence.

Alſo, what a witneſs hath been heard to ſay at another time, may be given in evidence, in order to invalidate or confirm the teſtimony he gives in court. 2 Hawk. P. C. c. 46. § 14.

So, what a perſon accuſed of a crime hath been heard to ſay at another time, may be given in evidence at his trial, either for (*a*) him or againſt him. 2 Hawk. P. C. c. 46. § 14.

(*a*) The declarations of a priſoner cannot be given in evidence for him; therefore a witneſs for this purpoſe cannot be called in his defence; but he may croſs-examine any of the witneſſes on the part of the proſecution as to any thing they may have heard him ſay relating to the fact he is charged with. *Id. ibid.* 6 Ed.]

[Where poſitive proof cannot be had, the declarations of perſons unintereſted, and who are then dead, are admiſſible, as in queſtions concerning legitimacy, or in queſtions of pedigree. Bull. Ni. Pri. 294.

Hearſay is good evidence to prove the death of any perſon beyond ſea. *Id. ibid.*

Hearſay is evidence in caſes of ſettlement of paupers. Rex v. Nutley,

3 Term Rep. 715. Rex v. Greenwich, *Id.* 716. Rex v. Holy Trinity in Wareham, Cald. 141.

It is evidence alſo, whether parcel or not parcel. Davis v. Pearce,

2 Term Rep. 53. See Garnons v. Barnard, Anſtr. 299.

In queſtions of preſcription, hearſay is good evidence in order to prove a general reputation. Bull. Ni. Pri. 295.

In a *quare impedit*, the plaintiff derived his title from Lord *R.* in whom he laid a preſentation of one *Knight*: the biſhop ſet up a title in himſelf, and traverſed the ſeiſin of Lord *R.*: the plaintiff gave in evidence an entry in the regiſter of the dioceſe of the inſtitution of *Knight*, in which there was a blank in the place where the patron's name is uſually inſerted, and then offered parol evidence of the general reputation of the country, that *Knight* was in by the preſentation of Lord *R.*: upon a bill of exceptions, this came on in *K. B.* when the better opinion was, that the evidence was admiſſible, the regiſter, which was the proper evidence, being ſilent; for a preſentation may be by parol, and what ſo commences may be tranſmitted to poſterity by parol, and that creates a general reputation. Biſhop of Meath v. Lord Belfield, Bull. Ni. Pri. 295. 1 Wilſ. 215. S. C.

It ſeems to be no objection to the admiſſion of hearſay evidence, that the party whoſe declarations are brought as hearſay evidence would not himſelf be an admiſſible witneſs, provided ſuch declarations at the time were indifferent.] Eſpin. Ni. Pri. 787.

(L) Of the Party's Confeſſion.

THE confeſſion of the defendant himſelf, whether taken on an examination before juſtices of the peace, in purſuance of 1 & 2 *P. & M. c.* 13. or of 2 & 3 *P. & M. c.* 10. upon a bailment or commitment for felony, or taken by the common law on an But for this *vide* 2 Hawk. P. C. c. 46. § 6.

examination before a magiſtrate for treaſon or other crime, or ſpoken in private diſcourſe, has always been allowed to be given in evidence againſt the party, but not againſt others.

But wherever a man's confeſſion is made uſe of againſt him, it muſt be taken all together, and not by parcels.

2 H. H. P. C. 284. Leach's Caſes, 286, 7. Burn's Juſt. tit. Examination. [The confeſſion muſt be voluntary, not drawn from the accuſed by hope, or extorted by fear. If the confeſſion be not reduced into writing, it cannot be uſed againſt the accuſed; and it is proper that he ſet his name or mark to it.

1 H. H. 585. His examination ought not to be upon oath.

Leach's Caſes, 287. Where the confeſſion is regularly taken, it is of itſelf, uncorroborated by any other evidence, ſufficient to convict the priſoner.]

(M) Of Similitude of Hands.

(a) 2 Hawk. P. C. c. 46. § 15. (b) 3 Stat. Tri. 213. 216, 217. 226. 230. (c) 3 Stat. Tri. 762 to 767. (d) 1 W. & M. c. 7. of private acts. (e) See 3 Stat Tri. 892, 893.

IT is obſervable (a) that this, with other circumſtances in (b) *Algernon Sidney*'s caſe, was ruled to be good evidence of his having written a paper charged againſt him as an overt-act of high treaſon: yet in the trial of the (c) ſeven biſhops, the court was divided in opinion, whether ſimilitude of hands was evidence of the defendant's having ſigned the paper charged againſt them as a libel; and the parliament having declared an opinion in the (d) reverſal of *Algernon Sidney*'s attainder, that compariſon of hands is no evidence of a man's hand-writing in criminal caſes: it ſeems to have been generally holden (e) ſince that time, that it is not evidence in any criminal caſe, whether capital or not capital.

4 Vol. 291, 292. and Francia's trial. Compariſon of hands was held not to be good evidence in treaſon, unleſs the papers were found in the cuſtody of the perſon himſelf, and not of another. Skin. 579. 12 Mod. 72. Ld. Raym. 40. S. C. and *per Curiam*, it is not ſufficient for the original foundation of an attainder, but may be well uſed as circumſtantial evidence, if the fact be otherwiſe proved, as in my Lord *Preſton*'s caſe, his attempting to go with ſeveral treaſonable papers into France, and principally where they were found on his perſon; but here, ſince they were found elſewhere, to convict on a ſimilitude of hands, was to run into the error of Colonel Sidney's caſe. 12 Mod. 72.

(N) Whether the Depoſitions of Witneſſes in another Cauſe may be given in Evidence.

Hardr. 22. 472. Bunb. 50. pl. 84. 91. pl. 148. 321. pl. 403. 9 Mod. 229. Carth. 181.

DEpoſitions cannot be given in evidence againſt any perſon who was not party to the ſuit; (f) and the reaſon is, becauſe he had not liberty to croſs-examine the witneſſes; and it is againſt natural juſtice that a man ſhould be concluded in a cauſe to which he never was a party.

Gilb. Evid. 62. Prec. Ch. 212. Theo. Evid. 30. 12 Vin. Abr. 113. pl. 45. 47. Vern. 413. pl. 390. Eq. Caſ. Abr. 227. pl. 3. Atk. Rep. 204. (f) But if a witneſs is examined in Chancery, you may read, without an order, any other depoſitions of the ſame perſon, in the ſpiritual court, or elſewhere, in any other cauſe, ſo as you make uſe of them only to confront the evidence he then gives. Anon. Moſely, 118. 188.

Excommunication.

EXcommunication is the higheſt eccleſiaſtical cenſure which can be pronounced by a ſpiritual judge againſt a chriſtian, for thereby he is (*a*) excluded from the body of the church, and diſabled to bring any action, or ſue any perſon in the common law courts. Co. Lit. 133. Godolp. Repert. 624.

(*a*) By the 33d of the Articles of the Church of England, that perſon, which by open denunciation of the church is rightly cut off from the unity of the church, and excommunicated, ought to be taken by the whole multitude of the faithful as an heathen and publican, until he be openly reconciled by penance, and received into the church by a judge that hath authority thereunto. Gib. Cod. 1095-6.——It was uſed by way of puniſhment only for great and heinous crimes, according to the rule in the *Reformatio Legum, fol.* 80. *Non debet excommunicatio minutis in delictis verſari, ſed ad horribilium criminum atrocitatem admovenda eſt, in quibus eccleſia graviſſimam infamiam ſuſtinet, vel quod illis evertatur religio, vel quod boni mores pervertantur.* But now the frequent uſe of excommunication is in caſes of contumacy, for not appearing or diſobeying ſentences, though in the ſmalleſt matters, and thoſe oft-times of a civil nature, which is one of the principal means of bringing a contempt upon it, and yet is the only way which the ſpiritual court hath to enforce obedience. Gib. Cod. 1095.

Excommunication is divided into the greater and leſs; the greater excludes a man from the communion of the faithful, as well as of the ſacraments; the leſs excludes him from the communion of the ſacraments only; but they both equally diſable him from bringing any action, *&c.* Co. Lit. 134.

Under this head we ſhall conſider,

(A) In what Caſes the Spiritual Court may properly excommunicate.

(B) In what Caſes a Perſon ſhall be ſaid to be *ipſo facto* excommunicated.

(C) By whom Excommunication is to be pronounced and certified.

(D) What Inconveniencies and Diſabilities it lays the Party excommunicated under: And herein, of his Diſability to bring any Action.

(E) Of the Proceedings on the Writ of *Excommunicato capiendo*, both at Common Law, and by virtue of the Statute 5 *Eliz. c.* 23.

(F) Of Abſolving and Aſſoiling a Perſon excommunicate.

(A) In what Caſes the Spiritual Court may properly excommunicate.

Roll. Abr. 883. 12 Co. 76.

IT ſeems agreed, that wherever the ſpiritual court hath juriſdiction in any (*a*) cauſe, and the party refuſes to appear to their citation, or after ſentence, being admoniſhed, refuſes to obey their decree, that he may be excommunicated.

(*a*) That anciently the king's tenants who held *in capite*, and whoſe attendance was neceſſary on the perſon of the king, could not be excommunicated. 2 Inſt. 631. Gibſ. Cod. 1102.——That a biſhop, or other peer of parliament, may be excommunicated. 7 Mod. 56. &c. The Biſhop of St. David's caſe.

Salk. 293. pl. 1. 350. pl. 7. Ld. Raym. 586. 618. Gibſ. Cod. 1097.

Alſo it ſeems, that at common law, the *ſignificavit* of an excommunication might be upon a general cauſe, as *propter contumaciam*, or *de non parendis mandatis eccleſiæ;* but now by the 5 *Eliz. c.* 23. the cauſe muſt be ſet forth in the writ *de excommunicato capiendo* itſelf, becauſe by that ſtatute the writ is made returnable in *B. R.* which would be to no purpoſe if the cauſe were not ſet forth in the writ, ſo as to enable the court to judge thereof.

14 H. 4. 14. b. Roll. Abr. 883.

But it was always holden, that the biſhop's certificate ſignifying the excommunication into Chancery, on which the writ of *excommunicato capiendo* iſſued, ought to compriſe the particular cauſe of the excommunication; ſo that the court might (*b*) judge whether it were a matter within their juriſdiction, or not.

(*b*) And therefore the court of Chancery, for any defect in the certificate, uſed to grant a *ſuperſedeas*; but before the 5 Eliz. c. 23. there were no diſcharges in B. R. on *excommunicato capiendo*, but where a man was excommunicated pending a prohibition. Salk. 293. pl. 1.

Roll. Abr. 884. Sterling's caſe. Roll. Rep. 174. S. C.

If the excommunication appears to have been by an archdeacon of a peculiar or limited juriſdiction, it ought to appear by the certificate, either expreſsly, or by implication, that the matter thereof aroſe (*c*) within his (*d*) juriſdiction; otherwiſe it is void.

(*c*) The defendant was taken upon a *capias excommunicatum*, and becauſe it was not mentioned in the *ſignificavit*, that he lived in that dioceſe at the time of the excommunication; it was therefore adjudged to be uncertain, and the party was diſcharged. Moor, 467. Beaumont's caſe. Show. Rep. 17. S. C. cited. Godb. 191. S. P. (*d*) The defendant was taken upon a *capias excommunicatum*, and the *ſignificavit* was, that he was excommunicated for not anſwering articles; but it not being ſhewn what theſe articles were; it was adjudged ill. Roll. Rep. 136. Fox's caſe.——If a man is excommunicated for an offence, which is pardoned by a general pardon, and this being ſhewn to the biſhop, he notwithſtanding refuſes to abſolve him, an action on the caſe lieth againſt him. 12 Co. 76.

Salk. 293. pl. 1. The King and Fowler, adjudged upon ſuch a return to a *habeas corpus*.

If the excommunication in a writ of *excommunicato capiendo* is recited to be *pro quibuſdam cauſis ſubſtractionis decimarum ſive* (*e*) *aliorum jurium eccleſiaſticorum;* this is too uncertain, for the *alia jura* might be ſuch matters as were out of their juriſdiction, and they ought to ſhew the matter was within their juriſdiction; for of that the king's courts are to be judges, and not they themſelves.

(*e*) *Secus*, if it had been the conjunctive *et*. 2 Atk. 499. Rex v. Turfoot, Ca. temp. Hardw. 314.]

So,

So, where in a writ of *excommunicato capiendo*, the recital of the *ſignificavit* was, that he was excommunicated for not paying the coſts *in quodam negotio puerorum educationis ſive inſtructionis ſine aliquâ licentiâ in eâ parte prius obtentâ*; the writ was quaſhed for incertainty, becauſe it might be a teaching to fence or dance, and not letters. Salk. 294. pl. 2. The Queen v. Hill, 2 Ld. Raym. 818. 1415.

There was a preſentment in the ſpiritual court of the Biſhop of *Ely* againſt the defendant for teaching ſchool* in *Cambridge* without a licence, by the churchwardens of the pariſh; whereupon, as the way was there, a citation was fixed up at the church door, for the defendant to come in and anſwer the charge of the preſentment; but he, being a diſſenter, and not coming to church, had no notice of the citation; and for his contempt in not coming, he was excommunicated; whereupon he applied to the biſhop to get himſelf aſſoiled, for that it was a writing-ſchool he taught, and ſo not within the biſhop's juriſdiction; but the court refuſed to aſſoil him, unleſs he would put in caution to anſwer ſuch articles, and abide by ſuch ſentence, as they ſhould make thereupon; which he was adviſed not to do, becauſe that would be owning their juriſdiction, and concluding himſelf to abide by their ſentence, and thereupon he moved for a prohibition, and had it, with a ſpecial clauſe to aſſoil him. Mr. *Page* moved for the prohibition, and inſiſted, that they could not excommunicate any one for contempt, without ſhewing that the matter itſelf was within their juriſdiction; and as they could not excommunicate for the original matter, if it were not within their juriſdiction, ſo neither could they for a contempt to a citation upon that matter; and cited 8 *Co.* 68. *Trollop's caſe, Doctor and Student.* 12 *Co.* 77. 14 *H.* 4. 14. 5 *Co.* 23. And he ſaid, by theſe books it appears, that, if the biſhop refuſed to aſſoil him, an action on the caſe would lie againſt him; but now-a-days, a prohibition was thought the better way; and he ſaid, this preſentment being only for teaching ſchool, they could not come after with articles, and charge him with any other matter, as a writing ſchool, Latin ſchool, or other particular ſchool; which the court agreed, and ſaid it was like a preſentment by a grand jury here, which cannot be altered or changed by articles after; and as the grand jury are upon their oath, ſo are the churchwardens there; and ſaid, that when articles are given in againſt any one, the citation ought to be founded upon them; but when it was by preſentment, that was a charge and a citation itſelf, and cannot be after altered by articles; though Serjeant *Parker* ſaid, he thought this preſentment to be only in the nature of a ſummons, and that it was neceſſary articles ſhould be drawn up againſt him after, to charge upon the particulars; but the prohibition with the ſaid clauſe was granted. Paſch. 6 Ann. The Queen and Bentley.

* None ſhall keep a ſchool-maſter, or teach ſchool, without the biſhop's licence, 23 El. c. 1. § 6 & 7. 1 Jac. 1. c. 4. § 9. 13 & 14 Car. 2. c. 4. § 11.

† For the cauſes in which an *excommunicato capiendo* may be awarded on the ſtatute, *vide* ſtat. 5 Eliz. c. 23. § 13.

[If the writ is in a ſuit *pro correctione morum*, it is too general. So, for not appearing to anſwer *certis articulis animæ ſuæ ſalutem, morumque correctionem concernentibus.* Rex v. Thead, 1 Str. 43. Rex v. Munnery, *Id.* 76.

If it is for *ſlander or defamation*, it is certain enough. Rex v Keat, 2 Str. 950.

Two

Rex v. Eyre, 2 Str. 1067.

Two *significavits* were quaſhed, being only ſaid to be in a cauſe which came by appeal in a matter merely ſpiritual. For by Lord *Talbot*, we are not to lend our aſſiſtance, but where it appears clearly they have juriſdiction, and are not to truſt them to determine what is a matter merely ſpiritual. In *Fowler*'s caſe, it was in cauſes of eccleſiaſtical rights, and held not ſufficient.]

(B) In what Caſes a Perſon ſhall be ſaid to be *ipſo facto* excommunicated.

(*a*) For the cauſes of excommunication *ipſo facto*, according to the conſtitutions and canons eccleſiaſtical of the church of England, *vide* Godolp. Repert. 629, 639.

BY ſeveral (*a*) acts of parliament, offenders of ſeveral kinds are made to incur the puniſhment of excommunication *ipſo facto*.

[By 27 G. 3. c. 44. no ſuit ſhall be commenced in any eccleſiaſtical court for ſtriking or brawling in any church or church-yard after the expiration of eight calendar months from the commiſſion of the offence.]

And to this purpoſe it is enacted by 6 *E.* 6. *c.* 4. "That if any "perſon whatſoever ſhall, by words only, quarrel, chide, or brawl "in any church or church-yard, that then it ſhall be lawful unto "the ordinary of the place where the ſame offence ſhall be done, "and proved by two lawful witneſſes, to ſuſpend every perſon "ſo offending, that is to ſay, if he be a layman *ab ingreſſu eccleſiæ*; and if he be a clerk, from the miniſtration of his office for "ſo long time as the ſame ordinary ſhall by his diſcretion think "meet and convenient, according to the fault."

And it is further enacted by the ſaid ſtatute, "That if any "perſon ſhall ſmite or lay any violent hands upon any other, "either in any church or church-yard, that then *ipſo facto* every "perſon ſo offending ſhall be deemed excommunicate, and be "excluded from the fellowſhip and company of Chriſt's congre-"gation."

And it is further enacted by the ſaid ſtatute, "That if any "perſon ſhall maliciouſly ſtrike any perſon with any weapon, in "any church or church-yard, or ſhall draw any weapon in any "church or church-yard, to the intent to ſtrike another with the "ſame weapon, that then every perſon ſo offending, and thereof "being convicted by verdict of twelve men, or by his own con-"feſſion, or by two lawful witneſſes before juſtices of aſſize, "juſtices of *oyer* and *terminer*, or juſtices of peace in their ſeſſions, "by force of this act, ſhall be adjudged by the ſame juſtices, be-"fore whom ſuch perſon ſhall be convicted, to have one of his "ears cut off, &c. and beſides that, every ſuch perſon to be "and ſtand *ipſo facto* excommunicated, as aforeſaid."

In the conſtruction hereof the following opinions have been holden:

Cro. Eliz. 224.

1. That the ſtatute extends as well to cathedral as parochial churches and church-yards.

Dyer, 275. pl. 48. Lit. Rep.

That notwithſtanding the words of the ſtatute be expreſſed, That he who ſmites another in the church (*b*), &c. ſhall *ipſo facto* be

be deemed excommunicate; yet there ought either to be a precedent conviction at law, which must be transmitted to the ordinary, or the excommunication must be declared in the spiritual court, upon a proper proof of the offence there; for it is implied in every penal law, that no one shall incur the penalty thereof till he be found guilty upon a lawful trial: also, it must be intended, in the construction of this statute, that the excommunication ought to appear judicially; for otherwise there could be no absolution.

149. Hetl. 86. Cro. Eliz. 919. Vent. 146.

[(*b*) For this second offence in the act, *smiting in a church-yard*, a precedent conviction at law is not necessary, though if there is one, the ordinary may use it as a proof of the fact. For with respect to this, and the first offence in the act, the statute, though it provides a penalty, does not change the jurisdiction. As to the last offence, *malicious striking with any weapon*, &c. there must be a previous conviction, and a transmission of the sentence, and a declaration. Wilson v. Greaves, 1 Burr. 240. Wenmouth v. Collins, 2 Ld. Raym. 850.]

That when the proceedings for the offences against this statute are in the spiritual court, costs may be given *pro expensis litis*, but not *pro damnis*.

Cro. Jac. 462. Hetl. 86. S. P. 1 Burr. 244.

That he who strikes another in a church, &c. can no way excuse himself, by shewing that the other assaulted him.

Cro. Jac. 367.

That (*c*) churchwardens who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute.

Saund. 13. Hawe v. Planner. 2 Keb. 124. Lev. 196. Sid. 301. Mod. 168.

S. C. (*c*) Or perhaps private persons. 1 Hawk. P. C. c. 63. § 29.

That if the proceeding be in the temporal courts, by way of indictment, for drawing a weapon in the church, &c. and it conclude *contra formam statuti*, it must be laid to be, with an intent to strike such a person; for being laid to be *contra formam statuti*, the jury cannot inquire of any other offence than that which comes within the description of the act.

Cro. Eliz. 231. Penhallo's case. 4 Leon 49. Noy, 171. S. C.

That in an indictment upon this statute, for striking in the church, in order to bring the offender within the latter clause of the statute, which subjects him to the loss of an ear, &c. it must be shewn that the striking was with a weapon.

Cro. Eliz. 464.

So, it hath been holden, that if a man take up a stone in the church-yard, and offer to throw it at another, or having a hatchet or ax in his hand offer to strike another therewith, that this is not an offence within this part of the statute; for these are not such weapons as may properly be said to be drawn, as a sword, dagger, &c.

Dalton's Justice, c. 34. f. 49. said to have been so holden by two justices.

Comp. Incumb. 347. cited.

Also, two persons committed to prison by certain justices of the peace for disturbing a minister in his office, were discharged upon a *habeas corpus*, by the court of King's Bench, for that their commitment was too general, not shewing wherein they disturbed, but only that they *per apertum factum* disturbed, &c. not shewing the particular fact whereby they did disturb, *viz.* by brawling, fighting, or otherwise, there being several punishments to each; but the court bound them to their good behaviour for a year.

3 Keb. 803. Rex v. Nicols and Robins. Comp. Incumb. 347. S. C. cited.

By

By the 3 *Jac.* 1. *c.* 5. § 11 and 12. it is enacted, "That every "popiſh recuſant convict ſhall ſtand to all intents and purpoſes "diſabled, as a perſon lawfully excommunicated, and as if ſuch "perſon had been ſo denounced and excommunicated according "to the laws of this realm, until he or ſhe ſhall conform, &c. "and that every perſon ſued by ſuch perſon ſo diſabled, may plead "the ſame in diſabling of ſuch plaintiff, as if he or ſhe were ex-"communicated by ſentence in the eccleſiaſtical court, except the "action of ſuch recuſant do concern ſome hereditament or leaſe, "which is not to be ſeiſed into the king's hands, by force of "ſome law concerning recuſancy."

In the expoſition hereof it hath been holden,

Noy, 87. Latch. 176. 3 Lev. 333, 4.

1. That a plea in diſability, purſuant to this ſtatute, ought to ſhew before what juſtices the conviction was, that the court may know where to ſend for a certificate thereof, if it be denied; and that the record itſelf, or at leaſt a certificate thereof, ought immediately to be produced.

Hetl. 176. * Why not in the nature of a plea, after the laſt continuance, if the plaintiff hath by his own act rendered himſelf incapable?

2. That if after ſuch a plea it be certified, that the plaintiff have conformed, and thereupon the defendant be ordered to plead in chief, and then the plaintiff relapſe and be convict again, the defendant cannot plead the ſame in diſability a ſecond time*.

3 Lev. 333, &c.

3. That it muſt appear, either from the conviction itſelf or by proper averments, that the plaintiff is convicted of popiſh recuſancy, becauſe no recuſants, except popiſh ones, are within the ſaid clauſe; but this is ſufficiently ſet forth, by alleging, that the plaintiff being *papalis recuſans* was indicted and convicted *ſecundum formam ſtatuti*, &c.

(*a*) 2 Bulſt. 155.

Alſo it is holden by (*a*) ſome, that all popiſh recuſants convict may be taken up by the writ *de excommunicato capiendo*, and that they are not to be admitted as competent witneſſes in any cauſe; but by (*b*) *Hawkins*, this ſeems to be a conſtruction over-ſevere; for inaſmuch as this, like all other penal ſtatutes, ought to be conſtrued ſtrictly, and the words thereof are no more than that ſuch perſons ſhall ſtand diſabled, &c. as perſons lawfully excommunicate, &c. and the purport thereof may be fully ſatisfied by the diſability to bring any action; it ſeems to be too rigorous to carry them farther.

(*b*) Hawk. P. C. c. 12. § 6.

But for this *vide* Gibſ. Cod. 1098.

By the 25 *E.* 1. *c.* 4. it is enacted, "That all archbiſhops and "biſhops ſhall pronounce the ſentence of excommunication againſt "all thoſe that by word, deed, or counſel, do contrary to the char-"ters of *Magna Charta*, or that in any point break or undo "them; and that the ſaid curſes be twice a year denounced and "publiſhed by the prelates aforeſaid."

(C) By whom Excommunication is to be pronounced and certified.

THE ſentence of excommunication can only be pronounced by the biſhop, or other perſon in holy orders, being a maſter of arts at leaſt: alſo, the prieſt's name pronouncing ſuch ſentence is to be expreſſed in the inſtrument iſſuing under ſeal out of the court. Gibſ. Cod. 1095.

Excommunication muſt be certified by the biſhop of the dioceſe, whoſe proper ſubject the party is, and cannot be certified by his commiſſary (*a*) or official; the reaſon whereof, according to the (*b*) civilians, is, becauſe no perſon inferior to a biſhop can call in the ſecular arm, by the laws of the church; but my Lord (*c*) *Coke* aſſigns the reaſon of it to be, becauſe no certificate of excommunication by any ſhall diſable one, but the certificate of him to whom the court may write to abſolve the party excommunicated. Co. Lit. 133. Roll. Abr. 884.

[(*a*) By the ancient common law, as was ſaid by Hankford, 11 H. 4. 64. a. a commiſſary might certify excommunication; and that he was reſtrained by parliament.] (*b*) Lindw. *de Sent.* Ex Gibſ. Cod. 1097. (*c*) 8 Co. 68.

But the vicar general, *epiſcopo in remotis agente*, or the guardian of the ſpiritualities, *vacante ſede*, may do it, (*d*) either by direct certificate, that the perſon is excommunicate, or by letters teſtimonial, reciting the entry thereof in the regiſter, and atteſting that ſuch entry is there found. Co. Lit. 133. F. N. B. 62. N. (*d*) Vern. 222. 3 Keb. 60. 69.

[And although the biſhop be in his dioceſe, yet the certificate of the vicar general, by his letters unto the Chancery, reciting that the biſhop is *in remotis agend.*, is good, and ſhall not be traverſed.] F. N. B. 62. N.

So, a parſon excommunicated by a commiſſary, official or archdeacon, who derive their juriſdiction from the biſhop, may be certified excommunicated by the biſhop himſelf (*e*). 8 Co. 63. Roll. Abr. 434. Reg. 65.

[(*e*) But in this caſe the rule in the regiſter is, that the excommunication muſt be ſaid in the writ to be by the authority of the biſhop himſelf.]

Alſo, the biſhop, after election, though before conſecration, may certify excommunication. F. N. B. 62. N.

[The chancellor of the univerſity of *Oxford* may certify excommunication of perſons within his juriſdiction. F. N. B. 64. C.

Whether the court of delegates have power to excommunicate, (though adopted in more modern practice,) hath formerly occaſioned a difference of opinion.] 2 Bulſtr. 4. 2 Roll. Abr. 233. Lutw. 17.

In times of popery, excommengement certified by the pope, or delegates commiſſioned by him, did not diſable the plaintiff to ſue, *&c.* becauſe the courts had no perſon to whom they could write to have him abſoiled. 16 E. 3. 31. 14 H. 4. 14. Roll. Abr. 883.

The court will not receive the certificate of excommunication of one biſhop from another, becauſe they muſt have the certificate from the biſhop whoſe proper ſubject the party was; and he might have been abſoiled by his own ordinary, after the firſt certificate to the biſhop. 8 Co. 63. F. N. B. 65. A.

Nor

Bro. Excom. 21. Co. Lit. 134. (a) Roll. Abr. 883.

Nor will they receive a certificate of a biſhop deceaſed, becauſe he may ſtand abſoiled by the preſent ordinary that now is, after the deceaſe of the biſhop who has certified; and the court will not (a) receive any certificate but from ſuch perſon to whom they can write to abſoil.

Co. Lit. 134.

[But when the biſhop hath certified the excommunication under ſeal, his death will not vacate the certificate.]

8 Co. 63. (b) Roll. Abr. 883. Lindw. 150. Swinb. 309.

The certificate ought to be directed, either to the court, or at leaſt *univerſis & Matris eccleſiæ filiis*, and (b) ought to contain the day of the excommunication, [that is, the day on which the excommunication was publiſhed in the church, for the writ *de excommunicato capiendo* cannot be awarded till the party hath lain under the ſentence forty days (c), which are to be reckoned from that day.

[(b) For within forty days it was competent to him to appeal to the court of Rome, and the appeal would operate as a *ſuperſedeas* to the proceſs, and liberate the party. 20 H. 6. 25. a. b.]

F. N. B. 64. F.

The certificate muſt ſignify, that the perſon was excommunicated by ſpecial name, and in a ſpecial ſuit againſt him *ex officio*, or by the party; for otherwiſe he doth not incur the ſentence of the greater excommunication.

Rex v. Burrard, 1 P. Wms. 435.

The defendant was excommunicated for not paying his proportion of a rate made for repairing the church of *D.* in *Suffolk*. It was moved to ſuperſede the writ, 1ſt, For that it was not ſhewn that the defendant was commorant within the dioceſe at the time of the excommunication pronounced, *Moor* 467. Sir *T. Jones* 89. 2dly, Becauſe there was no addition of the defendant in the writ. On the other ſide it was anſwered, (as to the firſt objection) that the defendant in the libel was ſaid to be of *D.* in *Suffolk*, which was the ſame pariſh where the church was, and it ſhould not be intended that, after the libel, he removed from thence: but if he did remove, his flying from the proceſs of the court ſhould not mend his caſe, for then the party, by his own act, and by turning his back upon juſtice, might avoid ſuch proceedings. As to the want of addition, this was ſaid to be only neceſſary in the cauſes of excommunication mentioned in the ſtatute of 5 *Eliz. c.* 23. for which reaſon it was true, that for want of addition, there could be no proceeding againſt him by way of proclamation with pains and penalties for not appearing; but ſtill as the matter was plainly of eccleſiaſtical cognizance, (*viz.*) the repairing of the church, the excommunication was good, and ſo was *Cro. Car.* 196. *Hughes*'s caſe, *T. Jones* 89. The inhabitants of *Bermondſey*, 1 *Show.* 16. *Johnſon*'s caſe, 1 *Salk.* 293. The king v. *Fowler*.—The chancellor diſallowed both the exceptions.

Dr. Trebec v. Keith, 2 Atk. 498.

Mr. *Keith*, miniſter of *May-fair* chapel, which was a chapel of eaſe to *St. George*'s pariſh, *Hanover-ſquare*, of which the plaintiff was rector, being cited into the biſhop of *London*'s court for officiating as a clergyman of the church of *England* without being licenſed by the biſhop, and having been denounced excommunicate forty days, for contumacy and contempt of the eccleſiaſtical laws, upon the biſhop's certificate into Chancery, the writ of *ſignificavit* iſſued,

iſſued, which it was moved to quaſh.—Lord *Hardwicke* Chancellor.—This is a caſe of as great conſequence to the good government and diſcipline of the church as can poſſibly happen. I can take notice of nothing but what appears on the *ſignificavit*(a); and the queſtion before me is, whether there is ſufficient to warrant the court to iſſue the writ of *excommunicato capiendo?* Now, if this gentleman is out of the juriſdiction, he is not without remedy, for he may go to a court of common law after ſentence, as well as before. The firſt and material exception is, that the particular cauſe of the excommunication ought to be ſet forth. It is not neceſſary for the eccleſiaſtical court to ſhew they have rightly proceeded; for if they have not, you have a remedy by appealing to higher eccleſiaſtical juriſdiction. Here is certainly a deſcription of the principal cauſe, and if ſome of the matters mentioned are within the juriſdiction, it is ſufficient. It is not like the caſe of *The King* and *Fowler*, which was held uncertain, as it was in the disjunctive, *tithes* OR *other eccleſiaſtical dues*, ſo that it might be eccleſiaſtical dues only: if it had been *tithes* AND *other eccleſiaſtical dues*, it would have been well enough. As to preaching, there is no pretence for his doing it without licence from the biſhop: the ſame as to the adminiſtration of the ſacrament, and celebration of marriage; for the canons of 1603, confirmed by act of parliament, are expreſs as to that matter. Here, the ground of the contumacy is deſcribed ſpecially, which is more than is neceſſary; for where the cauſe is ſufficient it may be ſet forth generally. The ſecond exception is, that it is not mentioned in what manner *Keith* officiated, or performed divine ſervice, and therefore it might be in his own houſe, or a private chapel. But the word *officiating* ought not to be ſo conſtrued; for reading prayers or a ſermon in a private family, is not performing divine ſervice. *Divine ſervice* is the expreſſion made uſe of in ſeveral acts of parliament, particularly in the act of uniformity, 13 & 14 *Car.* 2. *c.* 4. § 27. relating to the ſervice in *Welſh*: in ſeveral other acts of parliament that direct the reading of proclamations, the order is, that it be read after divine ſervice. The word *officiate* relates to his office as a preſbyter, which muſt mean his doing it in a publick manner. It is not indeed neceſſary for a miniſter to have a licence from the biſhop of the dioceſe for every particular caſe, but yet the biſhop may ſuſpend him wholly where he is irregular, till he ſubmits to perform his duty properly: and it is not here a deſcription of the caſe, but of the contempt only, for which he has excommunicated him. The fourth exception is, That it is not ſaid at the time of the excommunication he officiated within the dioceſe of *London*, and therefore has been cited out of the dioceſe contrary to the ſtatute of 23 *H.* 8. *c.* 9. It is not averred, indeed, that he was reſident in the dioceſe at the time of the excommunication pronounced, but being ſaid in the libel to be in the dioceſe, I will not preſume he was not commorant when the monition iſſued; and to this purpoſe the caſe of *The King* v. *Burrard*, 1 *P. Wms.* 435. was properly cited. There is another anſwer to this objection; that a man may be reſident in one dioceſe, and come into another and commit the

(a) The word *ſignificavit* is here uſed to denote the biſhop's certificate. It is ſometimes uſed to denote the writ *de excommunicato capiendo* itſelf. In this latter ſenſe it ſeemeth to be more properly applied; the writ having received its name from this ſame word in the beginning of it. *Significavit nobis venerabilis pater N.* &c.

The third exception was, that it is not ſaid he has performed divine ſervice ſince the monition. But to this his Lordſhip is not reported to have ſpoken.

the offence charged upon him in the *ſignificavit*, and this, for the purpoſe of being cited, is a reſidence ſufficient, and he may be preſented in the dioceſe where he committed the offence; and unleſs he was ſo conſidered, there would be no remedy. See Dr. *Blackmore*'s caſe in *Hardr.* 421. The fifth exception is, That he, who pronounced the ſentence of excommunication, is not ſaid to be a perſon in holy orders. The averment in the *ſignificavit* is ſufficient, for the words are, *a perſon lawfully authorized*, which take in the capacity of the perſon doing it. The ſixth exception is, That it doth not appear when the excommunication was pronounced. Now, the *ſignificavit* only avers, that he continued contumacious, but the *terminus a quo*, and the *terminus ad quem*, are never ſet forth. The laſt exception was, That Mr. *Keith* is within the toleration act, the 1ſt *W. & M. c.* 18. The act of toleration was made to protect perſons of tender conſciences, and to exempt them from penalties; but to extend it to clergymen of the church of *England*, who act contrary to the rules and diſcipline of the church, would introduce the utmoſt confuſion. All the exceptions therefore muſt be over-ruled.]

(D) What Inconveniencies and Diſabilities it lays the Party excommunicated under: And herein of his Diſability to bring any Action.

Gibſ. Cod. 435. 1096. 7. (*a*) But ſuch a perſon is entitled to the benefit of clergy.

A Perſon excommunicated is thereby diſabled to (*a*) be a witneſs in any cauſe, cannot be attorney or procurator for another, is to be turned out of church by the churchwardens, and not to be allowed chriſtian burial.

Bro. Clergy, 20.—And may contract marriage. Godolph. Repert. 626.

9 E. 4. 36. Co. Lit. 133. 8 Co. 63. Roll. Abr. 883.

An excommunicate perſon is diſabled to ſue or commence any action; but ſuch diſability cannot be pleaded (*b*) after a general imparlance, for thereby the defendant admits him a good plaintiff.

(*b*) Placita Gen. 10. Latch. 179. Lutw. 19. See tit. Abatement, vol. i. p. 4. 5.

Lit. § 207. 8 Co. 69. Co. Lit. 134. 3 Lev. 208. 240.

When excommunication is pleaded, the biſhop's letter under his ſeal, witneſſing the excommunication, muſt be ſhewn; and though the plaintiff cannot deny the plea, yet the writ ſhall not abate, but the defendant *eat inde ſine die*, becauſe the plaintiff, upon producing his letters of abſolution, ſhall have a re-ſummons or re-attachment.

3 Aſſiſe, pl. 22. 2 Hawk. P. C. 114.

If in an appeal of murder, *&c.* the defendant pleads excommunication in the plaintiff in diſability, the appellee ſhall be bailed until the plaintiff purchaſes letters of abſolution, and then he muſt plead in chief; for if the defendant ſhould be kept in priſon till the plaintiff be abſolved, he might be a priſoner for life.

Excom-

Excommunication is a good plea to an executor or adminiſtrator, though they ſue *in auter droit*, for an excommunicate perſon is excluded from the body of the church, and incapable to lay out the goods of the deceaſed to pious uſes: beſides, it is one of the effects of excommunication, that he cannot be a procurator or attorney for any other perſon, and therefore cannot repreſent the deceaſed (*a*). 43 E. 3. 13. Co. Lit. 134. Theol. 11. [(*a*) But an excommunicated perſon may be appointed executor, and is capable of a legacy: for the ſentence will not annul the executorſhip, or quite deſtroy the action; but only ſuſpend it till abſolution. God. O. L. 37, 38. Swinb. 367.]

Excommunication is no plea on a *qui tam*, becauſe it is for example; and the ſtatute having given the informer an ability to ſue, and not excepted excommunicated perſons from the liberty of informing, he is enabled to ſue by the ſtatute, notwithſtanding the cenſures of the church. 12 Co. 61.

When a prohibition is brought againſt the biſhop, and he pleads excommunication againſt the plaintiff, and in the excommunication there is no cauſe of ſuch excommunication ſhewn; this is no good plea; for, in ſuch caſe, it will be intended, that the excommunication was for endeavouring to hinder the biſhop's proceeding, by application to the temporal court; and if ſuch excommunication were allowed, it would deſtroy all prohibitions, and the plea of excommunication in this caſe is *exceptio ejuſdem rei cujus petitur diſſolutio*. 28 E. 3. 97.

If an action be brought by the bailiffs and commonalty of a corporation, the defendant ſhall not plead excommunication in the bailiffs, becauſe they ſue as a corporation, and a corporation cannot be excluded from the communion of the viſible church. 30 E. 3. 15. Co. Lit. 134.

When excommunication is pleaded in the plaintiff, he ſhall not reply, that he has appealed from the ſentence, for the ſentence is in force until it is repealed; and whilſt it is in force, he cannot appear in any of the courts of juſtice; but he may reply, he is abſolved; for then his diſability is taken away. Bro. Excommunication 3. 3 Bulſt. 72. 20 H. 6. 25 Placita Gen. 10. 72.

[A party in cuſtody on an *excommunicato capiendo* is entitled to the benefit of the rules.] Rex v. Buckland, 1 Str. 413.

(E) Of the Proceedings on the Writ of *Excommunicato capiendo*, both at Common Law and by virtue of the Statute 5 *Eliz. c.* 23.

IT is ſaid, that the writ *de excommunicato capiendo* is a liberty or privilege peculiar to the church of *England*, above all the realms in Chriſtendom; for though the aſſiſtance of the ſecular arm hath ever been afforded to the church in moſt other chriſtian countries as well as this, yet in no inſtance is it perhaps ſo ſurely and ſo effectually reached out, as by the execution of this writ, which is (*a*) *debitum juſtitiæ*, and not made to depend upon the pleaſure of the prince. Gibſ. Cod. 1102. cited from Dr. Coſen's Apol. fol. 8. (*a*) But in 2 Inſt. 623. 631. it is expreſſly ſaid, that *breve regis de excommunicato capiendo de gratiâ regis procedit.*

Fitz. N. B. 140. Salk. 293. pl. 1.

The writ of *excommunicato capiendo* iſſues out of Chancery, and is founded on the biſhop's certificate, ſignifying the excommunication, and at common law was only returnable into that court; ſo that for any uncertainty or defect in the writ, the party could only be diſcharged in Chancery.

But now by the 5 *Eliz. c.* 23. intitled, *An act for the due execution of the writ* de excommunicato capiendo, reciting, "Foraſmuch "as divers perſons offending in many great crimes and offences, "appertaining merely to the juriſdiction and determination of the "eccleſiaſtical courts and judges of this realm, are many times "unpuniſhed for lack and want of the good and due execution of "the writ *de excommunicato capiendo*, directed to the ſheriff of any "county, for the taking and apprehending of any ſuch offenders, "the great abuſe whereof, as it ſhould ſeem, hath grown, for that "the ſaid writ is not returnable in any court that might have the "judgment of the well executing and ſerving the ſaid writ, ac-"cording to the contents thereof; but hitherto hath been left "only to the diſcretion of the ſheriffs and their deputies, by whoſe "negligence and defaults for the moſt part the ſaid writ is not "executed upon the offenders as it ought to be, by reaſon "whereof ſuch offenders be greatly encouraged to continue their "ſinful and criminous life, much to the diſpleaſure of Almighty "God, and to the great contempt of the eccleſiaſtical laws of "this realm:

(a) That the preciſe form of the ſtatute muſt herein be obſerved, and that the writ muſt be brought and openly delivered in court. Cro. Jac. 567. (b) That the writ muſt be enrolled and delivered to the ſheriff in convenient time; Cro. Car. 583. Packer's caſe. Vent. 338. S. P. and the priſoner may be diſcharged on motion, as well as by pleading this matter, at the return of the *habeas corpus*, & *vide* Sid. 285.——But where for ſuch a fault the court refuſed to diſcharge the priſoners, or to bail them, becauſe they were dangerous perſons, and refuſed to take the oath of allegiance, *vide* Sid. 265. Alley

"2. Wherefore, it is enacted, That every writ of *excommuni-*"*cato capiendo*, that ſhall be granted and awarded out of the high "court of Chancery againſt any perſon or perſons within the "realm of *England*, ſhall be made in the time of term, and return-"able before the queen's highneſs, her heirs and ſucceſſors, in the "court commonly called the King's Bench, in the term next after "the *teſte* of the ſame writ, and the ſame writ ſhall be made to "contain, at the leaſt, twenty days between the *teſte* and the re-"turn thereof; and after the ſame writ ſhall be ſo made and "ſealed, that then the ſaid writ ſhall be forthwith brought into "the ſaid court of King's Bench, and there, in the preſence of "the juſtices, ſhall be opened and (*a*) delivered of (*b*) record to "the ſheriff or other officer (*c*), to whom the ſerving and execu-"tion thereof ſhall appertain, or to his or their deputy or depu-"ties; and if afterwards it ſhall or may appear to the juſtices of "the ſame court for the time being, that the ſame writ ſo de-"livered of record be not duly returned before them at the day "of the return thereof, or that any other default or negligence "hath been uſed or had in the not well ſerving and executing of "the ſaid writ, that then the juſtices of the ſaid court ſhall and "may, by authority of this act, aſſeſs ſuch amercement upon the "ſaid ſheriff or other officer, in whom ſuch default ſhall appear, "as to the diſcretion of the ſaid juſtices ſhall be thought meet "and convenient; which amercement ſo aſſeſſed ſhall be eſtreated "into the court of Exchequer as other amercements have been "uſed.

Alſo, upon the conſtruction of this clauſe of the ſtatute, it hath been holden, 1. That one taken on a writ of *excommunicato capiendo* cannot come into B. R. but by *habeas corpus*; and if he be brought in before the writ is returnable, he ſhall not be allowed to plead, or move to quaſh the writ. 2. The writ of *excommunicato capiendo* recites the *ſignificavit* which is in Chancery, but the writ is brought into B. R. and is enrolled there before it goes to the ſheriff, which enrolment is to inform the court, that at the return of the *excommunicato capiendo* they may award farther proceſs, as the caſe requires. 3. If by the recital of the *ſignificavit* it appears, that there was no cauſe for the writ, the court of King's Bench may quaſh it, and the court of Chancery cannot, though the *ſignificavit* be there. Salk. 294. pl. 3. [It was formerly doubted, whether after the writ had been iſſued out of Chancery, and brought into the court of B. R., and there delivered to the ſheriff, but not actually returned into B. R., the court of Chancery, on a plain error appearing, could ſuperſede it. Rex v Burrard, 1 P. Wms. 435. But it was determined by Lord Hardwicke, that after the return of the writ is out, the court of Chancery cannot, on a petition to quaſh the writ, do any thing in it, as they have no authority; for the court of B. R. have the cognizance of it, and they can compel the ſheriff to return it, and the application to quaſh it muſt be to them. If indeed the writ iſſue in the vacation, and be not yet returnable, (for it muſt be returned on one of the return days in the term,) the court of Chancery will give relief and diſcharge the party out of cuſtody. *Ex parte* Little, 3 Atk. 479. But if the writ iſſued from the court of Chancery be opened and enrolled in B. R., and on exceptions taken, a rule be made for the proſecutor to ſhew cauſe why the delivery of the writ to the ſheriff ſhould not be ſtaid, and before that can be done, the return be out, another writ may be ſued out from Chancery, but not from B. R. Rex v. Eyre, 2 Str. 1189. After a writ had been opened and entered of record, it was delivered out in order to take up the defendant; and before the return, the defendant moved and had it ſuperſeded; for the court ſaid, they could judge of it by the entry, and ſince it appeared the defendant could not be legally detained upon it, if he was taken, it was proper to ſuperſede it, to prevent him from being reſtrained of his liberty contrary to law: that the intent of this ſtatute in directing the writ to be delivered in open court, was to appriſe the court of the nature of the cauſe; that this was now to be conſidered as a writ that *improvidè emanavit*, and they were not to wait till the return, till all the inconveniencies, which they ſhould have prevented by not iſſuing the writ, had happened. Rex v. Theed, 1 Str. 43. 10 Mod. 350. S. C. (*c*) The words "*other officers*" in the ſtatute mean bailiffs of liberties or the coroner, who is the proper officer to execute proceſs, where the ſheriff is incapacitated: therefore, if one who is a priſoner in the Fleet be excommunicated, the court of Chancery cannot order the curſitor to direct the writ of *excommunicato capiendo* to the warden of the Fleet, the ſame being a *viſcountiel* writ; but the writ muſt be directed to the ſheriff, who may return a *non eſt inventus* into the King's Bench, upon which return the court will grant a *habeas corpus* to bring up the priſoner, and there charge him with an *excommunicato capiendo*. Strudwicke's caſe, 3 P. Wms. 53.]

" 3. It is further enacted, That the ſheriff, or other officer, to " whom ſuch writ of *excommunicato capiendo*, or other proceſs by " virtue of this act ſhall be directed, ſhall not in anywiſe be com- " pelled to bring the body of ſuch perſon or perſons as ſhall be " named in the ſaid writ or proceſs into the ſaid court of King's " Bench, at the day of the return thereof, but ſhall only return " the ſame writ and proceſs thither, with declaration briefly, how " and in what manner he hath ſerved and executed the ſame, " to the intent that thereupon the ſaid juſtices may then further " proceed, according to the tenor and effect of this preſent act.

" 4. And if the ſheriff or other officer, to whom the execution " of the ſaid writ ſhall ſo appertain, do or ſhall return, that the party " or parties named in the ſaid writ cannot be found within his " bailiwick, that then the ſaid juſtices of the King's Bench for " the time being, upon every ſuch return, ſhall award one writ " of *capias* againſt the ſaid perſon or perſons named in the ſaid " writ of *excommunicato capiendo*, returnable in the ſame court in " the term-time, two months at leaſt next after the *teſte* thereof, " with a proclamation to be contained within the ſaid writ of " *capias*, that the ſheriff, or other officers, to whom the ſaid writ " ſhall be directed in the full county-court, or elſe at the general " aſſizes or gaol delivery to be holden within the ſaid county, or " at a quarter ſeſſions to be holden before the juſtices of the peace " within the ſaid county, ſhall make open proclamation, ten days " at leaſt before the return, that the party or parties named in the

" ſaid writ ſhall, within ſix days next after ſuch proclamation, " yield his or their body or bodies to the priſon of the ſaid ſheriff, " or other ſuch officer, there to remain as a priſoner, according to " the tenor or effect of the firſt writ of *excommunicato capiendo*, " upon pain of forfeiture of ten pounds; and thereupon after " ſuch proclamation had, and the ſaid ſix days paſt and expired, " then the ſaid ſheriff or other officer, to whom the ſaid *capias* " ſhall be directed, ſhall make return of the ſame writ of *capias* " into the ſaid court of the King's Bench of all that he hath done " in the execution thereof, and whether the party named in the " ſaid writ have yielded his body to priſon, or not.

" 5. And if upon the return of the ſaid ſheriff it ſhall appear, " that the party or parties named in the ſaid writ of *capias*, or any " of them, have not yielded their bodies to the gaol and priſon of " the ſaid ſheriff, or other officer, acccording to the effect of the " ſame proclamation, that then every ſuch perſon, that ſo ſhall " make default, ſhall, for every ſuch default, (*a*) forfeit to the " queen's highneſs, her heirs and ſucceſſors, ten pounds, which " ſhall likewiſe be eſtreated by the ſaid juſtices into the ſaid court " of Exchequer, in ſuch manner and form as fines and amerce- " ments there taxed and aſſeſſed are uſed to be.

(*a*) This ſtatute doth not take away or affect the *excommunicato capiendo* at common law, but in the particular caſes therein mentioned gives a greater penalty to enforce it; and therefore the writ doth not only iſſue upon excommunication in any other caſes, but (as hath been often adjudged) though a *capias* with proclamations and penalties go forth in a matter not within this ſtatute, and the perſon be thereupon impriſoned, and pray to be diſcharged, becauſe the matter for which he was excommunicated (though of a ſpiritual nature) is not within this ſtatute, yet nothing ſhall be diſcharged but the penalties, and (without any new writ obtained) the excommunication and impriſonment may remain as at common law, and not be diſcharged but by abſolution in due form. Gibſ. Cod. 1106. but for this *vide* Cro. Car. 197. 199. Roll. Abr. 175. Jon. 226. Latch. 174. 204. 2 Jon. 89. Show. 17. 3 Mod. 42-3. Skin. 167. pl. 6. Vern. 24. Salk. 294. pl. 4. 7 Mod. 56. 117.

" 6. And thereupon the ſaid juſtices of the King's Bench ſhall " alſo award forth one other writ of *capias* againſt the ſaid perſon " or perſons that ſo ſhall be returned to have made default, with " ſuch like proclamation as was contained in the firſt *capias*, and " a pain of 20 *l.* to be mentioned in the ſecond writ and procla- " mation; and the ſheriff or other officer, to whom the ſaid ſecond " writ of *capias* ſhall be ſo directed, ſhall ſerve and execute the " ſaid writ in ſuch like manner and form, as before is expreſſed, " for the ſerving and executing of the ſaid firſt writ of *capias*; " and if the ſheriff or other officer ſhall return upon the ſaid " ſecond *capias*, that he hath made the proclamation according to " the tenor and effect of the ſame writ, and that the party hath " not yielded his body to priſon, according to the tenor of the " ſaid proclamation, that then the ſaid party, that ſo ſhall make " default, ſhall, for ſuch his contempt and default, forfeit to the " queen's highneſs, her heirs and ſucceſſors, the ſum of twenty " pounds, which ſaid ſum of twenty pounds the ſaid juſtices of " the King's Bench for the time being ſhall likewiſe cauſe to be " eſtreated into the ſaid court of Exchequer, in manner and form " aforeſaid.

" 7. And then the ſaid juſtices ſhall likewiſe award one other " writ of *capias* againſt the ſaid party, with ſuch like proclamation " and pain of forfeiture as was contained in the ſaid ſecond writ of

" *capias*, and the ſheriff or other officer, to whom the ſaid third " writ of *capias* ſhall be ſo directed, ſhall ſerve and execute the ſaid " third writ of *capias*, in ſuch like manner and form as before in " this act is expreſſed and declared, for the ſerving and executing " of the ſaid firſt and ſecond writs of *capias*; and if the ſheriff " or other officer, to whom the execution of the ſaid third writ " ſhall appertain, do make return of the ſaid third writ of *capias*, " that the party upon ſuch proclamation hath not yielded his body " to priſon, according to the tenor thereof, that then every ſuch " party, for every ſuch contempt and default, ſhall likewiſe for- " feit to the queen's majeſty, her heirs and ſucceſſors, other 20 *l.* " which ſum of 20 *l.* ſhall likewiſe be eſtreated into the ſaid court " of Exchequer, in manner and form aforeſaid; and thereupon " the ſaid juſtices of the King's Bench ſhall likewiſe award forth " one other writ of *capias* againſt the ſaid party, with like procla- " mation and like pain of forfeiture of 20 *l.*, and that alſo the " ſaid juſtices ſhall have authority by this act infinitely to award " ſuch proceſs, with ſuch like proclamation and pain of forfeiture " of 20 *l.* as is before limited againſt the ſaid party that ſo ſhall " make default in yielding his body to the priſon of the ſheriff, " until ſuch time as by the return of ſome of the ſaid writs before " the ſaid juſtices it ſhall and may appear, that the ſaid party hath " yielded himſelf to the cuſtody of the ſaid ſheriff or other officer, " according to the tenor of the ſaid proclamation, and that the " party, upon every default and contempt by him made againſt " the proclamation of any of the ſaid writs ſo infinitely to be " awarded againſt him, ſhall incur like pain and forfeiture of " 20 *l.*, which ſhall likewiſe be eſtreated in manner and form " aforeſaid.

" 8. And be it further enacted by the authority aforeſaid, That " when any perſon or perſons ſhall yield his or their body or " bodies to the hands of the ſheriff or other officer, upon any of " the ſaid writs of *capias*, that then the ſame party or parties, that " ſhall ſo yield themſelves, ſhall remain in the priſon and cuſtody " of the ſaid ſheriff or other officer, without (*a*) bail, baſton, or " mainprize, in ſuch like manner and form, to all intents and pur- " poſes, as he or they ſhould or ought to have done, if he or they " had been apprehended and taken upon the ſaid writ of *excom-* " *municato capiendo*.

(*a*) By the 1 E. 3. c. 8. Perſons excommunicate, taken at the requeſt of the biſhop, are expreſsly held to be irrepleviſable; but it hath been held, that the court of King's Bench may, as well before as ſince this ſtatute, bail a perſon taken upon *excommunicato capiendo*. Bulſt. 122.——But where the court refuſed in ſuch a caſe to bail the biſhop of St. David's, *vide* 7 Mod. 61. [It is a commitment in execution, and therefore it ſeems the court can have no power to bail. 1 Show. 16.]

" 9. And that if any ſheriff or other officer, by whom the ſaid " writ of *capias*, or any of them, ſhall be returned, as is aforeſaid, " do make an untrue return upon any of the ſaid writs, that the " party named in the ſaid writ hath not yielded his body upon the " ſaid proclamations, or any of them, where indeed the party did " yield himſelf, according to the effect of the ſame, and that then " every ſuch ſheriff or other officer, for every ſuch falſe and " untrue return, ſhall forfeit to the party grieved and damnified

" by ſuch falſe return, the ſum of 40 *l.*; for the which ſum of " 40 *l.* the ſaid party grieved ſhall have his recovery and due re- " medy by action of debt, bill, plaint, or information, in any of " the queen's courts of record; in which action, bill, plaint, or " information, no eſſoign, protection, or wager of law, ſhall be " admitted or allowed for the party defendant.

" 10. Saving and reſerving to all archbiſhops and biſhops, and " all others, having authority to certify any perſon excommuni- " cated, and like authority to accept and receive the ſubmiſſion " and ſatisfaction of the ſaid perſon ſo excommunicated in man- " ner and form heretofore uſed, and him to abſolve and releaſe, " and the ſame to ſignify, as heretofore it hath been accuſtomed, " to the queen's majeſty, her heirs and ſucceſſors, into the high " court of Chancery, and thereupon to have ſuch writs for the " deliverance of the ſaid perſon ſo abſolved and releaſed from the " ſheriff's cuſtody or priſon, as heretofore they or any of them " had, or of right ought or might have had; any thing in this " preſent ſtatute ſpecified or contained to the contrary hereof in " anywiſe notwithſtanding.

" 11. Provided always, That in *Wales*, the counties palatine of " *Lancaſter*, *Cheſter*, *Durham*, and *Ely*, and in the *Cinque Ports*, " being juriſdictions and places exempt, where the queen's " majeſty's writ doth not run, and proceſs of *capias* from thence " not returnable into the ſaid court of the King's Bench, after " any *ſignificavit*, being of record in the ſaid court of Chancery, " the tenor of ſuch *ſignificavit* by *mittimus* ſhall be ſent to ſuch of " the ſaid head officers of the ſaid country of *Wales*, counties " palatine and places exempt, within whoſe offices, charge, or " juriſdiction, the offenders ſhall be reſiant, that is to ſay, to the " chancellor or chamberlain for the ſaid counties palatine of *Lan-* " *caſter* and *Cheſter*, and for the *Cinque Ports* to the lord warden of " the ſame, and for *Wales* and *Ely*, and the counties palatine of " *Durham*, to the chief juſtice or juſtices there; and thereupon " every of the ſaid juſtices and officers, to whom ſuch tenor of " *ſignificavit* with *mittimus* ſhall be directed and delivered, ſhall, " by virtue of this eſtatute, have power and authority to make " like proceſs to the inferior officer and officers, to whom the ex- " ecution of proceſs there doth appertain, returnable before the " juſtices there, at their next ſeſſions or court, two months at " leaſt after the *teſte* of every ſuch proceſs; ſo always as in every " degree they ſhall proceed in their ſeſſions and courts againſt " the offenders, as the juſtices of the ſaid court of King's Bench " are limited, by the tenor of this act, in term-times to do and " execute.

" 12. Provided alſo, and be it enacted, That any perſon, at the " time of any proceſs of *capias* aforementioned awarded, being in " priſon, or out of this realm, in the parts beyond the ſea, or " within age, or of *non ſane memorie*, or woman covert, ſhall not " incur any of the pains or forfeitures aforementioned, which " ſhall grow by any return or default happening during ſuch time " of nonage, impriſonment, being beyond ſea, or *non ſane memorie*; " and

" and that by virtue of this ſtatute, the party grieved may plead " every ſuch cauſe or matter in bar of and upon the diſtreſs or " other proceſs, that ſhall be made for levying of any of the ſaid " pains or forfeitures.

" 13. And that if the offender, againſt whom ſuch writ of *ex-* " *communicato capiendo* ſhall be awarded, ſhall not in the ſame writ " of *excommunicato capiendo* have a ſufficient and lawful (*a*) addi- " tion, according to the form of the eſtatute of (*b*) *primo* of *Henry* " the Fifth, in caſes of certain ſuits, whereupon proceſs of *exigent* " are to be awarded, or if in the *ſignificavit* (*c*) it be not contained, " that the excommunication doth proceed upon ſome cauſe or " contempt of ſome original matter of hereſy, or refuſing to " have his child baptized, or to receive the holy communion, " as it is now commonly uſed to be received in the church of " *England*, or to come to divine ſervice now commonly uſed in " the ſaid church of *England*, or errors in matters of religion, or " doctrine now received and allowed in the ſaid church of *Eng-* " *land*, incontinency, uſury, ſimony, perjury in the eccleſiaſtical " court, or idolatry, that then all and every pains and forfeitures " limited againſt ſuch perſon excommunicate by this ſtatute, by " reaſon of ſuch writ of *excommunicato capiendo*, wanting ſufficient " addition, or of ſuch *ſignificavit*, wanting all the cauſes afore- " mentioned, ſhall be utterly void in law, and by way of plea to " be allowed to the party grieved.

(*a*) That if the party excommunicated has no addition in the writ, he may be diſcharged on motion. Salk. 294. pl. 4. Show. Rep. 16. But where the parties were named *A. B.* merchant, *C. D.* gent. *E. F.* yeoman de paroch. de *D.* this was held well, though it was objected, that the addition of the pariſh ſhould refer to him only who was laſt mentioned. The King and Barnes, 3 Mod. 42, 43. Skin. 176. pl. 6. S. C. adjudged. (*b*) This ſtatute (1 H. 5. c. 5.) enacts, That in every original writ of actions perſonal, appeals, and indictments in which the *exigent* ſhall be awarded in the names of the defendants in ſuch original writs, appeals, and indictments, additions ſhall be made of their eſtate or degree or myſtery, and the towns, hamlets, or places, and the counties where they were or be converſant, &c. [(*c*) Before this ſtatute, it was not neceſſary to ſhew the cauſe in the writ, only in the biſhop's certificate, but it was ſufficient to ſay the party was excommunicated for manifeſt contumacy. *Per* Holt, C. J. 1 Ld. Raym. 619.]

" 14. And if the addition ſhall be with a *nuper* of the place, " then in every ſuch caſe, at the awarding of the firſt *capias* " with proclamation, according to the form mentioned, one writ of " proclamation (without any pain expreſſed) ſhall be awarded into " the county, where the offender ſhall be moſt commonly reſiant " at the time of the awarding the ſaid firſt *capias*, with pain, in " the ſame writ of proclamation, to be returnable the day of the " return of the ſaid firſt *capias*, with pain, and proclamation " thereupon, at ſome one ſuch time and court as is preſcribed for " the proclamation, upon the ſaid firſt *capias*, with pain, and if " ſuch proclamation be not made in the county where the " offender ſhall be moſt commonly reſiant, in ſuch caſes of addi- " tions of *nuper*, that then ſuch offender ſhall ſuſtain no pain or " forfeiture by virtue of this ſtatute, for not yielding his or her " body according to the tenor aforementioned; any thing be- " fore ſpecified, and to the contrary hereof in anywiſe notwith- " ſtanding."

(F) Of abſolving and aſſoiling a Perſon excommunicate.

2 Inſt. 623. 12 Co. 76. & *vide* the 9 E. 2. c. 7. (a) For this *vide* F.N.B. 141.

IF a perſon be unjuſtly excommunicated, that is, if he be excommunicated for matter of which the ſpiritual court hath not conuſance, and he be taken on a writ of *excommunicato capiendo*, the party grieved ſhall have (a) a writ out of Chancery to the ſheriff, to deliver him out of priſon.

Sid. 232.

So, if the ſpiritual court proceed *inverſo ordine*, as if they refuſe a copy of the libel, &c., a prohibition ſhall go, with a clauſe to abſolve and deliver the party injured.

2 Inſt. 623.

Alſo, if a man be excommunicated, and offer to obey and perform the ſentence, and the biſhop refuſe to accept and to aſſoil him, he ſhall have a writ to the biſhop, requiring him, upon performance of the ſentence, to aſſoil him, &c. and the reaſon thereof is, for that by the excommunication the party is diſabled to ſue any action, or to have any remedy for any wrong done unto him, ſo long as he ſhall remain excommunicate. And ſo the party grieved may have his action upon his caſe againſt the biſhop, in like manner as he may when the biſhop doth excommunicate him for a matter which belongeth not to eccleſiaſtical conuſance. Alſo, the biſhop, in thoſe caſes, may be indicted at the ſuit of the King.

Gibſ. Codex, 1110. (b) This method of taking caution was once held to be againſt law; Bulſt. 122. But was afterwards on great debate held to be good, and that the biſhop having a diſcretionary power herein, it was as much in his option to take caution by obligation, as by either of the other two methods. 2 Lev. 36. Raym. 225.

But if the excommunication be for a juſt cauſe, the party muſt make preſent ſatisfaction before he can be abſolved, or he muſt put in caution, that he will hereafter perform that which the biſhop ſhall reaſonably and according to law injoin him; which caution, in the civil law, is of three ſorts. 1. (b) *Fidejuſſoria*, as when a man bindeth himſelf with ſureties to perform ſomewhat. 2. *Pignoratio* or *realis cautio*, as when a man engageth goods, or mortgageth lands for the performance. 3. *Juratoria*, when the party who is to perform any thing taketh a corporal oath to do it; which laſt is now the moſt frequent method.

But for this *vide* Cro. Car. 199. Cro. Jac. 212. 8 Co. 68. Jon. 227. 2 Lev. 36.

If, after a perſon is excommunicated, there comes a general act of pardon, which pardons all contempts, &c., it ſeems that this offence is taken away without any formal abſolution.

Execution.

(A) Of the Nature of Execution, and what Things were liable thereto by the Common Law.

(B) Of the Judgment on which Execution is to be taken out; and herein of Recognizances and Statutes which are in the Nature of Judgments: And herein,

1. Of the Nature of Recognizances at Common Law, and on the 23 *H.* 8. *c.* 6., *&c.* and of the Statute Merchant and Staple.
2. Of the ſeveral Proceſſes on theſe Securities when forfeited, in order to a full execution: And therein,
   1. *Of the Manner of Execution on the Recognizance at Common Law, and wherein it differs from the Statutes,* &c., *and they from each other.*
   2. *At what Time Execution may be granted on each of them.*
   3. *Who ſhall have Execution on them, as the Perſon alters.*
   4. *Againſt whom Execution may be granted.*
3. What Things are bound by them, and are liable to be extended for the Satisfaction of them.
4. What Proviſion the Law has made for Tenant by Statute Merchant, *&c.* in caſe of Eviction.
5. The ſeveral Ways of vacating and diſcharging thoſe Statutes, and this, either before or after Execution.

(C) Of the ſeveral Kinds of judicial Writs which lie after Judgment: And herein,

1. Of the Form, Teſte, and Return of ſuch Writs.
2. Of the *Elegit.*
3. Of the *Capias ad Satisfaciendum.*
4. Of the *Fieri facias* and *Levari facias.*
5. Of the *Habere facias Seiſinam* and *Poſſeſſionem.*

(D) Where the Party ſhall be concluded by the Election of one of them, and what further Remedy he has when he hath not received entire Satisfaction on his firſt Writ; and this, either againſt the Party or Sheriff.

(E) Of the Authority and Juriſdiction of the Court out of which the Execution iſſues: And herein of the Manner of executing a Judgment where the Record has been removed from an inferior to a ſuperior Court.

(F) Who are entitled unto, and may ſue out Execution.

(G) Of the Perſons againſt whom Execution may be ſued out: And herein,

1. Of ſuing Execution where there are ſeveral Parties concerned.
2. Of ſuing out Execution againſt the Heir and Executor.
3. Of ſuing out Execution againſt Infants.
4. Of ſuing out Execution againſt a Feme Covert.
5. Of ſuing out Execution againſt privileged Perſons.
6. Of ſuing out Execution againſt a Clerk in Holy Orders.

(H) At what Time Execution may be ſued out: And herein of the Neceſſity of a *Scire Facias*.

(I) To what Time the Execution ſhall have Relation, ſo as to avoid any Alienation by the Party: And herein of the Statute of Frauds.

(K) Of the King's Precedency in Executions.

(L) Of the proper Officer to do Execution: And herein of the preceding and ſucceeding Sheriff.

(M) Of the Manner of compelling him to do Execution: And herein of the Party's Remedy againſt him for Neglect of his Duty.

(N) Of the Sheriff's Authority in doing Execution: And herein of breaking Doors, *&c.*

(O) Of the Offence of hindering or obſtructing an Execution.

(P) Of the Party's Remedy when there hath been an irregular Execution, and how the ſame is to be ſet aſide.

(Q) To what he ſhall be reſtored when ſuch erroneous Execution is ſet aſide.

(A) Of the Nature of Execution, and what Things were liable thereto by the Common Law.

EXecution is the obtaining actual poſſeſſion of a thing recovered by judgment of law, and (*a*) is called the life of the law, and therefore in all caſes to be favoured. Co. Lit. 154. a. Carter, 194.

(*a*) *Executio eſt finis, & effectus legis.* Co. Lit. 289. 5 Co. 87.—It differs from an action which continues only till judgment is given, and therefore a releaſe of all actions is regularly no bar of an execution. Co. Lit. 289. 2 Roll. Abr. 404.

And here it will be neceſſary to conſider what things are liable to execution at common law in perſonal actions. Theſe we find were only the annual profits of the land as they aroſe, and the goods and chattels of the debtor; for neither his body nor lands were affected by recognizances or judgment for debt or damages, except as hereinafter excepted. Hob. 60. 3 Co. 12. b. Sir William Herbert's caſe. Cro. Jac. 450. Plow. 440. 2 Inſt. 19. 2 Roll. Abr. 472.

The reaſon why the common law ſubjected only the perſonal eſtate to the payment of debts, ſeems to be, for that it was only a chattel that was lent, and therefore the chattels of the debtor were liable only to pay it; and formerly men truſted one another no further than they had viſible chattels to anſwer the debt. The lands were not liable, becauſe they were obliged to anſwer the duties to the feudal lord; and a new tenant could not be forced upon him without his conſent in the alienation; and the perſon was not liable, becauſe that was obliged by the tenure to ſerve the king in the wars, and at home the ſeveral lords, according to the diſtinct natures of their tenure. But though this law was well framed for a nation bred to wars, who were to extend their fame and power by arms, yet it was no ways calculated to the circumſtances and conſtitution of a trading people, whoſe power and credit riſe and fall in proportion to the increaſe or decay of trade; therefore, in ſuch a nation, laws ought to be ſo contrived and framed, as to invite foreigners to trade with us, and bring their commodities to us; and the great encouragement to this will be to allow them all poſſible ſecurity in their contracts and dealings; and the way to that will be to ſubject all the effects of the debtor, whether in lands or chattels, and his perſon too, to ſatisfy the creditor; for otherwiſe it would be in the power of every bad man, by converting his chattels into land, to defraud his creditor, and againſt all reaſon and equity enjoy the profits of that land which he purchaſed with another's money. Accordingly we find, that towards the reign of *Ed.* I. when *magna charta* had given the tenants a power of alienation, without acquainting their lords, if they left enough to anſwer the duties of their tenure, they began to ſubject the land to anſwer the debts in trade; and as they grew more and more a trading people, it was thought reaſonable that the perſon ſhould be liable, that a cloſe confinement might oblige him the ſooner to ſatisfy his creditors, as alſo Plow. 440. 3 Co. 11. 2 Inſt. 19.

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make him the more wary how he contracted debts, without the proſpect of a competent fund or proviſion to diſcharge them.

Plow. 441. 3 Co. 11. But even at common law we find, that the king, by his prerogative, might have execution of body, goods, and lands, but ſtill under this reſtriction, that the land was not extendible while the chattels were ſufficient and the debtor ready to anſwer the debt.

3 Co. 12. a. Cro. Jac. 450. Plow. 441. Alſo, in caſe of a private perſon, the land was liable to execution, as in an action of debt againſt an heir upon an obligation made by his anceſtor; if the plaintiff had judgment, the law diſpenſed with the former rules, rather than the creditor, who fairly made out his demands, ſhould be without a remedy, and therefore gave the lands deſcended, in execution, to anſwer the debt; for ſince the common law allowed the action of debt againſt the heir, the creditor could have no benefit by the action, unleſs he were permitted to have execution of the lands which deſcended to the heir.

Roll. Abr. 226. Poph. 87. Hob. 58. Dyer, 344. b. Co. Lit. 144. So, if *A.* had granted for him and his heirs, to *B.* and his heirs, ſuch a rent out of his lands, in this caſe, the heirs, being comprehended in the contract, are bound to make good the grant as far as they have aſſets by deſcent from the grantor: and this was allowed at common law, becauſe the grantee of the rent had the land originally in view for his ſecurity; and by the grant itſelf, having it in his power to diſtrain the land for the rent, it was equal to the heir, whether the land was to anſwer the rent by diſtreſs, or by an execution upon a judgment in a writ of annuity.

Hob. 60. 2 Roll. Abr. 475. *11 Ed. 1. Thus ſtood the common law till the ſtatute of *Acton Burnell**, and the 13 *Ed.* 1. *de mercatoribus*, which, as appears in the preamble, was for the ſecurity of merchants and encouragement of trade, and ſubjected not only the goods and perſons, but the lands likewiſe of the debtor, into whoſe hands ſoever they came after the ſtatute acknowledged.

(*a*) Viz. 13. Ed. 1. c. 18. commonly called the ſtatute of Weſt. 2. *vide* 2 Inſt. 394-5. Alſo, in the ſame year and reign the *elegit* was given; and by this (*a*) ſtatute, he who recovereth in debt or damages, may have either a *fieri facias* of the chattels of the debtor, or a writ on which the ſheriff ſhall deliver to him all the chattels of the debtor, ſaving only his oxen and beaſts of his plough, and the one half of his land, until the debt be levied upon a reaſonable price or extent.

Vide Dalt. Sher. 144. The 25 *Ed.* 3. *c.* 17. ſubjected the perſon of the debtor, and gave the *capias ad ſatisfaciend.* in debt, detinue, &c., in the caſe of a common perſon.

(B) Of the Judgment on which Execution is to be taken out; and herein of Recognizances and Statutes which are in the Nature of Judgments: And herein,

1. Of the Nature of Recognizances at Common Law, and on the 23 *H.* 8. *c.* 6., *&c.* and of the Statute Merchant and Staple.

AN obligation by matter of record is a writing obligatory acknowledged before a judge, or other officer having authority for that purpoſe, and enrolled in a court of record; and of this there are two ſorts, *viz.* recognizances or ſtatutes.

The original of the acknowledgment of obligations in courts of record ſeems to be, that there might be no occaſion to have the trouble and charge of the proving, which was formerly in the manner of contracting more expenſive than at preſent; for formerly the perſons under the *his teſtibus* were joined to the jury who tried the cauſe, and the creditor was obliged by proceſs to bring them in to join them to the jury, which form, as my Lord *Coke* has obſerved, made great delay in the proceedings. To ſave this expence, the acknowledgment was made in courts of juſtice, and then the court atteſting the deed, there needed no proceeding or trial to make it evident. Co. Lit. 6.

The firſt of theſe ſecurities is the recognizance at common law, which is no more than an obligation on record, and may be acknowledged before the ſeveral judges out of term, and in any part of *England*, and may be entered on record, as well out, as in term: ſo, the (*a*) chancellor or keeper may take recognizances and award execution, or hold plea of *ſcire facias* and *audita querela* in the Chancery, to avoid execution, *&c.* as the caſe requires, on all recognizances taken in that court. Bro. Recognizance, 20. Vaugh. 102. Hob. 195. 4 Inſt. 79.

(*a*) But if a perſon enters into a recognizance to the chancellor for a debt due to himſelf, it is a void recognizance; for the law will not truſt him with the exerciſe of his power in his own caſe: but if one enters into a recognizance to the chancellor and a ſtranger, it is a good recognizance as to the ſtranger; for, ſo far as his intereſt is concerned, the chancellor is a proper perſon to take it, and cannot be ſaid to be a judge in his own cauſe. Dyer, 220. 8 Co. 118. a. Co. Lit. 141. a.

By the cuſtom of the city of *London*, the mayor, aldermen, or the mayor ſingly, may take recognizances; for the cuſtom is not only reaſonable in itſelf, but, as all other cuſtoms of the city, has been confirmed by act of parliament. 4 Co. 64. b. 2 Inſt. 395. Cro. Eliz. 187. Roll. Abr. 557.

The king, by ſpecial commiſſion, may appoint any perſon to take recognizances from one man to another, and ſuch a recognizance duly certified with the commiſſion into Chancery is of equal force with the former; and though the commiſſion be ſo particular, that it only mentions a recognizance to be taken from *A.* to *B.*, yet ſays *Fitzherbert*, the commiſſioners have a general power to take a recognizance from any other perſon. Fitz. N. B. 267. A. Regiſter, 149.

But thoſe recognizances at common law are no perfect record, till they are enrolled in ſome court of record; yet if they be taken Hob. 195.

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on one, and enrolled on another day, they find as reaſonable proviſion in the law; for ſince it allows any one judge out of court, and in any part of the kingdom, to take theſe recognizances which are the higheſt ſecurity of the common law, it was very neceſſary they ſhould be enrolled to perpetuate the contract, and by that means ſecure the creditor his juſt debt, which muſt have been very precarious and uncertain, while the ſecurity lay in a private hand, who might either through careleſſneſs miſlay, or by ill practices be prevailed upon to ſuppreſs it.

13 Ed. 1. ſt. 3. 2 Roll. Abr. 466.

A ſtatute merchant is a bond of record, acknowledged before one of the clerks of the ſtatute merchant, and mayor of the city of *London*, or two merchants of the ſaid city, for that purpoſe aſſigned, or before the mayor or warden of the towns, or other diſcreet men for that purpoſe aſſigned. This recognizance is to be entered on a roll, which muſt be double, one part to remain with the mayor, and the other with the clerk, who ſhall write with his own hand a bill obligatory, to which a ſeal of the king, for that purpoſe appointed, ſhall be affixed, together with the ſeal of the debtor.

The deſign of this ſecurity was to promote and encourage trade, by providing a ſure and ſpeedy remedy for merchant-ſtrangers as well as natives, to recover their debts at the day aſſigned for payment, the want of which, ſays the ſtatute of (*a*) *Acton Burnell* (which firſt created the ſtatute merchant), in a great meaſure prevented the importation of foreign commodities, and diſcouraged ſtrangers from trading with us, to the detriment not only of our own merchants, and other ſubjects, but of the prince himſelf, whoſe cuſtoms riſe and fall in proportion to the increaſe and decay of trade.

(*a*) 11 Ed. 1.

Winch. 83.

But though the ſtatute merchant ſeems firſt to have been introduced, and was wholly calculated for the eaſe and benefit of merchants, as the name itſelf imports; yet it was not long ingroſſed by them; for other men finding from their own obſervation, that it was much of the ſame nature with judgments given in *Weſtminſter-Hall*, but obtained with infinite leſs trouble and expence, out of regard to their own intereſt and quiet, eaſily fell into this way of contracting, and by degrees it came to be proved into a common aſſurance, as we find it at this day.

The addition of the king's ſeal, which was never required to any contract at common law, was to authenticate and make the ſecurity of a higher nature than any other then known; for by this the king, in the perſon of the mayor, *&c.* atteſts the contract, and takes conuſance of the debt, and, conſequently, execution is to be awarded upon failure of payment at the day aſſigned, without any meſne proceſs to ſummon the debtor, or the trouble or charge of bringing in proofs to convict him: for the judges, who are the king's repreſentatives, for the more ſpeedy adminiſtration of juſtice, require theſe on common contracts and ſpecialties, to ſatisfy themſelves of the juſtice and legality of the plaintiff's demands, before they award any execution againſt the defendant; but to this contract the king himſelf, by the mayor, warden, *&c.* is a witneſs,

witneſs, and has the frank acknowledgment and confeſſion of the debtor, that he really owes ſo much, which is the beſt and ſureſt proof the law requires; therefore the legiſlators of that time, out of a juſt regard to the prerogative and juſtice of the king, on theſe contracts, as on judgments, allowed of an immediate execution; theſe being the ſureſt means of conviction, *viz.* the confeſſion of the conuſor on record, which the judges at *Weſtminſter* ſeldom have to frame their judgments on; and thus it muſt be preſumed from the force of them, which is equal to judgments of the ſuperior courts, they obtained the name of pocket judgments. 3 Sheph. Abr. 318.

The ſeal of the king conſiſts of two pieces, one to lie in the cuſtody of the mayor, and the other of the clerk that enrols the recognizance, the better to prevent any fraud or corruption this ſecurity might be liable to, if the ſeal lay in one hand. Cro. Eliz. 233. 319.

The ſtatute ſtaple is a bond of record, acknowledged before the mayor of the ſtaple, in the preſence of all or one of the conſtables. To this end, ſays the (*a*) ſtatute, there ſhall be a ſeal ordained, which ſhall be affixed to all obligations made on ſuch recognizances acknowledged in the ſtaple. This ſeal of the ſtaple is the only ſeal the ſtatute requires to atteſt this contract; but it is no more under the power or diſpoſal of the mayor, than that appointed by the ſtatute merchant; for though the ſtatute appoints him the cuſtody of it, yet it is in ſuch a manner, that he cannot affix it to any obligation without their conſent, it being to remain in the mayor's hands, under the ſecurity of their own ſeals. 2 Roll. Abr. 466. (*a*) 27 Ed. 3. ſt. 2. c. 9.* * Alſo *vide* c. 8. of the ſame ſtatute; and 36 E. 3. c. 7.

To underſtand a little of the original and conſtitution of the ſtaple, and the advantage the nation had by this eſtabliſhment, we muſt obſerve. that the place of reſidence, whither the merchants reſorted with their ſtaple commodities, was anciently called *eſtapel*, which ſignifies no more than *mart* or *market*; and this was formerly appointed out of the *realm*, as at *Calais*, *Antwerp*, *&c.* and other ports on the continent which were neareſt to us, and whither the merchants might with ſafety coaſt it. 4 Inſt. 238.

But beſides theſe ſtaple ports appointed abroad, there were others appointed at home, whither all the ſtaple commodities were carried in order to their exportation, ſuch as *London*, *Weſtminſter*, *Hull*, *&c.* this was found to be of great uſe and conſequence to the prince in particular, and to the intereſt and credit of the nation in general; for at theſe ſtaple ports were the king's cuſtoms eaſily collected, and were by the officers of the ſtaple, at two ſeveral payments, returned into the exchequer. Beſides, at theſe ſtaples, all merchants goods were carefully viewed and marked by the proper officer of the ſtaple; and this neceſſarily avoided the exportation of decayed goods, or ill-wrought manufactures, and, conſequently, fixed a ſtamp of credit on the merchandizes exported, which, upon the view, always anſwered the expectation of the buyer. Maline's Lex. Merc. 337-8. *Vide* the 27 E. 3. c. 1.

The ſtaple merchandizes, according to Lord (*b*) *Coke*, are only wool, woolfells, leather, lead, and tin; (*c*) others add butter, (*b*) 4 Inſt. 238. (*c*) Maline's

Lex. Merc. 237. 27 E. 3. c. 8.

cheeſe, and clothes; but whatever they were, the mayor and conſtables had not only conuſance of all contracts and debts relating to them, but they had likewiſe juriſdiction over the people and all manner of things touching the ſtaple. This power was given them, leſt the merchants ſhould be diverted and drawn from their buſineſs and trade, by applying to the common law, and running through the tedious forms of it, for a determination of their differences, and for the greater encouragement of merchants, that they might have all imaginable ſecurity in their contracts and dealings, and the moſt expeditious method of recovering their debts, without going out of the bounds of the ſtaple.

Co. Lit. 290.

By this it appears, that this ſecurity was only deſigned for the merchants of the ſtaple, and for debts only on the ſale of merchandizes brought thither; yet in time others began to apply it to their own ends, and the mayor and conſtable would take recognizances from ſtrangers, ſurmiſing it was made for the payment of money for merchandizes brought to the ſtaple. To prevent this miſchief, the parliament in 23 *H.* 8. *c.* 6. § 11. reduced the ſtatute ſtaple to its former channel, and laid a penalty of 40 *l.* on the mayor and conſtables, who ſhould extend the benefit of the ſtatute to any but thoſe of the ſtaple. But though the ſtatute of 23 *H.* 8. *c.* 6. deprived them of this benefit; yet it framed a new ſort of ſecurity, to be uſed *ad libitum* by all men, known by the name of a Recognizance on 23 *H.* 8. *c.* 6. or a recognizance in the nature of a ſtatute ſtaple, ſo called, becauſe this act limits and appoints the ſame proceſs, execution, and advantage in every particular, as is ſet down in the ſtatute ſtaple.

Co. Lit. 290. a. 4 Inſt. 238. 2 Roll. Abr. 466. Co. Ent. 12.

A recognizance therefore in nature of a ſtatute ſtaple, as the words of the act declare, is the ſame with the former, only acknowledged under other perſons; for as the ſtatute runs, the chief juſtices of the King's Bench and Common Pleas, or in their abſence, out of term, the mayor of the ſtaple at *Weſtminſter*, and the recorder of *London*, jointly together, ſhall have power to take recognizances for payment of debt in the form ſet down in the ſtatute. In this, as in the former caſes, the king appoints a ſeal to atteſt the contract, which ſuch of the ſaid juſtices ſhall have the keeping of, and the ſaid mayor and recorder another of the ſame print and faſhion; and every obligation made and acknowledged before either of the juſtices, or the mayor or recorder, muſt be ſealed with the ſeal of the conuſor, with the king's ſeal, and with the ſeal of the chief juſtice, or the mayor and recorder before whom it is taken, who are likewiſe obliged to ſubſcribe their names: beſides this, the clerk of the recognizance (who is to be appointed for this purpoſe by the king) or his deputy, ſhall make and write all obligations thus acknowledged, and enrol them in two ſeveral rolls indented, one whereof ſhall remain with ſuch of the ſaid juſtices, or with the mayor and recorder that take the recognizance, and the other with the clerk, who is farther obliged, at the requeſt of the conuſee, his executors, or adminiſtrators, to certify ſuch obligations into Chancery under his ſeal.

But

But now by ſtat. 8 *Geo.* 1. *c.* 25. § 1. the clerk of the recognizances, or his deputy, ſhall prepare three parchment rolls, and ſhall, at the times of acknowledging every ſuch recognizance, fairly write or engroſs, inſtead of the heads or contents thereof, on the ſaid rolls, the full tenor, *in hæc verba*, of every ſuch recognizance; and one of the rolls ſhall contain all the recognizances taken before the chief juſtice of the King's Bench; another the recognizances taken before the chief juſtice of the Common Pleas; and the other the recognizances before the mayor of the ſtaple at *Weſtminſter*, and recorder of *London*; and the perſons before whom ſuch recognizances ſhall be taken, as well as the parties acknowledging the ſame, are to ſign their names to the roll of every recognizance, under the enrolment thereof, as well as ſign and ſeal the recognizance; and all rolls ſo ſigned ſhall at the end of every year be fixed together, and made one roll of, and are to remain in the cuſtody of the clerk, who is to keep a docket for ſearches.

2. Of the ſeveral Proceſſes on theſe Securities when forfeited, in order to a full Execution.

But before we enter into a particular inquiry concerning theſe proceſſes, it is proper to take notice, that the intereſt gained upon an execution of a ſtatute or recognizance is to be followed by an actual entry of the conuſee to perfect his ſecurity, and till ſuch entry the conuſee hath only a poſſeſſion in law, which he cannot aſſign or transfer over to any other perſon; therefore where the adminiſtrator of a conuſee in a ſtatute after his death ſued forth an extent, and upon that a *liberate*, which was returned, and before any actual entry or recovery of the poſſeſſion in ejectment, or without executing the deed upon the land, did by indenture aſſign over all his intereſt to the leſſor of the plaintiff, who thereupon brought his ejectment; it was adjudged, that the aſſignment was void; for by the return of the *liberate* he had accepted the poſſeſſion, and was eſtopped to ſay the contrary; then when the owner ſtill continues in poſſeſſion, this turns the poſſeſſion which the adminiſtrator had accepted by the *liberate* to a right, and ſuch right is by no means aſſignable; nor is this like an *intereſſe termini*, which, it is true, the leſſee may aſſign over before actual entry, becauſe in that caſe the leſſor is the principal agent, and hath done all on his part to transfer over an intereſt to the leſſee, which he may execute at pleaſure; and as the perſon who ſues the *liberate* in this caſe is eſtopped to ſay, that he hath not the poſſeſſion; ſo is the leſſor in the other caſe eſtopped to ſay, that he hath the poſſeſſion, againſt his own leaſe.

3 Lev. 312. Stephens and Hanham. Salk. 563. pl. 1. S. C. 4 Mod. 48. S. C. 1 Show. 290. S. C. Skin. 300. S. C.

See *poſt*, D.

1. *Of the Manner of Execution on the Recognizance at Common Law, and wherein it differs from the Statutes, &c. and they from each other.*

If the conuſor be within the juriſdiction of the mayor, or other officer, before whom the ſtatute merchant was acknowledged, and

13 Ed. 1. ſtat. 3.

be found there, then upon the conuſee's bringing the ſtatute, &c. to the mayor, &c. and clerk, and their finding the record of it, and the day of payment lapſed, the mayor may apprehend and impriſon the conuſor (if he be lay), there to remain till he ſatisfies his creditor.

Winch. 82. Jon. 52. And although there be no day of judgment expreſſed in the ſtatute, yet this omiſſion of the clerk does not vitiate the ſtatute; for in this, as in obligations, where no actual day is appointed for payment, the legal day is preſently, or when the conuſee pleaſes to demand it.

Winch. 83. 85. But there may be a day of payment fixed in the ſtatute, and yet the ſtatute void; as if it be payable at *Michaelmas* after *J. S.* goes to *Paul*'s, or returns from *Rome;* theſe are void ſtatutes, becauſe it does not appear judicially to the mayor, when to award execution; but if the ſtatute be payable the firſt return of *Michaelmas* term, or before *Michaelmas*, there is ſufficient certainty in theſe, and the mayor ought to take notice of them.

2 Roll. Abr. 473. But if the conuſor be out of the juriſdiction of the mayor, then ſhall he ſend the recognizance under the king's ſeal into Chancery, after which certificate the firſt proceſs is a *capias* to take his body only; and if upon this the ſheriff returns a *cepi corpus*, the debtor ſhall remain in priſon a quarter of a year, in which time he may diſpoſe of his goods and lands to the beſt advantage to pay his debts; but if the conuſor either omits to ſatisfy his creditor in that time, or if the ſheriff had returned on the *capias non eſt inventus*, or the conuſor dead, then ſhall the execution be granted againſt lands, goods, and chattels, and they be delivered to the conuſee by a reaſonable extent till the debt be levied; this writ of execution the ſheriff is to return into one of the benches, and how he hath performed the ſervice.

And here we muſt take notice, that the proceſs on a ſtatute merchant differs from that on the ſtatute ſtaple, and the recognizance in nature of a ſtatute ſtaple, in four particulars:

Bro. Statute Merchant, 16. 1. If the conuſor cannot be found within the ſtaple, nor his goods, to the value of the debt; the firſt proceſs, after the certificate under the ſeal in Chancery, is to take body, lands, and goods, all in one writ, in which reſpect it is preferable to the ſtatute merchant, as being a much ſpeedier remedy.

4 Inſt. 79. Co. Lit. 290. 2. They differ in reſpect of the place of the return; for, as is before obſerved, the writ of execution on the ſtatute merchant is returnable in either bench; but upon the ſtatute ſtaple the writ is returnable into Chancery; and 23 *H.* 8. *c.* 6. which firſt brought in the recognizance in nature of a ſtatute ſtaple, referring in this to the ſame proceſs and execution eſtabliſhed by 27 *E.* 3. *ſt.* 2. *c.* 9. on the ſtaple, the law muſt be the ſame in both caſes.

2 Roll. Abr. 475. 3. They differ in the ſubſtance of the writ of execution, for upon the ſtatute merchant the ſheriff may deliver the lands, &c. to the conuſee, upon a reaſonable extent, without the delay or charge of a *liberate;* but upon the ſtatute ſtaple, or recognizance in nature of it, the ſheriff, after the extent, cannot deliver the lands, &c. to the conuſee, but muſt ſeize into the king's hands, and

and the conuſee muſt have a *liberate* to get the lands, &c. into his hands; and in this reſpect the ſtatute merchant is preferable to the ſtatute ſtaple, or recognizance in nature of it.

4. A fourth difference is, that the ſtatute merchant having the ſeal of the conuſor beſides the king's ſeal, the conuſee may waive the execution given by the ſtatute, and uſe it as an obligation, and bring an action of debt on it: ſo, for the ſame reaſon may the conuſee, on the 23 *H.* 8. *c.* 6. the recognizance having the ſeal of the conuſor to it: *ſecùs* of a ſtatute ſtaple, becauſe the king's ſeal only, without that of the party, is affixed to it, which is abſolutely neceſſary in all obligations at common law. Bro. Statute Merchant, 16. Moor, pl. 1097. Cro. Eliz. 494.

2. *At what Time Execution may be granted on each of them.*

For the time of execution we muſt diſtinguiſh between recognizances at common law and ſtatutes merchant, &c. for upon the former, if the conuſee did not take out execution within a year after the day of payment aſſigned in the recognizance, he was obliged to commence the ſuit again by original; the law preſuming the debt might have been paid, if he did not ſue execution within the year after the money became payable. But this law was (*a*) altered in *Edward* the Firſt's time, and the conuſee had a *ſcire facias* given him to revive the judgment, and put it in execution if the conuſor cannot ſtop it by pleading ſuch matters as the law judges ſufficient for that end, ſuch as a releaſe, &c. but the conuſee of a ſtatute merchant, &c. may at any time ſue execution on them without the delay or charge of a *ſcire facias*. Co. Lit. 291. 2 Inſt. 469. F. N. B. 296. Bro. Recog. 17. (*a*) By Weſtm. 2. 13 E. 1. ſt. 1. c. 45. Which *vide poſt*.

If *A.* enters into a recognizance or ſtatute, &c. to *B.* and but one day of payment is appointed for the whole debt, *B.* may have execution upon failure of payment in the method before ſet down; but if the ſum be payable at three ſeveral days, as 20 *l.* at each day, the whole debt being 60 *l.* when the firſt day of payment is lapſed, the conuſee may have execution for 20 *l.* immediately, and ſo for the reſt as it becomes due, without waiting for the laſt day of payment, as he muſt have done if the debt had been due by bond. And this holds as well on recognizances at common law as upon ſtatutes; and the reaſon is, becauſe theſe are in nature of three ſeveral judgments. 2 Roll. Abr. 468. Bro. Execut. 142. Co. Lit. 292. 2 Inſt. 395. 471. Reg. 147. 5 Co. 81.

3. *Who ſhall have Execution on them, as the Perſon alters.*

Here we muſt again diſtinguiſh between recognizances at common law, and ſtatutes and recognizances introduced by ſtatute law: for, in the firſt caſe, if the conuſee dies before execution ſued, his executor ſhall not ſue it even within the year, without bringing a *ſcire facias* againſt the conuſor: the reaſon is, becauſe the law preſumes the debt might have been paid to the teſtator, and therefore would not ſuffer the debtor to be moleſted, unleſs it appeared he had omitted to perform the judgment; and this was to be done by *ſcire facias* brought by the executor, for the alteration of the perſon altered the proceſs at common law. But the 2 Inſt. 395. 471. Bro. Stat. Merch. 16. 43. 50.

ſtatute merchant, &c. being deſigned to encourage ſtrangers to trade with us, in this, as in many other inſtances, they have the advantage of any ſecurity known in the common law; and this dilatory proceſs is taken away in theſe caſes by the ſeveral acts of parliament that firſt introduced them; and therefore upon the death of the conuſee of a ſtatute merchant, &c. his executors may come into Chancery, and, upon their producing the teſtament and the ſtatute, ſhall have execution without *ſcire facias*, as the teſtator himſelf might.

But the difficulty in ſettling this point will be, either when there are two conuſees, and one of them dies after proceſs of execution is begun; or where there is but one conuſee, and he dies after proceſs begun. In order to clear theſe points, it is to be obſerved, that that which is certified into Chancery is a tranſcript of the record lodged with the mayor and clerk, and upon ſuch certificate the Chancery views the pocket ſecurity, and then proceeds to iſſue the proceſs according to the ſtatute 13 *Ed.* 1. *ſt.* 3. *de mercator*; and if there be any diſagreement between the pocket judgments and the certificate, there is a new *certiorari* awarded to the mayor to inſpect the rolls, and make a re-certificate, as appears in the (*a*) *regiſter*.

(*a*) Reg. 148. b.

Dyer, 180. When the Chancery hath iſſued proceſs in either bench, if the death of the conuſor, or *non eſt inventus* is returned, ſo that it appears, that the perſon is not to be found to give ſatisfaction, the benches direct all other proceſs, in order to give the party ſatisfaction. And the reaſon of this is, from the direction of the ſtatute to return the proceſs into theſe courts, which was upon this original policy, that all parties in intereſt might come in and have an opportunity to litigate where every man's property is determined.

But if the conuſee dies after proceſs returned into *C. B.* his executors cannot carry on the proceſs there, becauſe the ſtatute directs a certificate of ſuch ſort of recognizance into the Chancery, and the benches have no power to proceed, but according to the authority derived from that court; and whenever that authority ceaſes, as by the death of the party, the proceſs is at an end; and therefore the court of Common Pleas cannot carry it into execution, as they could on a judgment obtained in their own court; but the ſuitor muſt go back into Chancery, as in all caſes where proceſs thence iſſuing is determined by the death of any of the parties. When the executor comes back into Chancery, there is a new *certiorari* awarded to the mayor to certify the record, both becauſe the ſtatute directs, that the Chancery ſhall iſſue proceſs upon the recognizance returned, as alſo that it may appear to the court, that the ſecurity is ſtill in being upon which the proceſs is directed.

Roll. Abr. 467. If the conuſee of a ſtatute merchant ſues a *capias* returnable in *B.*, and upon a *non eſt inventus*, an *extendi facias* is awarded by the court, and before execution executed the conuſee dies, his executors cannot carry on the execution *in banco*, becauſe that proceſs out of Chancery which gave the court an authority to proceed, being

being in the teſtator's name, is now determined. But when the executor comes back into Chancery, he is not put to a new *capias*, but may have a ſpecial writ upon his caſe, to continue the proceſs where it determined, becauſe the *capias* would be nugatory and contrary to the record *in banco*, by which it appears, that the perſonal ſatisfaction failed, and the execution was awarded on his effects. But if the conuſee of a ſtatute merchant ſues a *capias*, and upon a *non eſt inventus* an *alias* is awarded, before the return of which he dies, his executor, when he comes back into Chancery, muſt be put to a new *capias*, becauſe the teſtator died in purſuit of the perſonal ſatisfaction, and there is no record in this caſe, whereby it appears deficient; and therefore the executor is put to a new *capias*, that the deficiency of the perſonal ſatisfaction may appear on the return of it, according to the direction of the ſtatute. But it ſeems in both caſes, by *Dyer* and the *regiſter*, that there ought to be a new *certiorari* and re-certificate thereon, that the exiſtence of the ſecurity may appear at the time when the proceſs iſſues. Dyer, 180. b. Reg. 148.

If two conuſees of a ſtatute merchant ſue execution, and the ſheriff returns the conuſor dead, upon which an *extendi* is awarded, and one of the conuſees declares in court, that the other died ſince the ſuit commenced, and therefore prays execution for himſelf; in this caſe he muſt have a re-certificate of the record from the mayor, and then a writ upon his caſe directed to the bank to continue the proceſs where it ended at the death of the other conuſee; for it would be nugatory to put him to his *capias* again, ſince it appeared by the return of the ſheriff, that the conuſor was dead. 2 Roll. 467. 25 E. 3. 38.

If conuſee of a ſtatute ſtaple dies, and *B.* his executor ſues an extent in Chancery, but before execution executed *B.* dies, and adminiſtration *de bonis non* is granted to *C.* who continues the proceſs, and after the extent returned ſues out a *liberate* of the conuſor's lands, which were taken in execution upon the *extendi* brought by *B.* and has them delivered to him; this is a void extent, and the conuſor may recover his land in ejectment; for the *extendi* being ſued in *B.*'s name, muſt by his death abate, and conſequently, all the proceedings continued after by *C.* muſt fall, having no foundation to ſubſiſt on. Beſides, *C.* comes in paramount the writ of *B.* not as privy to himſelf, but as the immediate repreſentative of *A.* So, if in this caſe *B.* had ſued an extent, and after execution, and a ſeizure into the king's hands, *B.* died, *C.* ſhall have no *liberate*, becauſe he, coming in paramount the extent, cannot continue the proceſs, which abated by the death of *B.* 2 Roll. Abr. 467. Cro. Car. 450. 457. Jones, 385.

If a conuſee of a recognizance in nature of a ſtatute ſtaple ſue execution, and after the extent and ſeizure into the king's hands die, his executor ſhall have no *liberate*, for that were to continue the proceſs which the teſtator begun, and abated by his death. 2 Roll. Abr. 467.

4. *Againſt whom Execution may be granted.*

Bro. Stat. Merch. 33. Co. Lit. 290. Moor, pl. 121. 203. Dyer, 239. Co. Ent. 12. * Where execution ſhall go againſt the heir after an alienation of lands deſcended, *vide* 3 W. & M. c. 14. § 5, 6. *infra*, vol. 3. p. 460.

If the conuſor of a ſtatute dies, the body of the heir * is protected by the ſtatute from execution, but the lands and goods of the conuſor are extendible in his hands; for it would be moſt unreaſonable to ſubject the heir to payment of his father's debts, any farther than to the value of the aſſets deſcended; nor are theſe extendible in his hands, if he be an infant at the death of the conuſor, till he comes of age. The ſtatute in this particular is founded on the reaſon, and follows the courſe of the common law, by which, if judgment had been given againſt a man for debt or damages, and the defendant died before execution ſued, his heir within age was not liable to execution during his minority; but the parol demurred till he came of age. And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as, if there be father and two daughters, and judgment be given for debt againſt the father, who dies, one of the daughters being within age, partition being made, the eldeſt ſhall not be charged alone, but ſhall have the benefit of her ſiſter's minority, which puts a ſtop to the execution.

Co. Lit 290. Bro. Stat. Merch. 33.

So, if the conuſor of a ſtatute merchant dies, and his heir within age endows his mother, the land in dower ſhall not be extended during the minority of the heir.

3 Co. 14.

In the next place, let us ſee how the law directs the execution, where the conuſor conveys the land to ſeveral perſons after the ſtatute acknowledged. It would be very unreaſonable to load one feoffee with the whole debt, when the burden ought to be on the whole land, into whoſe hands ſoever it comes after the recognizance acknowledged; and therefore the law allows of contribution againſt the other purchaſers, by which we muſt not underſtand, that they are to allow the purchaſer, whoſe land is extended, any thing by way of contribution to the extraordinary charge, which he ought not to bear alone; but the perſon grieved muſt relieve himſelf by *audita querela*, which ſets aſide the execution, and reſtores him to the meſne profits, and obliges the conuſee to ſue execution of all the lands.

Plow. 72. Pope and Roſs. 3 Co. 12.

And here we muſt conſider by what rules the law has governed itſelf in ſuch executions. By the words of the ſtatute *de mercatoribus*, all the lands of the conuſor are liable, and therefore the conuſee may extend the execution to them all; but if while they continue in the hands of the conuſor, he takes but part, it is a merciful execution to the conuſor, becauſe it leaves him the reſt of the land for his ſubſiſtence in the mean time, and therefore he cannot ſet aſide the execution as for partiality, ſince it is plainly made for his advantage. But if the conuſor aliens part of his land, then the caſe is very much altered; for if the conuſee ſues out execution of the land of the alienee, that were apparent partiality in him, and contrary to the intent of the conuſor, which makes all the land equally liable; and therefore ſuch execution may

may be ſet aſide by *audita querela*, for the apparent partiality and injuſtice of it. And it is the ſame law where there are ſeveral feoffees, and execution is ſued againſt one of them only, and this for the ſame reaſon. But if the lands of the conuſor only, after ſuch alienation, had been taken in execution by the conuſee, this execution had been good; for ſuch conuſor could not charge him with any partiality ſince the debt was his own, and his perſon and effects ſtill liable after ſuch alienation, and he is ſuppoſed to receive the purchaſe-money from the alienee; and therefore there is no reaſon to bring him into the payment of the debts which ſuch conuſor had previouſly contracted.

If *A.* ſeiſed of three acres in fee, acknowledges a ſtatute to *J. S.* and enfeoffs *B.* of one acre, and *C.* of another, if *J. S.* ſues out execution againſt *B.* he may have an *audita querela* to oblige the conuſee to charge the lands of *A.* and *C.* equally, for 13 *Ed.* 1. ſays, that all the lands of the conuſor ſhall be extended into whoſeſoever hands they come; and therefore the acre of *B.* ſhall not be liable to the whole debt, when the ſtatute in this caſe ſubjects the other two: but if *J. S.* had ſued execution againſt *A.* the conuſor only, he ſhall have no *audita querela* to avoid it: ſo, if in this caſe the conuſor had died, and execution had been ſued againſt the heir, he ſhall have no contribution againſt *B.* and *C.* becauſe the heir comes to the land without any conſideration, and the conuſor might bind his heir, as far as the land deſcended would anſwer his debts. And yet in ſome caſes the heir ſhall have contribution; as if the anceſtor acknowledge a ſtatute, and die, leaving iſſue two daughters; or if the land which deſcends be of the nature of borough-engliſh or gavelkind, the heir at law ſhall make the ſpecial heirs contribute, becauſe all of them come in as heirs to the land deſcended, and are equally charged with his debts.

Bro. Stat. Merch. 49. 2 Inſt. 396. 3 Co. 13. a. 7 Co. 39. a. Roll. Abr. 311. 2 Roll. Abr. 472. Plow. 72.

Hob. 25. Co. Lit. 376.

But if *A.* in the principal caſe had conveyed his three acres to *B.*, *C.*, and *D.*, and the conuſee extended the acre of *B.* who after the extent conveys by fine his acre to *J. N.*, in this caſe *J. N.* cannot avoid the extent by *audita querela*, and have contribution againſt *C.* and *D.*, for though the feoffee of a feoffee may have contribution where the conveyance is before the extent; yet in this caſe *J. N.* claiming under a fine levied after the land was actually extended, muſt hold it under the incumbrance, for *tranſit terra cum onere*; and it is no way unreaſonable that he ſhould hold it as he purchaſed, ſince he is ſuppoſed to pay a conſideration accordingly: beſides, the judgment in the *audita querela* is, that the plaintiff ſhall be reſtored to all the meſne profits, which *J. N.* cannot have in this caſe, becauſe the extent was ſued before he purchaſed, and he can have no title to them but from the fine levied.

2 Bulſt. 14, 15.

If *A.* binds himſelf in a recognizance or ſtatute, and after his death ſome of his lands deſcend to the heir of the part of the father, and ſome to the heir of the part of the mother, both heirs ſhall be equally charged; and if the conuſee loads one only, he ſhall have contribution.

3 Co. 13. a. 2 Co. 25. b.

If

2 Roll. Abr. 468. If *A.*, *B.*, and *C.* bind themſelves jointly and ſeverally in a ſtatute, the conuſee may have execution againſt one of them alone, or againſt all together; but he cannot have execution againſt two only; for the execution muſt purſue the ſtatute, which is joint or ſeveral; but execution againſt two is neither one nor the other.

3. What Things are bound by them, and are liable to be extended for the Satisfaction of them.

Hob. 60. 2 Roll. Abr. 475. The ſtatute of 13 *Ed.* 1. *de mercatoribus*, which, as appears in the preamble, was for the ſecurity of merchants and encouragement of trade, ſubjected not only the goods and perſon, but the lands likewiſe of the debtor into whoſe hands ſoever they came, after the ſtatute acknowledged: therefore, if the perſon of the conuſor only be taken in execution on a ſtatute, and die, his goods and lands are ſtill liable to the extent, becauſe being all due at firſt to ſatisfy the conuſee, he may, at diſcretion, take them all at one time, or at ſeveral.

3 Co. 12. 2 Roll. Abr. 472. Winch. 84. So, if a conuſor ſell all or part of his lands, after he has bound himſelf, the conuſee may ſtill extend it by the words of the ſtatute; otherwiſe it would be in the power of the conuſor to fruſtrate the ſecurity intended by the law: ſo, if the conuſor purchaſe after he has bound himſelf, ſuch lands are ſubject to execution; for the ſtatute ſays, "All his lands ſhall be extended," which ſtill muſt be underſtood of thoſe only which he has a power over, and may charge; and conſequently, thoſe which he diſpoſed of for valuable conſideration before his entering into the ſtatute are not liable in the hands of the purchaſer, for they really in no ſenſe can be called his lands.

2 Roll. Abr. 472. If the conuſor has two manors, the conuſee may ſue execution in which of the manors he pleaſes, for he may diſpenſe with any part of the proviſion the ſtatute has made for him.

Bro. Execution, 85. Cro. Jac. 85. If tenant in tail acknowledge a ſtatute and die, and the conuſor ſue execution againſt the iſſue, the iſſue may avoid it, either by aſſiſe or *audita querela*; for no charge of the conuſor's can affect the land in tail longer than his own life, by virtue of the ſtatute *de donis*, which as to ſuch lands repeals the other.

2 Roll. Abr. 473. If in this caſe, tenant in tail, after he had bound himſelf, had enfeoffed *J. S.*, and for his further aſſurance had levied a fine to him, the conuſee may extend the land in the hands of *J. S.*, and neither he nor the iſſue in tail can avoid the execution, for the iſſue is totally barred by the fine, and *J. S.* purchaſed the land under the charge, and conſequently, muſt hold it ſo.

Bro. Execut. 76. *Qu.* *As this does not ſeem to be law, nor conſiſtent with the caſe next but one. *Supra*. * But if tenant in tail bind himſelf in ſuch recognizance or ſtatute, and die, and his iſſue enfeoff *J. S.*, it ſeems, the conuſee may extend the lands in the poſſeſſion of *J. S.*

2 Roll. Abr. 472. If a reverſioner upon a leaſe for years acknowledge a ſtatute, both the reverſion and rent are extendible, and the conuſee may have

have an action of debt for the rent. So, a rent upon an eſtate for life may be extended for ſatisfaction of a ſtatute: but the conuſee in this caſe can have no action of debt for the rent, any more than the reverſioner himſelf could have; becauſe, during the continuance of the freehold, no action of debt lies for the rent. *Vide* head of Rent.

If a reverſioner in fee upon an eſtate for life acknowledge a ſtatute, and after grant the reverſion upon the death of tenant for life, the conuſee may extend the land, for the reverſion being a tenement is bound by the ſtatute. Moor, pl. 118. 2 Roll. Abr. 473.

So, if *A.* ſeiſed of a rent-charge bind himſelf in a ſtatute merchant, this rent is extendible, for the word *land*, which the ſtatute ſubjects to the execution, includes all hereditaments extendible, and the conuſee in this caſe may diſtrain and avow for the rent, though the tenant never attorned; for the law creating his eſtate gives him all means neceſſary for the enjoyment of it. Moor, pl. 104. Co. Lit. 135. By ſtat. 27 E. 3. ſt. 2. c. 9. the conuſee hath an eſtate of freehold. *Vide poſt.*

If the grantee of a rent-charge, after the acknowledgment of the ſtatute, releaſe to the tenant, by which the rent is extinguiſhed, yet upon failure of payment the conuſee may extend it; for to this purpoſe it has ſtill a continuance, the ſtatute *de mercatoribus* binding all the land (which includes all hereditaments extendible) the conuſor had at the time of entering into the ſtatute; conſequently, this muſt be liable into whoſe hands ſoever it comes. 7 Co. 39. Lillingſton's caſe.

If the conuſor has lands in ancient demeſne, they ſhall be extended on forfeiture of the ſtatute; for though diſputed titles to theſe lands are not determinable in courts of common law (and therefore ejectment does not lie of them) leſt the tenants ſhould be brought from the ſervice of the plough; yet they are extendible in this caſe, for the extent is performed by the ſheriff *in pais*, and the title of the land is not directly put in plea or diſpute in the king's courts, by which the tenant might be brought from his buſineſs. 5 Co. 105. Moor, pl. 351. 2 Inſt. 397. 2 Roll. Abr. 472. Hob. 47. but Dyer, 372. *cont.*

If a feoffment be made to *A.* upon condition to re-infeoff the feoffor, and *A.* binds himſelf in a ſtatute; if *A.* continue ſeiſed of the land, or re-infeoff the feoffor, the land in either caſe may be extended by the conuſee: for whoever comes to the land under the feoffment of *A.*, takes it chargeable with the ſtatute, and conſequently, is liable to the execution. But if the feoffor had entered, as he well might, becauſe the feoffee had diſabled himſelf to perform the condition, inaſmuch as he cannot return it in the ſame plight it was given him, then he ſhould not be charged; for this being a lawful entry, like an eviction in a court of record, ſets aſide all incumbrances. But if in this caſe *A.* had been diſſeiſed, and then bound himſelf in a ſtatute, this had not charged the land during the diſſeiſin, and conſequently, there is no diſability to perform the condition; for a diſſeiſee can no more charge his right, as ſuch, than he can transfer it; nor is the land extendible in the hands of the diſſeiſor; becauſe, though his entry is tortious, yet he held it free during the diſſeiſin, as the diſſeiſee enjoyed it: but if the Co. Lit. 222. 2 Co. 59. Julius Winnington's caſe.

the diſſeiſee enters or recovers by action, then the land becomes chargeable with the ſtatute.

Co. Lit. 184. b. 2 Roll. Abr. 88. 6 Co. 70. Lord Abergavenny's caſe.

If *A.* and *B.* be jointenants in fee, and *A.* enter into a ſtatute, and die before execution ſued, the land is not extendible in the hands of *B.* becauſe he claims the land as ſurvivor from the firſt feoffment which conveyed it to him free from any charge. But if the conuſee had ſued execution before the death of *A.*, the ſurvivor *B.* ſhould hold it charged; for execution is equivalent to a ſale, and, like a leaſe for years, ſhall bind the ſurvivor. So, if *A.* in this caſe had, after the acknowledgment of the ſtatute, releaſed to *B.*, then the land would be chargeable with the ſtatute, though *A.* ſhould die before execution, becauſe the acceptance of the releaſe prevents him from claiming by ſurvivorſhip; for by the releaſe *B.* had the land before his companion died.

Co. Lit. 185. a. 6 Co. 78, 79.

Co. Lit. 185. a.

But the law is otherwiſe in the caſe of parceners; for if one of them charged the land, the other ſhall hold it under the incumbrance of the ſtatute, for he comes in as heir by deſcent under the charge; whereas the jointenant ſurviving claims from the firſt feoffment, which is prior to the charge.

2 Roll. Abr. 472.

If a conuſor, at the time of acknowledging a ſtatute, has goods and chattels to a great value, they are all liable to ſatisfy the conuſee, if they be found in his hands when execution is ſued: but if the conuſor diſpoſes of them, they ſhall not be extended in the hands of a purchaſer, as lands may be; for ſince there is no ſolemnity eſtabliſhed or required, it is impoſſible to find in whoſe poſſeſſion they lie, in order to extend them: beſides, it muſt neceſſarily put a ſtop to trade and commerce, if execution was to purſue the goods wherever they were found.

Roll. Abr. 346. 444. Co. Lit. 46. *Vide* tit. Baron and Feme.

If a huſband, *poſſeſſed* of a *term* in right of his wife, acknowledge a ſtatute, and die, the leaſe ſhall not be extended in the hands of the wife; for though the law gives him an abſolute power over the term, ſo as to diſpoſe of it, yet if he does not make uſe of that power during the coverture, the wife ſhall enjoy it free as ſhe brought it to him. But if the execution be ſued in his life, and the term extended, this will bind the wife; for the extent is a diſpoſition in law to anſwer the conuſee's debt, and therefore, ſhall affect the wife as much as if he had ſold the term, or granted it for years.

Bro. Stat. Merch. 18. Co. Lit. 30. a.

If the huſband be *ſeiſed* of lands of *inheritance* in the right of his wife, and acknowledge a ſtatute, upon which execution is ſued, the heir upon the death of the feme, may enter and avoid the extent: but this muſt be underſtood of lands of which he cannot be tenant by the curteſy; for ſuch he may as well charge as convey during his life, to bind the heir.

2 Roll. Abr. 475. 2 Inſt. 395. Hob. 60.

By what has been ſaid, it appears what things are extendible and liable to execution for the ſatisfaction of ſtatutes merchant, of the ſtaple, and recognizances in the nature of the ſtatute ſtaple; and the ſame are alſo liable to ſatisfy all debts due on recognizances at common law, only with this difference, that in the former caſes both body, goods, and lands, being all due, the conuſee may take all at once, or different times; ſo that if he

extends

extends the lands first, he may afterwards take the body; whereas upon the recognizance at common law, if the conusee sues an *elegit*, he can have no *capias* afterwards to take the body, because he hath determined his choice by that writ to the goods and chattels, and a moiety of the land.

4. What Provision the Law has made for Tenant by Statute Merchant, &c. in case of Eviction.

By the common law, after a full and perfect execution had by extent, returned and entered on record, the conusee could have no new re-extent on the effects of the conusor, because there was once satisfaction given to the creditor on record, though the lands had been recovered from him before he had levied the debt out of them. The severity of this law was laid aside in *Henry* VIII.'s time; for in the 32d year of his reign it was enacted, That if lands delivered in execution on just cause be recovered from the tenant by execution before he hath received his whole debt, the conusee (and by a favourable construction of the statute, his (*a*) executors) may have a *scire facias* out of that court where execution is first awarded, or out of any court where the record shall be moved by writ of error and affirmed; but this statute is to be construed under these restrictions, that where the conusee hath remedy for part of his debt *in præsenti*, or *in futuro*, for the whole or for part, there he can have no aid nor benefit of this statute. 32 H. 8. c. 5. (*a*) 8 Co. Lit. 290.

As, if all the lands extended but one acre be recovered from the conusee, he shall have no advantage of this statute, because the act relieves those conusees only who are clearly without remedy, which the conusee cannot be said to be in this case, where he has one acre left him, though it be but a poor remedy. Co. Lit 289.

If *A.* be bound to *B.* in one statute, and to *C.* in another, and *C.* first sue execution, and extend the lands, and afterwards *B.* extend and take the lands from *C.* as by law he may, because his statute is prior, *C.* shall have no benefit of this statute, though he has not one acre left him, because he hath a remedy *in futuro*; for after the extent of *B.* is ended, he shall re-enjoy the lands by force of the former execution: so, for the same reason, if the wife of the conusor recover dower against the tenant by execution, he hath no relief from this statute. Co. Lit. 289. b. 4 Co. 67.

If a lessor ousts his lessee for years, or disseise his tenant for life, and then acknowledge a statute, and the conusee sue execution; if the lessee in either case re-enter, the conusee is not relieved by this act, because he has a remedy *in futuro*, *viz.* after the death of the lessee, or the lease ended by holding over. Co. Lit. 289.

If tenant in execution, by recognizance at common law, or by statute merchant, &c. be disseised, he may, by the express words of the statute, have an assise of novel diseisin also; and if there be no assignment by the conusee in his lifetime, they shall go to the executor, being really but chattels, who in case of a disseisin shall have the same remedy the testator might have had by an equitable construction of the statute. 2 Inst. 396. Co. Lit. 43. b.

Before

Before we conſider in what caſes theſe tenants by ſtatute merchant, *&c.* can hold over the time of their extent, it is firſt to be obſerved, that the ſheriff is to make a reaſonable extent of the lands; ſo that computing the debt and value of the land, it will be eaſily known how long the extent is to continue, and when the conuſor is to have his land again.

4 Co. 82. 2 Roll. Abr. 478. Here we muſt diſtinguiſh between the act of a ſtranger and the act of the conuſor; for in caſe of a diſſeiſin or any interruption by a ſtranger, the conuſee ſhall not hold over the time of the extent, but is to have ſatisfaction for the injury done by action againſt the ſtranger: but if the conuſor himſelf had given the tenant by execution any interruption, or hindered him from taking the profits, there, the tenant might either hold over, or have an action againſt the conuſor; for, as in the firſt caſe, it would be unreaſonable to puniſh the conuſor for the act of a ſtranger, by keeping him out of his lands; ſo, in the laſt caſe, it would be equally unreaſonable to permit the conuſor, by any act of his, to turn the conuſee out of the land before he has levied the debt.

2 Roll. Abr. 479. If land of a leſſee for life, or years, be extended upon a ſtatute, and afterwards part be recovered in an action of waſte, for waſte done by the conuſor before the extent, the conuſee ſhall hold the reſidue over the time of the extent, becauſe no act of the conuſor's ſhall prejudice the conuſee, or hinder him from levying his juſt debt out of the lands: but if the land had been recovered for what was committed by the conuſee, there, he ſhould not take advantage of his own wrong, and hold over to the prejudice of the conuſor.

3 Co. 67. 2 Roll. Abr. 478-9. So, if tenant in execution either ſuffers the land to lie waſte, or neglects to levy the debt out of it, or if he makes a conditional ſurrender of the land to him in the reverſion, and enters for the condition broken; theſe are all his own wilful acts; and it is but reaſonable he ſhould ſuffer for them, and not hold over the land to the prejudice of the conuſor.

4 Co. 82. b. 2 Roll. Abr. 478. But on the other hand, where there is no default or negligence in the conuſee, but he is prevented from making the uſual profits of the land by the act of God, as, where the land is ſurrounded by water, or rendered unprofitable by wild-fire, there, the conuſee ſhall hold over the time of the extent; for it would be unreaſonable to puniſh the conuſee for what he could by no induſtry or poſſibility prevent.

7. The ſeveral Ways of vacating and diſcharging theſe Statutes, and this either before or after Execution.

As we find that both body, goods, and lands are liable to execution, and the conuſee may, at pleaſure, take one or all by one writ of execution, or all at different times by ſeveral writs of execution, we ſhall conſider,

1*ſt*, What acts of the conuſee will diſcharge the land, or ſuſpend the execution of it for a time; and this either before or after execution ſued.

2*dly*,

2*dly*, What acts of the conuſee will vacate the ſtatute, &c. by diſcharging both body, goods, and lands; and this either by cancelling the ſtatute, or by defeaſance, or releaſe, which are equivalent to it; and herein of the *Audita Querela*, which is the proper remedy for the conuſor, if execution be ſued after ſuch acts are preferred by the conuſee.

3*dly*, In what caſes the conuſor may avoid and deſtroy the ſtatute by entry or plea, and in what caſes he is put to his *ſcire facias*.

As to the firſt point; if *A.* acknowledges a ſtatute to *B.*, and afterwards another to *C.*, in this caſe *B.* is firſt to be ſatisfied, his ſtatute being prior in time to *C.*'s; yet if *B.* accepts a leaſe for years from *A.* then may *C.* ſue execution firſt, becauſe *B.* by his acceptance of the leaſe, has ſuſpended the execution of his ſtatute during the term. 2 Roll. Abr. 470. Cro. Jac. 424. 477.

But if a conuſee accepts a feoffment of parcel of the land from the conuſor, the reſidue in his hands is ſtill liable; for his body being ſtill liable, whatever remains in his hands muſt be ſo too: But if the conuſor had enfeoffed a ſtranger of the reſidue, then the conuſee by his purchaſe of part, had diſcharged the whole land; for the conuſor, by his purchaſe, has diſcharged that part of the land from being liable to the debt, ſince his own lands cannot in any manner be liable to his own ſecurities; and having diſcharged a part of the land by his own act, it is a diſcharge of the whole, ſince ſuch act of his has prevented the legal execution on the whole lands, in the manner the ſtatutes have directed, and therefore to execute it on the other alienees is partial, and to execute it on himſelf, together with the other purchaſers, is impracticable. Plow. 72. 2 Roll. 471. Bro. Statute Merch. 42. F. N. B. 104. Cro. Eliz. 756.

Thus, if a conuſee extends a rent-charge, and after purchaſes parcel of the land out of which it iſſued; this frees the whole rent from the ſtatute; for, beſides that the rent-charge is extinguiſhed, and, conſequently, can be no longer in extent, the conuſee, by his purchaſe, though it had continued, has diſcharged it, for the whole rent was extended to anſwer the ſtatute; and part of it being diſcharged by the conuſee's own act, the remainder muſt be liable to the whole debt, which would be contrary to the extent, or elſe muſt be diſcharged. Savil, 69.

If the conuſor enfeoffs the father of the conuſee of part of his land, and a ſtranger of the remainder of it, and, upon the death of the father, that part deſcends to the conuſee; this deſcent, though before execution, diſcharges the whole land, and the ſtranger ſhall enjoy his purchaſe free from that ſtatute; for ſince the lands are made liable, which were not ſo, to any executions at common law, the conuſee muſt take the execution according to the ſtatute, which in this caſe cannot be had, ſince he cannot lay any part of the debt upon the land, which he is owner of: therefore, not being able to take execution on the whole land, according to the ſtatute, his remedy fails; and there can be, in this caſe, no proviſion of the common law in his favour. 2 Roll. Abr. 47.

Bro Statute Merch. 25. 2 Roll. Abr. 470.

If the conuſor enfeoffs the conuſee of all his lands, by this purchaſe the conuſee has diſcharged the land from the extent, becauſe it would be moſt abſurd to extend his own land to pay his own debt: but if the conuſor repurchaſes the lands, he has revived the extent againſt them; for the firſt feoffment only diſcharged, or rather ſuſpended, the execution againſt the land, and left the body and goods ſtill liable; and whilſt the conuſor is ſubject to execution, ſo long will all lands he purchaſes after the acknowledgment of this ſtatute be ſubject.

Plow. 72.

So, if the conuſor, after the repurchaſe, had aliened to a ſtranger, the conuſee might ſue execution againſt him; for he purchaſed them ſubject to the incumbrance of the ſtatute, ſince they were chargeable in the hands of the conuſor.

But all theſe acts of the conuſee, which diſcharge the land only, muſt be underſtood to be done before the execution ſued. Let us ſee in the next place, how far ſuch acts will affect him after execution is ſued, and we ſhall find them not only to diſcharge the land, but the body and goods alſo, as will appear by the following inſtances:

2 Roll. Abr. 477. Plow. 72. Bro. Statute Merch. 42.

For where the body and lands of the conuſor are in execution, and the conuſee purchaſes the whole or parcel of the land; this diſcharges not only the land, as in the precedent caſes, but the body alſo; for the lands are taken in execution as a real ſatisfaction for the debt, and therefore, as in all other caſes of execution, are a diſcharge of the body, which is but a pledge for ſatisfaction: but theſe debts being preſumed to be mercantile, are therefore to be ſatisfied as ſoon as poſſible, that the merchant may attend his buſineſs; for which reaſon the ſtatute allows, that, where the real ſatisfaction is had by the extent of the lands, yet the body ſhall be a pledge, in order for a more ſudden ſatisfaction, if the money can be raiſed: but yet if the real ſatisfaction by the purchaſe or deſcent of the land be diſcharged, as it muſt be when the conuſee cannot have it in the manner it was extended, (as the conuſee cannot have in this caſe, ſince he cannot have the term and fee-ſimple in the land together,) it follows of courſe, that the body, which is only a pledge, cannot continue in execution, when that which was the real execution is diſcharged in the hands of the conuſee: ſo, if the conuſee ſurrenders part, or the whole land, this diſcharges both land and body; for the body being only in execution, in order to oblige him the ſooner to ſatisfy the conuſee, when he by any act acknowledges himſelf ſatisfied, as he does by the ſurrender, the body muſt conſequently be ſet at liberty.

2 Roll. Abr, 477.

Thus, if the bodies of *A.*, *B.*, and *C.* be in execution, and the conuſee come into court, and ſay, that he will not have one of them in execution; if this be entered of record, it ſhall diſcharge every one of them: the reaſon is, the debt being entire and chargeable on each of them, his acknowledgment of ſatisfaction by this act of one of them, ſhall, like a releaſe, extend to all.

If *A.* and *B.* acknowledge a ſtatute to *C.*, who takes their bodies, and the lands of *B.* in execution; if afterwards *B.* die, and his land in execution deſcend to *C.* the conuſee; this diſcharges the body of *A.* Bro. Statute Merch. 15. 2 Roll. Abr. 477.

If a conuſor be leſſee for life, and his body and lands be taken in execution, and the conuſee, being in by the extent, commit waſte, for which the reverſioner recovers the land (as he well may, becauſe the eſtate of the leſſee, which was extended, was ſubject to the puniſhment of waſte); this ſhall diſcharge the body of the conuſor: *ſecùs*, if the land had been recovered for waſte done by the conuſor; for then the body ſhould not be diſcharged, leſt the conuſor by his act and wrong ſhould free himſelf from the execution. Bro. Statute Merch. 15. 2 Roll. Abr. 477.

The next thing conſiderable is, what acts of the conuſee will vacate the ſtatutes, by diſcharging body, goods, and lands, and this may be done,

1*ſt*, By cancelling the ſtatute, as tearing off the ſeals, which are ſo eſſentially neceſſary, that without them the ſtatute, like common ſpecialties, is wholly void and uſeleſs.

2*dly*, By defeaſance, which may vacate the ſtatute abſolutely, or upon condition.

3*dly*, By releaſe, which is a ſolemn renunciation of a man's right by deed. But it may be demanded how theſe ſtatutes, which have the force and ſolemnity of a judgment, can be avoided by acts of leſs notoriety than themſelves, as theſe acts *in pais* muſt be confeſſed to be, which overthrows the eſtabliſhed rule, *unumquodque ſolvi eo ligamine quo ligatur?* The anſwer to this is, that notwithſtanding the releaſe, *&c.* from the conuſee, the ſtatute ſtill continues in force; but the law, with reaſon, conſtruing all men's deeds moſt ſtrongly againſt themſelves, by theſe acts, precludes the conuſees from execution.

But if the court, at the inſtance of the conuſee, grants him execution, as they really ought, ſince nothing appears to them deſtructive of the ſtatute; what remedy has the conuſor? For after ſuch releaſe or defeaſance he cannot ſtop the execution, becauſe he has no day in court to plead this in bar; but his proper remedy in ſuch caſe is by *audita querela*, which is a writ to ſet aſide an unjuſt judgment, for ſome injuſtice which could not be pleaded in bar; for if it might, then it was the party's own fault not to plead it in bar of ſuch unjuſt demand, which is not relieved by this writ, that proceedings might not be endleſs *. F. N. B. 104. 2 Sid. 108, 109. Co. Lit. 290. Moor, pl. 693.

* *Qu.* If it might not be done upon motion, a much more expeditious, and much leſs expenſive method? The ſame *query* is applicable to many of the following caſes.

And if, upon a *ſcire facias* on a recognizance at common law, the conuſor is returned ſummoned, he ſhall never avoid it by *audita querela*, becauſe the recognizance was upon condition, which he hath performed: for by the ſummons he had a day in court given him to plead the performance of the condition, which would have been ſufficient to ſtop the execution; but if the ſheriff had returned, that he found nothing whereby to ſummons the conuſor, on which execution had been granted, then the conuſor 2 Roll. Abr. 306. Cro. Eliz. 4. 25. Sid. 55.

might have an *audita querela*, and then the releaſe of the conuſee, or the performance of the condition, might well be ſuggeſted therein, becauſe he had no day in court to plead them in bar of the execution.

Sid. 54. Raym. 19. If *A.* be tenant for life, remainder to *B.* his ſon in tail; *A.* enter into a recognizance, and die, *C.* bring a *ſcire facias*, and *B.* be returned heir and tertenant, and warned, but make default, he can have no *audita querela* to avoid this execution, becauſe he had a day given in court to ſet aſide the recognizance; and it was his folly not to appear when warned.

F. N. B. 104. If *A.* enters into a ſtatute to *B.*, and pays the money at the day aſſigned, upon which the ſtatute is cancelled, and after *B.* forges a new ſtatute in the name of *A.*, in this caſe *A.* may relieve himſelf by *audita querela;* for the forged ſtatute having all the eſſentials of a true one, the court was obliged to look on it as ſuch, till the contrary appeared, which the conuſor could not ſet forth before execution, having no day to appear judicially in court, and therefore is put to this writ to avoid the execution founded on the injuſtice of the pretended conuſee.

Roll. Abr. 313. If the conuſee of a ſtatute, upon agreement with the conuſor, delivers up the ſtatute in lieu of an acquittance, and after ſues execution, and the conuſor prays a re-extent, becauſe that the land was extended too low, and has it granted to him, he ſhall never avoid the extent by *audita querela*, becauſe by his praying the re-extent he admits the ſtatute good and executory.

F. N. B. 105. 2 Roll. Abr. 307. If a conuſee of a ſtatute gives a deed of defeaſance to the conuſor, and afterwards ſues execution contrary to the form of the defeaſance, the conuſor may have an *audita querela*, becauſe the defeaſance precludes the execution, if the terms or condition of it be performed by the conuſor; and the conuſor may have the *audita querela*, though the condition be not performed according to the defeaſance, if execution was ſued before the condition broken, becauſe the conuſee extended before his time; and therefore the execution being unjuſtly ſued muſt, conſequently, be an injury to the conuſor.

Moor, 811. pl. 1097. Trot and Spurling. In an *audita querela*, the caſe was this; the conuſee gave a defeaſance, that if he ſued execution of the lands the conuſor had in *Kent*, the ſtatute ſhould be void; the conuſee, contrary to this defeaſance, extended the land in that county; and it was adjudged this writ well lay, to avoid the execution and vacate the ſtatute; for the defeaſance was no way repugnant to the ſtatute, becauſe the conuſee might ſtill extend the lands of the conuſor in any other county, and take his body and goods.

Cro. Eliz. 40. 551. And. 133. Roll. Abr. 313. Co. Lit. 265. 291. 10 Co. 47. b. 2 Roll. Abr. 470. If the conuſee releaſes to the tertenant all right, intereſt, and demands, together with all ſuits and executions, and afterward ſues execution, the tertenant ſhall have an *audita querela* to ſet aſide this execution; and this differs from the caſe of *Burrows* and *Gray* in *Cro. Eliz.*, for there the conuſee releaſed only all his right, intereſt, and demand to the tertenant, which was held not to be ſufficient, becauſe he had only a poſſibility, and no intereſt in the land before execution, and, conſequently, could not releaſe what he

he had not: but in the former caſe, though the conuſee had no right to the land before execution, yet there are words ſufficient to diſcharge the execution, ſince it is releaſed by expreſs words: and in the firſt caſe, the words of the releaſe refer to the executions, ſuits, and demands upon the ſtatute, which ſtatute, ſince it was in being, the executions and demands upon it may be releaſed at any time; but in the other caſe the words *right, title, and intereſt* relate to the land, which the conuſee had no intereſt in till execution ſued, and therefore cannot releaſe or transfer over what he had not: beſides, in the firſt caſe, the conuſee has releaſed all ſuits, by which, ſays my Lord *Coke*, the execution is gone, becauſe no common perſon can have execution without prayer and ſuit to the court.

Another method of avoiding executions is by *ſcire facias ad rehabendam terram:* and this writ differs from the *audita querela*, for that avoids an execution unjuſtly obtained at firſt; but the *ſcire facias* allows the execution juſt at firſt; but ſhews, that the end for which it was granted being obtained, it ought of conſequence to ceaſe. 2 Roll. Abr. 480.

If the conuſor, after his land is extended, tender the money to the conuſee, who refuſes it; or if the debt, with all coſts and damages which the ſtatute *de mercatoribus* allows, be ſatisfied from any caſual profit ariſing from the land; in theſe caſes, the conuſor is put to his *ſcire facias*, and cannot enter: but in caſe of an *elegit* on a recognizance at common law, when the conuſee is anſwered his debt, by the perception of the certain and uſual profits of the land, the debtor may enter, and is not put to his *ſcire facias:* yet in this caſe, if the creditor be ſatisfied by an accidental perquiſite, there, the debtor cannot enter, but muſt have a *ſcire facias ad rehabendam terram.* And the reaſon of theſe diſtinctions is, becauſe, in the firſt caſe, the execution iſſues according to the direction of the ſtatute, not only till the principal debt be levied, but all coſts and damages ariſing by reaſon thereof; and therefore, ſince the damages are not aſcertained, the record will always oppoſe an entry, which is but an act *in pais*, and cannot be turned to the defeaſance of a matter of record, till ſuch damages are ſettled on record in the *ſcire facias:* but in the ſecond caſe, when the debt is certain, and the value of the land aſcertained in the extent, there, when ſuch debt is paid by perception of ſuch ſettled profits, there is no act on record to oppoſe an entry, and therefore an entry is lawful. But where the ſatisfaction ariſes from accidental profits, which do not appear in the extent, this then is ſtill matter of record, in oppoſition to the entry, ſince ſuch accidental profits do not appear in the valuation of the land ſettled by the extent on record. 2 Roll. Abr. 479, 480. 4 Co. 67. 2 Inſt. 398.

If lands be extended on a ſtatute, and the time of the extent expired, the conuſor is to be put to his *ſcire facias*, becauſe the conuſee may have cauſe to hold the land longer than the time of extent, for he may retain it till he has received his coſts of ſuit and reaſonable expences, which the chancellor ſhall aſſeſs. 4 Co. 67. 2 Roll. Abr. 479.

2 Roll. Abr. 483. [(a) But if the conuſee be ſatisfied by perception of the profits, though not by the extended value, the conuſor may be aided in equity, and may compel the conuſee to account according to the real value by him received. 2 Ventr. 338. Hardr. 136.]

No *ſcire facias* lies upon a general averment, that the conuſee has levied the debt before the time of the extent expired, becauſe this may happen by the conuſee's induſtry in improving the land, which the debtor can take no advantage of. So, if the land taken in execution be really worth 20 *l. per annum*, but it is extended only at 10 *l.* though by this computation it is evident the conuſee might levy the debt before the time of the extent is ended; yet the conuſor, upon an averment that the debt is levied, ſhall have no *ſcire facias* (*a*), becauſe that would be contrary to the record, and the court is to judge of the value according to the extent, by which it appears the debt is not yet levied. But if the conuſee has levied part by cutting wood, and has received the reſidue, as appears by an acquittance produced by him, in this caſe, he ſhall have a *ſcire facias*: the reaſon is, becauſe the end of the extent being only to ſatisfy the conuſee his reaſonable demands, whenever it appears to the court that they are anſwered, whether it be by perception of the profits, or otherwiſe, they grant a *ſcire facias* to avoid the extent, and reinſtate the conuſor in his former poſſeſſion, ſince the end for which it was given is anſwered.

2 Roll. Abr. 482.

If the conuſee has levied part of the debt, according to the extent, the conuſor, upon tender of the reſidue *in court*, ſhall have a *ſcire facias* to recover the lands within the time of the extent; for here, it appears on record how much was due at firſt, how much was paid, and what remains due and in arrear; and the end of the extent being to ſatisfy the conuſee of his juſt debt, whenever that appears to the court the extent ſhall ceaſe. But if the conuſor had tendered the remainder of the debt out of court, or if in court he had only offered to come to an agreement with the conuſee; in neither of theſe caſes ſhall the *ſcire facias* be granted, becauſe it does not appear on record that the debt is paid.

2 Roll. Abr. 482.

If the conuſee of a ſtatute for 100 *l.* apportions the ſtatute, and ſues execution for the body and land, for ſeveral parts of it, in ſeveral counties, as for 20 *l.* in *Kent*, 20 *l.* in *Surry*, his body is taken in *London* for 20 *l.*, upon tender of this 20 *l.* in court, the conuſor ſhall have a writ to the ſheriff of *London* to ſet him at liberty; for this writ of extent was to take his body, *&c.* till 20 *l.* not the 100 *l.* was paid, and conſequently, upon tender of the 20 *l.* the ſheriff has no power to keep him in priſon. *Secùs*, if the body had been taken before apportionment, for then it could not be diſcharged upon payment of 20 *l.*, it being taken at firſt for the whole debt.

Roll. Abr. 304. Cro. Jac. 424. 477.

If *A.* leaſes *Black-acre* for years to *B.*, and then acknowledges a ſtatute to *C.*, and afterwards another to *D.*, then *C.* takes a leaſe of the reverſion, and the rent from *A.*, by which he has ſuſpended the execution of the ſtatute during the term, and, conſequently, laid the land open to the extent of *D.*, the ſecond conuſee, who ſues execution; if therefore *C.* ſhould extend the reverſion and rent during his own leaſe, *B.* the leſſee is not obliged to pay him the rent, but may avoid the extent by plea without *audita querela*, becauſe

cauſe *C.* hath ſuſpended the execution of his ſtatute, the firſt in date, by the acceptance of the leaſe from the conuſor.

If tenant in tail acknowledges a ſtatute, and dies, the conuſor ſues execution againſt the heir, he may avoid it by aſſiſe, without being put to his *audita querela:* ſo, if a diſſeiſor acknowledges a ſtatute, and the diſſeiſee enters, the conuſee extends the land, the diſſeiſee is not put to his *audita querela* to avoid the extent, becauſe there is not the appearance of juſtice in this extent; the conuſor having only a tortious and unlawful ſeiſin of the land, and, conſequently, no power to charge it. Roll. Abr. 304.

[After an extent of a ſtatute in one county, and a *liberate* returned and filed, the conuſee may have an extent into another county, if the prayer for the ſecond extent was entered at the time the firſt extent was taken out; otherwiſe not. Yet in this laſt caſe, a court of equity will relieve him; for the intention and agreement of the conuſor is, that all his lands (be they in never ſo many counties) ſhall be bound by the ſtatute; and, conſequently, it would be moſt unreaſonable to confine the conuſee to the lands of the conuſor in any one county; for this would be to defeat that ſecurity which the party himſelf had agreed to give, and had actually given.] Oates v. Robinſon, 1 Str. 461. Fort. 373. S. C. 2 P. Wms. 91.

(C) Of the ſeveral Kinds of judicial Writs which lie after Judgment: And herein,

1. Of the Form, Teſte, and Return of ſuch Writs.

THE form of judicial writs muſt be according to the approved precedents in thoſe caſes; and therefore, where on a writ of *elegit*, which was *ideo tibi præcipimus quod bona & catalla* of the defendant, *quæ habuit die judicii prædict. redditi, deliberari facias*, omitting *& medietatem terrarum & tenementorum prædictorum*, the ſheriff extended the lands and goods, and delivered the moiety of the lands, *&c.* On motion, the court refuſed to (*a*) amend the writ, and held, that the party muſt take out a new *elegit*, the inquiſition herein being without warrant, the ſheriff having no authority by this writ to extend the lands. *Vide* head of Writs. Cro. Car. 162. Walker and Riches. (*a*) Whether any of the ſtatutes of jeofails extend to judicial writs, *vide* tit. Amendment and Jeofail.

Every writ of execution, in caſe of a common perſon, muſt bear teſte in term-time, for being the proceſs of that court in which judgment is given, they have no authority of awarding it at any other time: but original writs iſſuing out of Chancery may bear teſte at any time, becauſe that court is always open. Co. Lit. 161. 2 Inſt. 40. Latch. 11. 2 Jon. 150. Vent. 362. —But if a writ of execution bear teſte out of term, the ſheriff is juſtifiable in executing it, for he is not judge of the validity of the proceſs, provided the court, out of which it iſſues, has juriſdiction of the matter. 2 Salk. 700. pl. 4.——But though he is juſtifiable in executing ſuch proceſs, yet if he lets a perſon eſcape whom he arreſted on a *capias ad ſatisfaciend.* which bore teſte out of term, no action lies againſt him, for the writ was void. 2 Salk. 700. pl. 4. 2 Ld. Raym. 775. 7 Mod. 29. 11 Mod. 50. pl. 20. *per* Holt, Chief Juſtice.

But if judgment be entered as of *Hilary term*, the party may take out execution in the vacation following, by a writ teſte the laſt day of the ſaid precedent term; for having run through the whole courſe of a judicial proceeding, and his cauſe ripe for execution Whether it can be averred that the writ did not iſſue till a day ſubſe-

quent to the teſte, *vide* Lev. 173. 1 Sid. 271. Lutw. 332.

cution at that time, it would be unreaſonable to oblige him to wait till the enſuing term, by which he might be diſappointed of the effect of his judgment.

2 Keb 33. 2 Burr. 966.——Where it appeared that an execution was levied before the judgment was ſigned, though after the firſt day of the term to which the judgment related, and after the teſte of the *fieri facias*, yet held naught. 2 Show. 494. pl. 460.

5 Co. 90. Hae's caſe. 4 Co. 67. (*a*) But a *capias* in meſne proceſs muſt be returned, for the end thereof is

All writs of execution which are to be executed by the ſole authority of the ſheriff, ſuch as a *capias ad* (*a*) *ſatisfaciendum*, *habere facias ſeiſinam* or *poſſeſſionem*, *fieri facias*, *liberat.* &c. are good when duly executed, though (*b*) never returned by the ſheriff; for the plaintiff has the effect of his ſuit, and there is nothing farther to be done on his part; and hence it is ſaid, that an execution executed is the end of the law.

to compel the defendant to appear, and therefore, if the writ be not returned, the arreſt is tortious. 5 Co. 90. a. Cro Car. 447. (*b*) But if the party apprehends himſelf injured by an erroneous writ of execution, he may apply to the ſheriff to return it, and if he refuſes, an action on the caſe lies againſt him. Keb. 551.

5 Co. 90. a. 4 Co. 74. 2 Inſt. 396. Cro. Jac. 569. Cro. Eliz. 584. * Which ſee *infra*.

But in caſe of an *elegit*, although it be a judicial writ, yet the ſheriff muſt return it, for this is not to be executed by his ſole authority, but by an inqueſt taken by him, according to the ſtatute of *Weſtm.* 2. * therefore he muſt return the writ, that it may appear that he hath purſued the directions of the ſtatute.

2 Salk. 700. pl. 4. Shirly and Wright. 2 Ld. Raym. 775. 7 Mod. 29. 11 Mod. 50. pl. 20.

On this diſtinction it hath been held, that a *capias ad ſatisfaciendum* may be taken out, returnable the term next but one after the teſte; for in this caſe the intervening term makes no diſcontinuance, it not being neceſſary, as in caſe of a *capias* in meſne proceſs, that the defendant ſhould have a day in court; for his cauſe is at an end, and he muſt be in priſon, whether the writ be returned or not; whereas on a *capias* in meſne proceſs, the party may be at great prejudice, by reaſon of the impriſonment in the mean time.

2 Jon. 200.

So, if a *fieri facias* iſſues to the ſheriff of *S.* returnable on a common return day, and he at the day returns *nulla bona*, a *fieri facias teſtatum* may iſſue the day following, to the ſheriff of *Kent*, and execution by him ſhall be good; for though on meſne proceſs there can be no *teſtatum* till the *quarto die poſt*, yet it is otherwiſe in writs of execution, for on theſe the party has no day in court.

2. Of the *Elegit*.

(*c*) *Viz.* By Weſtm. 2. c. 18. or 13 E. 1. c. 18. 2 Inſt. 394.

An *elegit* is a judicial writ given by (*c*) ſtatute, either upon a recovery of any debt or damages, or upon a recognizance in any court which had authority to take the ſame: the words of this law are, *Cum debitum fuerit recuperatum vel in curia regis recognitum, vel damna adjudicata, ſit de cætero in electione illius qui ſequitur pro hujuſmodi debito aut damnis ſequi breve, quod vicecom. fieri faciat de terris & catallis debitoris, quod vicecom. liberet ei omnia catalla debitoris (exceptis bobus & afris carucæ) & medietatem terræ ſuæ quouſque debitum fuerit levatum per rationabile pretium & extentum, & ſi ejiciatur*

ejiciatur de illo tenemento, habeat recuperare per breve novæ disseisinæ, & postea per breve de redisseisina, si necesse fuerit *. * Tenant by *elegit* has but a chattel.

2 Inst. 396. Yet he shall hold *ut liberum tenementum*; and he, his executor or administrator, shall have an assise. *Id.*

When a person has judgment in an action of debt, or any other action in which he has damages, and he chooses to take out execution by *elegit*, the entry is, *Quod elegit sibi executionem fieri de omnibus catallis & medietate terræ*, and from this election either to have a *fieri facias* or *capias ad satisfaciendum*, or this writ, it is called an *elegit*, the form of which being first given by this statute (for, as has been before observed, there was no execution against the lands of a debtor at common law) is, *Ac cum idem* J. S. *juxta statutum inde editum elegerit sibi liberari pro prædict.* 20 *libris omnia catalla & medietatem terræ ipsius* J. D. 2 Inst. 395. Reg. 299. Co. Lit. 189. b.

But though by this statute the lands of a debtor are made liable, as well as his personal estate; yet if the creditor takes out an *elegit*, and it appears to the sheriff, that there are goods and chattels (*a*) sufficient of the debtor's, to satisfy the debt, he ought not to extend the lands. 2 Inst. 395. (*a*) But an *elegit* executed upon goods only, is not a *fieri facias*: for a *fieri facias* is executed by sale by the sheriff, but the *elegit* by the appraisement of the goods by a jury, and delivery to the party. Sid. 184. Lev. 92. Keb. 105. 261. 465. 556. 692. 1 Ld. Raym. 346.

Upon this writ the sheriff is to impannel a (*b*) jury who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements; and upon such inquisition the sheriff is to deliver all the goods and chattels (except the beasts of the plough) and a moiety of the lands to the party, and must return his writ, in order to record such inquisition in that court out of which the *elegit* issued. (*b*) That it cannot be done by the sheriff without an inquest, for the words of the statute are *per rationabile pretium & extentum*, which must be found such by the oaths of twelve men, is laid down and admitted in all the books which treat of this matter, as 2 Inst. 396. Co. Lit. 389. b. Dyer, 100. 5 Co. 74. a. b. &c. [But if there are no lands, the sheriff need not take or return an inquisition. Stonehouse v. Ewen, 2 Str. 874.]

When the jury have found the seisin and value of the land, the sheriff, and not the jury, is to set out and deliver a moiety (*c*) thereof to the plaintiff by (*d*) metes and bounds. Cro. Car. 319. Sparrow and Mattersock, so resolved, and that all the precedents were so. [(*c*) If he deliver more than a moiety, the execution is void. Patten v. Purbeck, 2 Salk. 563.] (*d*) If upon an *elegit* the sheriff deliver a moiety of an house without metes and bounds, such return is ill, and shall be quashed for incertainty. Carth. 453. *per* Holt, Ch. Just. [If the defendant be joint-tenant, or tenant in common, it ought to be specially alleged in the return. Hutt. 16.]

[But the sheriff does not now, as formerly, deliver *actual*, but only *legal* possession of a moiety of the lands; and in order to obtain actual possession, the plaintiff must proceed by ejectment (*e*); in which he must not only prove the judgment, and, by the judgment roll, that an *elegit* issued and was returned, but he must also prove the writ of *elegit* by a true copy thereof, and the inquisition thereon; for it is the *elegit*, and inquisition upon it, which carve out the term, and give the right of entry, the judgment roll being no more than a *memorandum*, that the *elegit* issued and was returned.] Tidd's Pr. 754. 2 Eq. Ca. Abr. 381. 3 Term Rep. 295. (*e*) Gilb. Evid. by Loft. 10, 11. Runningt. Eject. 217.

Lev. 16. *per Curiam*, Earl of Stamford and Needham; but *vide* Sid. 239. S. C.

If the ſheriff, on an inquiſition upon an *elegit*, returns the defendant to have twenty acres in *Dale*, and twenty acres in *Sale*, and delivers the twenty acres in *Sale* for the moiety of the whole, all is void, for he ought to deliver a moiety of the twenty acres in each vill, and this might be avoided in evidence in ejectment brought for the lands.

[And it hath been adjudged that the ſheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c., making in value a moiety of the whole. Denn v. Earl of Abingdon, Dougl 473. 1 Burt. Pr. Exch. 289.]

Cro. Eliz. 482. Huyt and Cogan.

If *A.* and *B.* recover ſeverally againſt *C.*, and *A.* ſues out execution, and has a moiety of *C.*'s land delivered to him on an *elegit*, and then *B.* ſues out an *elegit*, he can only have a moiety of the lands which remained with *C.* after the firſt extent, and not the whole delivered to him.

Hard. 23. &c. And. 27. The Attorney General and Andrews.

But if *A.* acknowledges two judgments to *B.* and in the ſame term he takes out two *elegits*, on the one he may have a moiety of *A.*'s lands delivered to him, and on the other the other moiety, and it is not reſtrained to a moiety of a moiety, for in judgment of law the whole term is but one day.

Gilb. Execut. 56.

[On lending money therefore, if the lender take two ſeveral bonds and warrants of attorney, one for a part, and the other for the reſidue of the money, and enter up two ſeveral judgments thereon, of the ſame term, he may take the whole of the defendant's lands under them.]

Cro. Eliz. 584. Palmer and Humphry. 4 Co. 74. S. C.

If, upon an inqueſt taken upon an *elegit*, the jury find that the party was poſſeſſed of a term, which commenced the 2 & 3 *Ph. & Mar.*, when in truth it commenced the 3 & 4 *Ph. & Mar.*, and the ſheriff ſells the term according to the value found by the jury, the execution is void, for the ſheriff has only authority to ſell or extend ſuch things as are found to be the party's; but in this caſe the inqueſt finding one thing, and the ſheriff ſelling another, the inqueſt does not warrant the ſale.

Cro. Eliz. 584. See Gilb. Exec. 35.

But if the inqueſt had found, that he was poſſeſſed of ſuch land for terms of divers years *adhuc vent.* which they had appraiſed at ſo much, without ſhewing the certain beginning or determination thereof, it had been well enough; for they ſhall not be compelled to find a certainty, not having means to be informed thereof.

2 Inſt. 395. 8 Co. 171. Dalt. Sh. 137.

Upon an *elegit* the ſheriff may either extend a term for years, that is, may deliver a moiety thereof to the plaintiff as part of the lands and tenements of the defendants, or may ſell it abſolutely as part of his perſonal eſtate.

Gilb. Exec. 35. 33.

[If the term be extended, the plaintiff is accountable for all the profits he receives out of the term, upon ſuch extent; and if he receive the debt out of ſuch term, before it expires, the defendant ſhall be reſtored to the term itſelf; but otherwiſe he ſhall keep the term, and not account for the profits of it.]

Moor, 32. pl. 104. (*a*) But a rent-ſeck cannot be

Alſo it ſeems that a (*a*) rent-charge may be extended on an *elegit*, for the word *land*, which is made ſubject to the execution, includes (*b*) all hereditaments extendible; and in this caſe the party may diſtrain and avow for the rent, though the tenant never attorned;

attorned; for the law creating his eſtate gives him all means neceſſary for the enjoyment of it.

delivered on an *elegit* as *liberum tenementum*.

Cro. Eliz. 656. (*b*) But the office of filazer cannot be extended, for a man ſhall not have execution of that which he cannot aſſign, though he may have of this an aſſiſe, *ut de libero tenemento*. Dyer, 7. pl. 10.

Lands in ancient demeſne upon an *elegit* may, by the ſheriff, be delivered in execution, becauſe the title of the land is not directly put in plea in the king's court.

Hob. 47. 4 Inſt. 270. 2 Inſt. 397. Moor, 211. pl. 351. Brownl. 234.

By the ſtatute 29 *Car.* 2. *c.* 3. the ſheriffs may extend lands, tenements, &c. of which any ſhall be ſeiſed or poſſeſſed in *truſt* for him, againſt whom execution is ſued, of ſuch eſtate as the truſtee was ſeiſed at the time of execution ſued.

But the ſtatute of *Weſtm.* 2. *c.* 18. or 13 *E.* 1. *c.* 18. which gives the *elegit*, extends not to copyhold lands, for then the lord would have a tenant brought in upon him without his admittance or conſent.

3 Co. 9. Co. Cop. 149.

[An advowſon in groſs cannot be extended on an *elegit*, becauſe a moiety cannot be ſet out by the ſheriff, nor can it be valued at any certain rent towards payment of the debt.

Gilb. Exec. 39. But *qu.* and ſee 3 P. Wms. 401.

Neither doth an *elegit* lie of the glebe belonging to a parſonage, or vicarage, or to the church-yard, for theſe are each *ſolum deo conſecratum*.

Id. 40. Jenk. 207. pl. 36.

A queſtion having ariſen in the court of Chancery, whether, upon an *elegit*, the plaintiff could be allowed intereſt beyond the penalty of a judgment, Lord *Hardwicke* was of opinion, that at law, upon a judgment entered up, the penalty is the *debitum recuperatum*, and the ſtated damages between the parties; but if the creditor does not take out execution againſt the perſon of the debtor, or his perſonal eſtate, but extends the lands by *elegit*, which the ſheriff does only at the annual value, and much below the real, the creditor holds *quouſque debitum ſatisfactum fuerit*, and at law, the debtor cannot upon a writ *ad computandum* inſiſt upon the creditor's doing more than account for the extended value; but if the debtor comes into a court of equity for relief, this court will give it him by obliging the creditor to account for the whole he has received, and as a perſon who comes for equity muſt do equity, will direct the debtor to pay intereſt to the creditor, even though it ſhould exceed the principal. And he ſaid, he remembered very well, upon Serjeant *Whitaker*'s inſiſting before Lord Chancellor *Cowper*, that this would be repealing the ſtatute of *Weſtminſter*, his Lordſhip ſaid, he would not repeal the ſtatute, but he would do complete juſtice, by letting the creditor carry on the intereſt upon his debt, as he was to account for the whole he had received.]

3 Atk. 517. Ambl. 529.

3. Of the *Capias ad Satisfaciendum*.

This writ lay only at common law, in caſe of the king, (*a*) who by his prerogative might have execution of the body, goods, and lands of his debtor; but by the ſtatute of (*b*) *Marlbridge*, *c.* 23. it is enacted,

[(*a*) It lay only in actions of treſpaſs *vi*

et armis. Hob. 56.] (*b*) Enacted 52 H. 3. which *vide* explained, 2 Inſt. 143. That theſe ſtatutes introduced the *capias*, which did not before lie in theſe caſes, *vide* 3 Co. 11. 12. Co. Lit. 289. 2 Inſt. 394. Godb. 290. 2 Leon. 85. 2 Bulſt. 63.

enacted, That if bailiffs, who ought to make account to their lords, do withdraw themſelves, and have no lands nor tenements whereby they may be diſtrained; then they ſhall be attached by their bodies, ſo that the ſheriff in whoſe bailiwick they be found, ſhall cauſe them to come to make their account; and by the 25 *E.* 1. *c.* 17. it is accorded, that ſuch proceſs ſhall be made in a writ of debt and detinue of chattels, and taking of beaſts by writ of *capias*, and by proceſs of *exigent* by the ſheriff's return, as is uſed in a writ of account.

Roll. Abr. 904. Cro. Car. 240. *vide* tit. Eſcape. *Ca. ſa.* returnable out of term, not void, though liable to be ſet aſide on motion. 2 Burr. Rep. 1187.

On this writ the ſheriff cannot take bail, nor can he return, that the party was reſcued, for he may take the *poſſe comitatus*; and therefore if he returns, that the party was reſcued, an action lies againſt him for the eſcape, or a new *capias* againſt the party, for an ineffectual execution is as none.

4. Of the *Fieri facias* and *Levari facias.*

T. Raym. 346. * But the ſheriff may ſell for the real value to a friend of the plaintiff's in truſt, and ſee *infra.*

On *elegit* goods may be delivered to the party, but not upon a *fieri facias* *.

(*a*) Co. Lit. 290. b. 8 Co. 11. (*b*) But the ſheriff cannot, by force hereof, meddle with the debtor's lands, ſo as to ſell or deliver them to the creditor in ſatisfaction of the debt, but may collect the debt out of the profits of the land, as the corn or graſs growing thereon, or out of the rents payable to the debtor. Godb. 290. Plow. 441. a. Finch, 101. Comb. 470. & *vide* 2 Inſt. 453. what ſhall be counted the iſſues of the land.

The *fieri facias* and *levari facias* are judicial writs which lay at the common law. The *fieri facias*, on which the goods and chattels of the debtor only could be taken in execution, took its name, as my Lord *Coke* (*a*) obſerves, from the words of the writ, *quod fieri facias de bonis & catallis, &c.*; but on the *levari facias* the ſheriff was commanded *quod de* (*b*) *terris & catallis ipſius* A. *levari facias, &c.*

2 H. 7. 13. Office of Executor, 87.

The ſheriff, on theſe writs, cannot deliver a furnace annexed to a freehold in execution; for though the writs give the ſheriff authority to levy the debt upon the goods and chattels of the debtor; and this is indeed a chattel; yet they do not give the ſheriff any authority to break or diſunite any thing from the freehold, which he cannot do unleſs particularly empowered by writ.

Dalt. Sh. 145. 3 Co. 13. (*c*) But in Comb. 391. it is ſaid to have been admitted, that ſince the ſtatute 29 Car. 2. c. 3. an eſtate *pur auter vie* may be ſold by the ſheriff on a *fieri facias*. (*d*) But if the ſheriff on a *fieri facias* ſells a leaſe or term of a houſe, he cannot turn the leſſee out of poſſeſſion, but the vendee, in ſuch caſe, muſt bring his ejectment. 2 Show. Rep. 85. *per Cur.* [This muſt be underſtood of a *forcible* expulſion; for it hath been determined, that under a *fieri facias*, the ſheriff may juſtify expelling the defendant *peaceably*, in other words, if the defendant will conſent to go out, the ſheriff may put the vendee in poſſeſſion. Taylor v. Cole, 2 Term Rep. 292.]

Nor has the ſheriff, by force hereof, any authority to ſell an eſtate for (*c*) life, which being a freehold can no more be affected by theſe writs, than any other eſtate of inheritance; but he may diſpoſe of (*d*) leaſes for years, which are but chattels, be they of ever ſo long a continuance.

Alſo,

Alſo, on theſe writs the whole perſonal eſtate is liable to execution, except wearing apparel; but it hath been (*a*) held, that, if the party hath two gowns, the ſheriff may ſell one of them. 3 Co. 12. (*a*) Comb. 356. *per* Holt, Ch. Juſt.

[So, where there have not been ſufficient effects of the defendant to ſatisfy the judgment, the court has ordered the ſheriff to retain, for the uſe of the plaintiff, money which he has levied in another action at the ſuit of the defendant.] Armiſtead v. Philpot, Dougl. 231.

But the abſolute property of thoſe goods muſt be in the debtor; and therefore, if the ſheriff takes the goods of a ſtranger, though the plaintiff aſſures him they are the defendant's, he is a treſpaſſer; for he is obliged, at his peril, to take notice whoſe the goods are, and for that purpoſe may impanel a jury to inquire in whom the property of the goods is veſted; and this it is (*b*) ſaid ſhall excuſe him in an action of treſpaſs. Keilw. 119, 120. Bro. tit. Treſpaſs, 99. [4 Term Rep. 633. 641. 6 Term Rep. 88.] (*b*) Dalt. Sheriff, 146.

Nor can the ſheriff take in execution goods pawned or gaged for debt, nor goods demiſed or letten for years, nor goods diſtrained. Bro. tit. Pledges, 28. Dyer, 67. b. *in margine.*

In treſpaſs the ſheriff juſtified, that by virtue of (*c*) a *fieri facias* out of the Exchequer for the queen's debt, he took the plaintiff's beaſts, being *levant* and *couchant* upon the land of the debtor, and ſold them for the queen's debt; and adjudged, that it was not lawful, for they were not to be ſold as the goods of the debtor (*d*), but they might have been diſtrained for the queen's debt. Cro. Eliz. 431. Hil. 37 Eliz. 2 Roll. Abr. 359. S. C. (*c*) But the cattle of a ſtranger being levant and couchant upon the land of a perſon outlawed, may be taken by virtue of a *levari facias* for the king; for this writ commands the ſheriff to levy this duty out of the iſſues and profits of the land, and theſe cattle being levant and couchant are iſſues; and were it otherwiſe, it would be in the power of the party, by agiſting his lands, to defeat the king of the benefit of the outlawry; but for this *vide* Salk. 395. Skin. 618. Comb. 469. Ld. Raym. 305. Salk. 408. pl. 4. 5 Mod. 109. Carth. 441. Comyns, 51. pl. 34. 12 Mod. 178. Raym. 17. Hard. 101. (*d*) That as to this point it muſt be a miſtake of the printer; for that the beaſts may be taken, and not ſold, is a contradiction. Skin. 619. But, as to the principal point, the caſe is good law, being on a *fieri facias*, which gives the ſheriff power to diſpoſe of the goods and chattels of the debtor only. Comb. 470.

[And as the ſheriff cannot take the goods of a third perſon, ſo, if the defendant becomes bankrupt, before the delivery of the writ to the ſheriff, or, as it ſeems, before it is actually executed, the ſheriff cannot legally take or diſpoſe of them, after notice of the act of bankruptcy, and of a commiſſion ſued out or docket ſtruck: for by *Holt*, C. J. if a writ of execution be delivered to the ſheriff againſt *A.*, who becomes bankrupt before it is executed, the execution is ſuperſeded; conſequently, the property of the goods is not abſolutely bound by the delivery of the writ to the ſheriff. Tidd's Pr. 735. 1 Lev. 173. 1 Ld. Raym. 252. and ſee 2 Eq. Ca. Abr. 381.

But if the ſheriff ſeize and ſell the goods, before he has notice of an act of bankruptcy, he is excuſed (*e*), and if he ſell them after ſuch notice, though he may be ſued in *trover* (*f*), yet he is not liable to an action of treſpaſs (*g*). (*e*) 1 Bl. Rep. 205. 2 Bl. Rep. 829. (*f*) 1 Burr. 20. 1 Bl. Rep. 65. (*g*) 1 Term Rep. 475.

An execution taken out againſt the goods of a bankrupt after his certificate is ſigned, but before it is allowed, is good. 1 Term Rep. 361. and ſee 1 Bl. Rep. 400.

In an action againſt the huſband, the ſheriff cannot take under a *fieri facias* goods veſted in truſtees before marriage, for the benefit of the wife. Cadogan v. Kennett, Cowp. 432. Jarman v. Wolloton, 3 Term Rep. 618. See Underwood v. Mordant, 2 Vern. 239.

In

Farr v. Newman, 4 Term Rep. 621.

In an action againſt an executor for his own debt, the goods of the teſtator, in the hands of the defendant, cannot be taken in execution.

Heydon v. Heydon, 1 Salk. 392. See Jacky v. Butler, 2 Ld. Raym. 871. Pope v. Harman, Comb. 217.

In an action againſt partners, the ſheriff muſt ſeize all their joint property, becauſe the moieties are undivided; for if he ſeize but a moiety, and ſell that, the other will have a right to that moiety; but he muſt ſeize the whole, and ſell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.]

Marriott v. Shaw, Com. Rep. 277. Fox v. Hanbury, Cowp. 449. Eddie v. Davidſon, Dougl. 650.

(a) Cro. El. 504. Thomſon and Clark, adjudged, Lutw. 589. S. P.

Upon a *fieri facias* the ſheriff cannot deliver the defendant's goods to the (a) plaintiff in ſatisfaction of his debt; nor ought he to deliver them to the (b) defendant againſt whom execution is; but the goods are to be (c) ſold, and in (d) ſtrictneſs the money is to be brought into court.

(b) 2 Vent. 95. (c) Therefore if the ſheriff on a *fieri facias* levies the goods, and pays the plaintiff with his own proper money; yet he cannot keep the goods to his own uſe, for the authority by which he acted was to ſell the goods. Noy, 107. Waller and Weedale, adjudged. Lutw. 589. S. C. citeo. (d) But if the ſheriff pays the money to the party, it is good, and the court will allow of ſuch return, becauſe the plaintiff is thereby ſatisfied, although the writ run, *ita quod habeat coram nobis*. 2 Show. 87. pl. 78.—— But this is only by the permiſſion of the court, and not by force of the law. 3 Lev. 203-4.

Comb. 452. & *vide* Carth. 419. Ld. Raym. 251. Salk. 320. pl. 4.

But it hath been holden, that upon a *fieri facias* goods may be ſold to the plaintiff, who ſues out the writ, though not actually delivered to him *.

5 Mod. 376. 6 Mod. 292. 12 Mod. 126. where it is admitted to be the practice, to make a bill of ſale of the debtor's goods to the plaintiff, & *vide* 2 Vent. 95.—— * For ſince the ſtatute of frauds, goods are bound by the delivery of the writ.

Cro. Eliz. 281. Mod. 188. S. P. adjudged. (e) That this was clearly ſo before the 29 Car. 2. c. 3. before which ſtatute the goods were bound from the *teſte* of the writ; but by this ſtatute they are bound only from the time of delivery of the writ to the ſheriff: but even ſince the ſtatute, the execution ſeems good in this caſe, for the ſtatute was made for the benefit of ſtrangers, who might have a title to the goods between the *teſte* of the writ of execution and time of the delivery thereof to the ſheriff, and not for the benefit of the party, or his executors or adminiſtrators. *Vide* Comb. 33. 2 Vent. 218. Salk. 322. pl. 10.

If the defendant die after the execution awarded, and before it be ſerved, yet it may be ſerved upon his goods in the hands of his executor or adminiſtrator (e); for by the execution awarded the goods are bound, and the ſheriff need not take notice of his death.

Salk. 322. pl. 10. *per Cur.*

So, if the plaintiff die, the execution does not abate, and the ſheriff may, notwithſtanding, proceed in it, becauſe the ſheriff has nothing more to do with the plaintiff; for the writ commands him to levy and bring the money into court, which the plaintiff's death does no way hinder: beſides, an execution is an entire thing, and cannot be ſuperſeded after it is begun.

5. Of the *Habere facias Seiſinam* and *Poſſeſſionem*.

Bro. Seiſin, 7. 14. 30. Dalt. She-

The *habere facias ſeiſinam* and *poſſeſſionem* are judicial writs, which (f) lie for the ſeiſin and poſſeſſion of lands and tenements:

the

the firſt is in real actions, where the freehold is recovered; the laſt is founded on the (g) *ejectione firmæ*, in which the party is to be reſtored to the poſſeſſion of his term of which he was ouſted: The ſeiſin or poſſeſſion on theſe writs is uſually performed by the ſheriff, by delivering the party who recovers, a twig, bough, clod, *&c.* of the land; or if it be of an houſe, by delivery of the ring of the door, *&c.*

riff, 254-5. Perk. 42. (f) But wherever the writ demands land, rent, or other things in certain, the demandant, after judgment, may enter or diſtrain before any ſeiſin delivered to him by the ſheriff, upon a writ of *habere facias ſeiſinam*. Co. Lit. 34. b. (g) For the recovery of the poſſeſſion in ejectment, *vide* tit. Ejectment.

To a writ of *habere facias ſeiſinam*, the ſheriff cannot return, that another is tenant of the land by right, for of this there can be no iſſue taken between them, and the ſheriff has nothing to do but to execute the king's writ. 6 Co. 52. a.

A man recovers ſeveral houſes in an aſſiſe, and after the tenant reverſes the judgment in a writ of error, and a writ iſſues thereupon to the ſheriff, to put him in poſſeſſion of thoſe houſes: in this caſe, though the tertenants are ſtrangers to the recovery, and therefore ought not to be ouſted without a *ſcire facias*; yet, if the ſheriff executes the writ, and ſo puts them out of poſſeſſion by virtue of it, he is no diſſeiſor; for he acts under the authority of the court, which he is ſworn to obey, under the penalty of being fined, if he does not. Roll. Abr. 663.

The ſame law in all caſes, where execution is of a judgment wherein the demand is made of a thing certain: but if an execution is to be executed without mentioning any thing in particular, there, the ſheriff, at his peril, ought to make execution of the thing in demand, otherwiſe he will be a diſſeiſor, for he is obliged to take notice of the thing in demand. Roll. Abr. 664. Floyd and Bethel.

(D) Where the Party ſhall be concluded by the Election of one of them, and what further Remedy he has when he has not received entire Satisfaction on his firſt Writ, and this, either againſt the Party or Sheriff.

WHEN the plaintiff has judgment, he has it in his election to ſue out what kind of execution he pleaſes; but he cannot regularly take out two different executions on the ſame judgment, nor a ſecond of the ſame nature, unleſs upon failure of ſatisfaction on the firſt. 2 Roll. Abr. 475. Hob. 60. 2 Inſt. 395.

Therefore, if the plaintiff, upon a judgment or (a) recognizance at common law, ſues out an *elegit*, he can have no *capias ad ſatisfaciendum* afterwards to take the body, becauſe he hath determined his choice by that writ to the goods and chattels, and a moiety of the land, which being entered upon the record, he is thereby eſtopped; and though he takes but an acre of land in execution, Bro. Elegit, 15. Roll. Abr. 896. Hob. 2. 57. 2 Bulſt. 97. 5 Co. 87. Cro. Jac. 338. S. C.

6 Co. 46. Godb. 181. Lev. 92. Comb. 232. execution, yet it is held a ſatisfaction of the debt, be it never ſo great, becauſe in time it may come out of it.

(a) But on ſtatutes merchant, ſtaple, and recognizances in nature of ſtatutes ſtaple, body, goods and lands, being all liable by the ſeveral acts of parliament that create theſe ſecurities, the conuſee may take all at once or at different times; ſo that if he extends the lands firſt, he may afterwards take the body. Hob. 60. 2 Roll. Abr. 475. [And if the defendant has no lands, and the goods are not ſufficient to ſatisfy the plaintiff, he may have a *capias ad ſatisfaciendum* after an *elegit*. 1 Str. 226. 2 Ld. Raym. 1451.]

Hob. 2. Cro Jac. 339. pl. 3. But though the plaintiff cannot take out a ſecond *elegit* after the firſt is returned, executed, and filed; yet, if, upon the firſt, the ſheriff returns *nihil*, the plaintiff may ſue out a ſecond.

Lev. 92. Glaſcock and Morgan, adjudged. Keb. 465. 496. 556. 632. Sid. 184. S. C. and ſame points adjudged; but there ſaid, that the court was divided, whether the plaintiff could take out any new execution. —But it is held by my Lord Hobart, that if upon an *elegit* the execution be on the goods only, without any lands, and they appear not to be ſufficient, the party may have a *capias*, for it is in effect but a *fieri facias*, though the word be *elegit*. Hob. 58.*—* An extent is not avoided by omiſſion of lands liable. Stat. 16 & 17 Car. 2. c. 5. § 2.—On a defect in the firſt execution, a new one may go by ſame ſtat. and 8 Geo. 1. c. 25. § 4. —So, a new execution ſhall go, on the eviction of land extended, 32 H. 8. c. 5. 8 Geo. 1. c. 25. § 4. —Or, on the diſcharge of a priſoner by privilege of parliament. 1 Jac. 1. c. 13.

So, where in debt on a judgment of 2000 *l.* the defendant pleaded, that the plaintiff had ſued three ſeveral *elegits* on the ſaid judgment into ſeveral counties, on one of which the ſheriff returned, that he had levied of the defendant's goods 500 *l.*; on demurrer it was adjudged, 1ſt, That this *elegit* being executed on the goods of the party only, the plaintiff was not precluded by his election thereof from any benefit he had at the common law, by any nice conſtruction of the word *elegit* of the ſtatute of *Weſtm.* 2. which intended to give a farther remedy than there was at common law, and that the action well lay, otherwiſe the ſtatute would be a trap to catch, and not a remedy to help, perſons to their debts. 2dly, That if, as objected, any lands were extended on the other two *elegits* which were not returned, the defendant ought to have ſhewn it in pleading. 3dly, That after this levy on the goods, he might extend the lands, and hold them till debt paid.

Hob. 52, &c. Foſter and Jackſon. Cro. Jac. 136. 143. Roll. Abr. 903. It was formerly held, that, if a perſon taken on a *capias ad ſatisfaciendum* died in execution, the plaintiff had no further remedy, becauſe he determined the choice by this kind of execution, which, affecting a man's liberty, is eſteemed the higheſt and moſt rigid in the law.

But now by the 21 *Jac.* 1. *c.* 24. reciting, "That foraſmuch as "daily experience doth manifeſt, that divers perſons of ſuffi- "ciency in real and perſonal eſtate, minding to deceive others of "their juſt debt, for which they ſtood charged in execution, have "obſtinately and wilfully choſen rather to live and die in priſon, "than to make any ſatisfaction according to their abilities; to "prevent which deceit, and for the avoiding ſuch doubts and "queſtions hereafter, be it declared, explained, and enacted, That "the party or parties at whoſe ſuit, or to whom any perſon ſhall "ſtand charged in execution for any debt or damage recovered, "his or their executors or adminiſtrators, may, after the death of "the perſon ſo charged, and dying in execution, lawfully ſue "forth,

" forth and have new execution againſt the lands and tenements, " goods and chattels, or any of them, of the perſon ſo deceaſed, " in ſuch manner and form, to all intents and purpoſes, as he or " they, or any of them, might have had by the laws and ſtatutes " of this realm, if ſuch perſon ſo deceaſed had never been taken " or charged in execution."

" Provided, That this act ſhall not extend to give liberty " to any perſon or perſons, their executors or adminiſtrators, at " whoſe ſuit or ſuits any ſuch party ſhall be in execution, and " die in execution, to have or take any new execution againſt any " the lands, tenements, or hereditaments of ſuch party dying in exe- " cution, which ſhall at any time after the ſaid judgment or judg- " ments be by him ſold *bonâ fide*, for the payment of any of his " creditors, and the money, which ſhall be paid for the lands ſo " ſold, either paid, or ſecured to be paid, to any of his creditors, " with their privity and conſent, in diſcharge of his or their due " debts, or ſome part thereof."

[If a plaintiff conſent to the defendant's being diſcharged out of execution upon an agreement, he cannot afterwards retake the defendant, although the ſecurity given by the defendant on his diſcharge ſhould be afterwards ſet aſide. Withey, 1 Term Rep. 557. Thompſon v. Briſtow, Barnes, 205. Vigers v. Aldrich, 4 Burr. 2482. Jaques v.

So, if the plaintiff conſent to diſcharge one of ſeveral defendants taken on a joint *capias ad ſatisfaciendum*, he cannot afterwards retake ſuch defendant, or take any of the others.] Clark v. Clement, 6 Term Rep. 525.

If *A.* has judgment againſt *B.* and he takes out a *capias ad ſatisfaciendum*, directed to the ſheriff of *Middleſex*, who directs his precept to the bailiff of the liberty of the duchy *ad cap.* B. *ad reſpond.* A. inſtead of *ad ſatisfaciend.* and thereupon the ſheriff returns *cepi corpus ſecundum exigentiam brevis;* though by this return the ſheriff makes himſelf liable to the debt to the plaintiff, by not purſuing his authority, yet *A.* may take out a new writ of execution againſt *B.* for he never was in cuſtody by virtue of the *capias ad ſatisfaciendum*. Yelv. 52. Wood and Harburn, adjudged.

So, if a party taken on a *capias ad ſatisfaciendum* eſcapes, or is reſcued, though the ſheriff is hereby liable, becauſe he ought to have taken the *poſſe comitatus*, yet the plaintiff may take out any new execution, and ſhall not be compelled to take his remedy againſt the ſheriff, who may be dead or inſolvent. Cro. Car. 40. 455. Vent. 4. But for this *vide* tit. Eſcape.

If on a *fieri facias* all the money is not levied, the plaintiff may take out a new execution; but as ſuch new execution muſt be grounded on the firſt writ, ſuch writ muſt be returned, and muſt recite, that all the money was not levied on the firſt. But if on the firſt writ all the money had been levied, it need not be returned, for no further proceſs was neceſſary. Salk. 318. pl. 1. Oviat and Vyner.

If on a (*a*) *fieri facias* the defendant pays the money to the ſheriff, he is diſcharged of the execution, and the plaintiff muſt bring his action againſt the ſheriff. Cro. Eliz. 208-9. (*a*) *Secùs*, if on a *capias ad ſatisfaciend.* he pays the money to the ſheriff, for that writ only empowers him to take the body. Ley. 203. 2 Jon. 57. 2 Mod. 214. Taylor and Baker.——2 Show. 139. pl. 116. S. P. adjudged accordingly.——*Secùs*, if he had paid it to the plaintiff's attorney on record. 2 Show. 139. pl. 116. admitted, for

for that would have been a payment to the plaintiff himſelf. So payment on *ca. ſa.* to warden of Fleet bad. 1 Mod. 194.

2 Mod. 214. (*a*) So, if the ſheriff takes a bond from the party, this is a good execution, and the ſheriff ſhall anſwer for the money. Keb. 551. —— But if there be an execution againſt *J. S.*, and he bring 90 *l.* part of the condemnation-money, to the ſheriff, who refuſes to take it, ſaying, the plaintiff in the action will not accept it, and thereupon *J. S.* deſire the ſheriff to keep the money till the plaintiff comes to town; if in this caſe the ſheriff is robbed, *J. S.* muſt pay the money over again. 2 Show. 172. pl. 166. *vide* tit. Bailment.

So, if the ſheriff take (*a*) goods in execution by virtue of a *fieri facias*, whether he ſells them or not, yet, being taken from the party againſt whom the execution was ſued, he may plead that taking in diſcharge of himſelf, and ſhall not be liable to a ſecond execution, though the ſheriff hath not returned the writ. And the reaſon is, becauſe the defendant cannot avoid the execution, and he would therefore be in a very bad condition if he was to be charged the ſecond time; and if the ſheriff dies after the goods are taken in execution, his executors are liable to the plaintiff, for they have *quid pro quo*, and it is in nature of a contract raiſed by law.

Hob. 206. 4 Mod. 404. 2 Show. 79. pl. 63. 281. pl. 271.

As therefore the defendant in theſe caſes is diſcharged as to the plaintiff, hence it ſeems to be clearly agreed, that the plaintiff may maintain an action of debt againſt the ſheriff; for though there is no actual contract between the ſheriff and the creditor, yet the levying of the money creates a contract in law, which lays a lien on the ſheriff; for otherwiſe the party would be without remedy.

2 Show. 79. pl. 63. 281. pl. 271. S. P.

Alſo it has been held, that an action lies even by an executor againſt an under-ſheriff for money levied on a *fieri facias*, as money received to the plaintiff's uſe, though before the return of the writ; for if the ſheriff were permitted to ſtave off the action by his delay, in not returning his writ, it would be allowing him to take advantage of his own wrong.

2 Show. 79. pl. 63. Cockram and Welbye. 2 Mod. 212. S. C. adjudged by three judges againſt *Scroggs*, Juſt. becauſe the action was brought againſt the defendant as an officer, who acted by virtue of an execution, in which caſe the law creates no contract; and here was a wrong done, for which the plaintiff had taken a proper remedy, and therefore ſhould not be barred by this ſtatute. Mod. 245. Cro. Car. 297.

So, it hath been held, that ſuch action is not within the ſtatute of limitations; for though it be not a matter of record till the writ be returned, yet it is founded upon a record, and hath a ſtrong relation to it.

2 Saund. 47. Wilbraham and Snow adjudged. (*b*) But if the ſheriff returns *nulla bona*, and there is a recovery againſt him for his falſe return, that veſts no property of the goods in him, but they remain in the party, and are liable to any ſubſequent execution for his debt. 2 Vern. 238-9. —— Where the ſheriff pleaded, that he levied goods to the value of 16 *l.* and they were reſcued out of his hands, and held an ill plea on demurrer. 2 Saund. 343-4.

And as the law ſubjects the ſheriff to an action in theſe caſes, ſo it (*b*) veſts ſuch a poſſeſſory property in him in the goods taken by him in execution, that if they are taken out of his poſſeſſion, he may maintain treſpaſs or trover againſt the wrong-doer, at his election, as well as a carrier or bailee of goods, and here he could not return a reſcue, but muſt anſwer for them.

Carth. 419, 420. Smalcomb v.

If *A.* and *B.* have two ſeveral judgments againſt *C.* and they take out two writs of *fieri facias*, which are both delivered to the ſheriff

ſheriff on the ſame day, and the ſheriff executes that which was laſt delivered, it bearing teſte before the other; and afterwards apprehending that he ought to have executed that which was firſt delivered, he takes the ſame goods and delivers them in execution on the firſt writ; this ſecond execution is void; for though the ſheriff ought to have executed the writ that was firſt delivered, yet having executed the laſt firſt, the vendee ſhall keep the goods, and the party muſt ſeek his remedy againſt the ſheriff; and the reaſon hereof is, for the quiet of purchaſers under ſheriffs upon executions; for otherwiſe it would be dangerous to make ſuch purchaſes of ſheriffs; which might make writs of execution of no effect. Buckingham & al. v. Vicecom. London. Salk. 320. p. 4. S. C. Ld. Raym. 251. 5 Mod 176. 6 Mod. 292. 12 Mod. 126.

So, where a writ of *fieri facias* is delivered to the ſheriff to-day, and another to-morrow, and the ſheriff executes the laſt firſt, by making ſale of the goods, ſuch ſale will ſtand good, and the vendee ſhall hold the goods againſt him who firſt delivered the writ to the ſheriff; and his remedy is only by action againſt the ſheriff. Carth. 420. *per Cur.* See Stat. 29 Car. 2. c. 3.

[But where two writs of *fieri facias* againſt the ſame defendant are delivered to the ſheriff on different days, and no ſale is actually made of the defendant's goods, the firſt execution muſt have the priority, even though the ſeizure were firſt made under the ſubſequent execution. And if the perſon claiming under the ſecond execution pay the ſheriff the amount of the debt under the firſt execution, the court will not, on motion, compel the ſheriff to refund that money. Hutchinſon v. Johnſton, 1 Term Rep. 729. But where the ſheriff had given a bill of ſale to the perſon claiming under the ſecond execution, that was holden to bind the ſheriff. Rybot v. Peckham, B. R. M. 19 G. 3. cited *Ibid.*

If a *fieri facias* be executed fraudulently, a ſecond *fieri facias* at the ſuit of another perſon executed afterwards ſhall have the preference.] Bradley v. Wyndham, 1 Wilſ. 44.

(E) Of the Authority and Juriſdiction of the Court out of which the Execution iſſues: And herein of the Manner of executing a Judgment where the Record has been removed from an inferior to a ſuperior Court.

JUdgments muſt be executed in thoſe courts in which they are given, and by ſuch proceſs and means as the law allows, and are agreeable to the eſtabliſhed practice of thoſe courts; and therefore, in caſe an inferior juriſdiction refuſes to execute a judgment, a (*a*) writ of *adjudicatione judicii* lies, which if they diſobey, the ſuperior courts grant an attachment. Cro. Car. 34. (*a*) For this *vide* F.N.B. 42.

If a man recovers in a court-baron, they have not power to make execution to the plaintiff of the goods of the defendant; but they muſt diſtrain him, and retain the diſtreſs till ſatisfaction. 4 H. 6. 17. b. 22 Aſſ. 72. Roll. Abr. 543. S. C. Bro. Court Baron, S. C. but a *quære* made, for it is uſual for the ſuitors aſſigned by the ſteward to tax the ſums, and

and then to award a *levari facias*.—By Brownl 81. upon a *levari* out of a court-baron, goods cannot be ſold without a cuſtom to ſell, &c., and Noy, 17. 20.

2 Lev. 81. Doe and Parmiter. 2 Keb. 117. 126. S. C. —It is held, that, though the proceſs of an hundred-court is a diſtringas, a levari may be good by cuſtom. Comb. 124. Show. 47. 3 Danv. 304. (L) pl. 1. 2 Lutw. 1369. N. L. 439. Carth. 53.——And in 3 Lev. 203 it is held, that the precept may iſſue from the ſheriff, though the ſuitors are judges.

But it hath been held, that execution may be in a hundred-court by *levari facias*, and that where the books ſpeak of a *diſtringas*, they muſt be intended of a *levari*, for a diſtreſs infinite would be endleſs in an execution.

Tidd's Pr. 719. 1 Salk. 84. Barnes, 58.

[In actions on a policy of aſſurance, where there is a verdict for the plaintiff againſt one of ſeveral under-writers, and the reſt have entered into the conſolidation rule, and agreed to be bound by it; or where on a reference to arbitration, it is agreed that a verdict ſhall be taken for the plaintiff's ſecurity, and an award is afterwards made in his favour—in each of theſe caſes, execution cannot be taken out without leave of the court.

Jones v. Edwards, 2 Str. 1241.

So, where in ejectment, the landlord is admitted to defend on the tenant's non-appearance, and judgment is thereupon ſigned againſt the caſual ejector, with a ſtay of execution till further order, the leſſor of the plaintiff, having ſucceeded, muſt apply to the court for leave to take out execution; and in ſuch caſe, if a writ of error be brought by the landlord, it may be ſhewn for cauſe, and will be a ſufficient reaſon againſt taking out execution. But if the landlord omit the opportunity of ſhewing it for cauſe, the execution is regular, and cannot be ſet aſide (*a*).

(*a*) George v. Wilſon, 2 Burr. 757.

Howell v. Hanforth, 2 Bl. Rep. 843. Ogilvie v. Foley, *Id.* 1111.

It ſeems to be proper, where there has been already an execution in an action of debt upon bond for the payment of an annuity, to apply to the court for leave to take out another execution for ſubſequent arrears.]

Vent. 274. 3 Keb. 522. S. C. Sir William Bucknal and Sellwood.

If judgment is given in debt in *C. B.* and the record removed in *B. R.* by writ of error, and judgment affirmed (be it after *ſcire facias*, and appearance upon it, and errors aſſigned, or otherwiſe,) and execution awarded by *capias*, the *capias* ought to be ſpecial, reciting, that judgment was in *C. B.* and removed in *B. R.* by error, *&c.* for otherwiſe the *unde convictus eſt* in the *capias* ſhall be intended of a conviction in *B. R.* and this was ſaid by the clerks to be their courſe; wherefore a *ſuperſedeas* was awarded of the execution *quia erronicè emanavit*, the writ not being returned.

Salk. 321. pl. 6. Coot and Lynch. 5 Mod. 421. S. C. Ld. Raym. 427. 12 Mod. 255. Carth. 460. Comp. 843.

If a writ of error be brought of judgment in *B. R.* in *Ireland* here, and the judgment affirmed, the method is to have a writ, reciting all the proceedings here in *England* directed to the judges of the King's Bench in *Ireland*, requiring them to iſſue proceſs of execution; and by this mandatory writ the cauſe is reſtored to that court; but no writ of execution of ſuch a judgment can iſſue here.

[Where a writ of error determines in the Exchequer-chamber by abatement or diſcontinuance, the judgment is not again in *B. R.* till there be a *remittitur* entered; for without a *remittitur* it cannot

cannot appear to that court, but that the writ of error is ſtill pending in the Exchequer-chamber (*a*): and therefore in ſuch caſe, it is uſual for the plaintiff to move the court, on an affidavit of the fact, for leave to enter a *remittitur*, and take out execution (*b*).

(*a*) 1 Salk. 261. 319. 1 Ld. Raym. 244.

(*b*) 1 Salk. 205. 1 Cr. Pr. 369, 70.

So, if the plaintiff recover a judgment againſt two defendants in *B. R.* and one of them bring a writ of error in the Exchequer-chamber, the plaintiff cannot charge the other defendant in execution till the record be remitted, notwithſtanding the writ of error might have been quaſhed immediately, becauſe not brought by both the defendants.] 2 Term Rep. 737.

(F) Who are entitled unto, and may ſue out Execution.

NO perſon is entitled to, or can ſue out execution, who is not privy to the judgment, or entitled to the thing recovered, as heir, executor, or adminiſtrator to him who has judgment. Roll. Abr. 889.

But if an adminiſtrator, *durante minori ætate* of an executor, recovers in debt, and, before execution, the executor comes of age, executor ſhall have a *ſcire facias* on this recovery, for he is privy to the judgment. Roll. Abr. 888-9. Margaret Wright's caſe, adjudged.

So, if *J. S.* makes *A.* executor, upon condition, that if *A.* does ſuch an act, that the executorſhip ſhall ceaſe, and that then *B.* ſhall be executor; if *A.* recovers in debt, and then does the act, *B.* ſhall take out execution. Roll. Abr. 889. Walwin and Herbert, by three judges againſt one.

If a feme, executrix to *J. S.* marries, and her huſband and ſhe bring an action of debt on an obligation, as executrix to *J. S.* and have judgment, and the wife dies; in this caſe the huſband, though privy to the judgment, ſhall not ſue out execution, for he is not entitled to the thing recovered, but the ſame belongs to the ſucceeding repreſentative of *J. S.* Roll. Abr. 889. Beaumont and Long adjudged. Cro. Car. 208. 227. 464. S. C.

So, where *A.* ſued as adminiſtrator to *J. S.* on an obligation entered into by the defendant to the inteſtate, and had judgment, and afterwards the letters of adminiſtration were repealed; though *A.* was privy to this judgment, and took out execution thereupon, yet the court granted a *ſuperſedeas* thereof, and held, that, the adminiſtration being revoked, the ſuing out execution afterwards was void; for the adminiſtrator had no intereſt or authority, but as a miniſterial officer to the ordinary. Yelv. 83. Barnehurſt and Sir Charles Yelvertone. 2 Saund. 148-9. S.P. adjudged between Turner and Davis, for

if he were permitted to ſue out execution, he would, notwithſtanding, be ſubject to the action of the rightful adminiſtrator, which would create a circuity of action, which the law abhors.

Alſo, it was formerly held, that if an adminiſtrator had judgment in right of his inteſtate, and died before execution, that the adminiſtrator *de bonis non* could not have a *ſcire facias*, ſo as to take out execution on this judgment, not being privy to the record. Cro. Jac. 4. Yate and Gough, adjudged by three judges againſt Gaudy J. Yelv. 83-4. S. P. *per Cur.*

Sid. 29. Harriſon and Bowden. But where an executor had judgment, and ſued out an *elegit*, but died inteſtate before the debt was levied; yet it was held that the adminiſtrator *de bonis non* ſhould take advantage thereof, and that the *elegit* being ſued out, made it an intereſt veſted, though it would have been otherwiſe if execution had not been ſued out.

(*a*) For this *vide* 6 Mod. 290 and Salk. 323. where it is ſaid *per Curiam* to be

And now by the 17 *Car.* 2 *c.* 8. § 2. it is enacted, "That "where any judgment, after a (*a*) verdict ſhall be had, by or in "the name of any executor or adminiſtrator; in ſuch caſe an ad- "miniſtrator *de bonis non* may ſue forth a *ſcire facias*, and take "execution upon ſuch judgment."

but reaſonable, and within the equity of this act, that an adminiſtrator *de bonis non* ſhould be permitted to perfect an execution begun by an executor or adminiſtrator, though the judgment was by default, &c. See 2 Ld. Raym. 1072. 11 Mod. 34. pl. 6.

Cleeve v. Vere, Cro. Eliz. 450. 457. Sir W. Jon. 385. [But in caſe of an extent, and inquiſition had, the execution is not complete till a *liberate* is awarded; and if the plaintiff in the execution die before the *liberate* is awarded, the writ of *extendi facias* is abated by his death; and his repreſentative cannot have any fruit thereon, becauſe no right was veſted by the extent.]

46 E. 3. 25. b. Roll. Abr. 889. S. C. If a man has judgment for the arrearages of rent, and dies, his executor ſhall ſue out execution, and not the heir; for by the recovery it becomes a chattel veſted, to which the executor is entitled.

19 E. 4. 5. b. 43 E. 3. 2. Roll. Abr. 889. So, if the demandant in a writ of coſinage, or (*b*) other real action, in which land and damages are recovered, has judgment, and dies, the heir ſhall take out execution as to the land, and the executor as to the damages.

(*b*) So, of a recovery in waſte, the heir ſhall have execution of the land, and the executor of damages. 43 E. 3. 2 Roll. Abr. 889. S. C.

48 E. 3. 12. b. Roll. Abr. 889. S. C. If a ſtatute be entered into, to huſband and wife, and the huſband die, the wife ſhall take out execution.

But for this Roll. Abr. 342. 889, 890. So, if huſband and wife recover lands and damages, and the huſband die, the wife ſhall have execution of the damages, and not the executors of the huſband.

Hob. 61. If there are two executors who have judgment, and the one prays a *capias*, and the other a *fieri facias*, it is ſaid the *capias* ſhall be awarded, as being beſt for the teſtator.

Cro. Jac. 159. Doctor Atkins v. Gardener, adjudged without argument. If the preſident of the college of phyſicians brings an action againſt one for practiſing phyſick in *London* without licence, purſuant to the ſtatute 14 & 15 *H.* 8. *c.* 5. and has judgment, and dies before execution; the ſucceſſor, and not the executor of him who recovered, ſhall ſue out execution; for this action is given to the preſident by an act of parliament, and the proceedings and judgment thereupon obtained by him, were in his corporate capacity; and therefore the ſucceſſor, on whom the law transfers the duty, ſhall take out execution.

(G) Of the Perſons againſt whom Execution may be ſued out: And herein,

1. Of ſuing Execution where there are ſeveral Parties concerned.

IF a man has judgment in an aſſiſe againſt any three for lands and damages, he cannot ſue execution by *capias* againſt one only, for the damages; but the *capias* ought to be againſt all, for the execution ought to enſue the nature of the original. 15 H. 7. 6. Roll. Abr. 888. [That a ſeparate *capias ad ſatisfaciendum* againſt one, on a joint judgment againſt two, is bad, hath been lately adjudged. Clerk v. Clement, 6 Term Rep. 525.]

So, if a man has judgment in debt againſt two, he muſt take out joint execution againſt both, and (*a*) cannot have a *capias* againſt one, and an *elegit* againſt the other. Roll. Abr. 888. Beverley and Beverley.

For this *vide* Cro. Eliz. 573-4. 5 Co. 86-7. S. P. (*a*) *Vide* Hob. 2. 59. Cro. Car. 75.

But if a man have judgment for damages againſt two, and he ſue out a *ſcire facias* againſt both; if one be returned ſummoned, and he make default, and it be returned, and the other have (*b*) nothing, the plaintiff may have execution againſt him who made default for the whole. 1 E. 3. 13. Roll. Abr. 890. S. C. (*b*) So, if it be returned that one of them is dead, he ſhall have execution for the whole againſt the other. 1 E. 3. 13. b. Roll. Abr. 890. S. C.

So, if two become bail for *J. S.*, and he be condemned, and there be judgment on *ſcire facias* againſt the bail, the plaintiff may take out execution againſt either of them, being ſeverally as well as jointly bound. Roll. Abr. 888. Dixon and Adams; but for this *vide* head of Bail.

If there be judgment in debt againſt two, and one die, a *ſcire facias* lies againſt the other alone, reciting the death, and he cannot plead, that the heir of him that is dead has aſſets by deſcent, and demand judgment, if he ought to be charged alone; for at (*c*) common law, the charge upon a judgment being (*d*) perſonal ſurvived, and the ſtatute of *Weſtm.* 2. *c.* 18. or 13 *E.* 1. *c.* 18. that gives the *elegit*, do not take away the remedy of the plaintiff at the common law; and therefore the party may take out his execution which way he pleaſes, for the words of the ſtatute are, *Sit in electione*: but if he ſhould, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by (*e*) ſuggeſtion, or elſe by *audita querela*. Raym. 26. Edſar and Smart Lev. 30. S. C. Keb. 92. 123. S. C. (*c*) So adjudged. 1 E. 3. 13. pl. 41. 3 E. 3. pl. 37. & *vide* 29 Aſſ. pl. 37. 29 E. 3. 29. (*d*) For the difference between real and perſonal execution, and that a perſonal execution will ſurvive, though a real one will not, *vide* 3 Co. 14. Yelv. 209. Raym. 153. 2 Keb. 3. 331. 4 Mod. 315. 3 Keb. 295. Salk. 319. pl. 2. Show. 402. Holt, 1. pl. 2. Carth 236. Salk. 261. pl. 1. (*e*) For this *vide* F. N. B. 166. 44 E. 3. 10. See Comb. 441. 5 Mod. 338. Carth. 404. Show. 405. Ld. Raym. 244.

2. Of ſuing out Execution againſt the Heir and Executor.

If there be judgment againſt one who has lands in fee-ſimple, or if ſuch a one acknowledge a ſtatute, and die, and his lands deſcend to his heir, * execution may be taken out againſt the heir, but For this *vide* tit. Heir and Anceſtor.

& *vide* Dyer, 81. pl. 62. 207. pl. 15. 344. pl. 1. Moor, pl. 203. Co. Lit. 103. 290.

but his body is protected; for it would be most unreasonable to subject the heir to the payment of his ancestor's debts, any farther than to the value of the assets descended.

——* See the stat. 3 W. & M. c. 14. § 5, 6. where execution shall go against the heir, after an alienation of lands descended.

For this *vide* head of Executors and Administrators, & *vide* Mod. 188. 2 Vent. 218. Skin. 257. pl. 4. 2 Show. 485. pl. 449. Salk. 322. pl. 10.

So, if there be judgment against *J. S.* and he die intestate, or having made his executor, a *fieri facias* may be executed of his goods in the hands of the executor or administrator.

1 Cr. Pr. 346. 3 Bl. Com. 414.

[Neither an *elegit*, nor a *capias ad satisfaciendum*, will lie against executors, unless a *devastavit* be returned.]

3. Of suing out Execution against Infants.

Co. Lit. 290. a. Roll. Abr. 140.

By the (*a*) common law, if judgment be given against a man for debt or damages, and the defendant die before execution sued, his heir within age is not liable to execution during his minority; but the parol must demur in such case till he comes of age.

(*a*) But though upon a judgment in debt, or upon a statute or recognizance, there can be no proceeding against an infant at common law during his minority, yet there may in Chancery, and a sequestration may issue against his lands. 2 Chan. Ca. 163-4.——That the lands of one who enters into a statute merchant, staple, or recognizance, are not extendible in the hands of his heir, until he comes of age, *vide* Bro. Stat. Merch. 33. Co. Lit. 290. Moor, pl. 121. 203. Dyer, 239. Co. Ent. 12. *Vide ante.*

Co. Lit. 290. a.

And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as if there be father and two daughters, and judgment be given for debt against the father, who dies, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution.

Co. Lit. 290. a. Bro. Stat. Merch. 33.

So, if the conusor of a statute merchant die, and his heir within age endow his mother, the land in dower shall not be extended during the minority of the heir.

2 Str. 1217.

[But an infant seems to be liable to a *capias ad satisfaciendum.*]

4. Of suing out Execution against a Feme Covert.

Roll. Abr. 890. but for this *vide* tit. Baron and Feme, and Cro. Car. 518. 526. 3 Keb. 205.

If a person recovers in trespass against baron and feme, execution may be sued out against the feme after the death of her husband.

39 H. 6. 45. Roll. Abr. 346. S. C.

So, if a recovery be in an assise against them upon a disseisin, execution shall be against the feme after the death of her husband, as well for the damages as for the principal.

45 E. 3. 23. Roll. Abr. 890. S. C.

So, if in a *quare impedit*, damages be recovered against baron and feme to the amount of two years, and the husband die, the damages may be recovered against the wife.

2 Str. 1167. 1237. 1 Wilf. 149.

[In an action against husband and wife, they may both be taken in execution; and the wife shall not be discharged, unless it appear

pear, that there is fraud and colluſion between the plaintiff and her huſband, to keep her in priſon.] Say. Rep. 149.

5. Of ſuing out Execution againſt privileged Perſons.

There can be no execution taken out againſt a member of parliament during privilege of parliament *. But for this *vide* tit. Privilege.

* For preventing delays of juſtice, by reaſon of privilege of parliament, ſee 10 Geo. 3. c. 50. which enacts, that ſuits may at any time be proſecuted in courts of record, equity, or admiralty, and courts having cognizance of cauſes matrimonial and teſtamentary againſt peers, and members of the Houſe of Commons, and their ſervants. But the perſons of members of the Houſe of Commons are not to be arreſted or impriſoned.

Alſo no *capias* can iſſue againſt a peer; for even in the caſe of a private perſon, at common law, the body was not liable to a man's creditors; and the ſtatute of *E.* 3. which ſubjects the body, does not extend to peers becauſe of the ſacredneſs of their perſons; as alſo the law ſuppoſes, that perſons thus diſtinguiſhed by the king have wherewithal otherwiſe to ſatisfy their creditors. 6 Co. 52. Hob. 61. Cro. Car. 205.

6. Of ſuing out Execution againſt a Clerk, or one in Holy Orders.

If a writ of execution be taken out againſt a clerk in holy orders on a judgment obtained againſt him, or upon a ſtatute ſtaple, or recognizance in nature of it, which he has entered into; and the ſheriff return, that he is a clerk, he ought to extend his lay fee and chattels, or return that he hath neither; but if he return, *quod clericus eſt beneficiatus nullum habens laicum feodum, ſed quod beneficiatus eſt* in ſuch a dioceſe, then (*a*) a writ of ſequeſtration ſhall iſſue to the biſhop to ſequeſter the living. 2 Roll. Abr. 474. Roll. Abr. 891. 2 Inſt. 472. Jenk. 207. (*a*) That the writ in this caſe is like a *fieri facias*, and the biſhop is in nature of a temporal officer or eccleſiaſtical ſheriff, and may, as the ſheriff in other caſes, ſeize eccleſiaſtical things and ſell them, and muſt return *fieri feci*, and not *ſequeſtrari feci* upon this writ. Mod. 257. 2 Mod. 258. [He may alſo be called upon by rule to return the writ; and if he make a falſe return, will be liable to an action. Gilb. Exec. 26. 1 Salk. 320. 1 Ld. Raym. 265.]

[Upon this writ, the biſhop or his officer makes out a ſequeſtration directed to the churchwardens, or, upon a proper ſecurity, to perſons of the plaintiff's own appointment, requiring them to ſequeſter the tithes, and other profits of the benefice; which ſequeſtration ſhould be forthwith duly publiſhed, by reading it in church during divine ſervice, and afterwards at the church door, and fixing a copy thereon: for where a ſequeſtration was made out, and not publiſhed whilſt the writ was in force, but was ſtayed in the regiſtrar's hands, by deſire of the plaintiff's attorney, the court held, that it had no priority, as againſt other ſequeſtrations, afterwards made out and duly publiſhed; but that if it had been publiſhed, the execution would have taken effect, and muſt have been firſt ſatisfied, notwithſtanding it was then returnable.] 3 Burn's E. L. tit. Sequeſtration. Legaſſicke v. Biſhop of Exeter, E. 22 Geo. 3. K. B. Tidd's Pr. 745, 6.

If the conuſor of a ſtatute merchant be a clerk within orders, by the ſtatute 13 *E.* 1. the ſheriff cannot take the body in execution; and if he return, that he is a clerk, no execution ſhall be granted to the ſheriff to levy the debt *de bonis eccleſiaſticis*, for his perſon 2 Roll. Abr. 468. Reg. Jud. 8. Bro. Stat. Merch. 38. Co. Ent. 13.

perſon is protected by the letter of the ſtatute, and the ſtatute doth not ſubject the *bona eccleſiaſtica* to the execution; but in this caſe the conuſee may have execution granted out of his lay fee.

Salk. 320. pl. 5. Moſeley and Warburton. Ld. Raym. 265.

On a *fieri facias* againſt a fellow of *Wincheſter* college, the ſheriff returned *clericus beneficiatus nullum habens laicum feodum*, whereupon a *fieri facias de bonis eccleſiaſticis* iſſued to the biſhop, who ſent his mandate to the warden and fellows of the college to ſequeſter his ſalary, and they refuſed; and it being moved in *B. R.* to know, whether the biſhop might not compel them by eccleſiaſtical cenſures, the court thought that this was not an eccleſiaſtical conſtitution, the univerſities being only ſocieties *ad ſtudendum & orandum*, but ſaid that a prebend is an eccleſiaſtical benefice; and in ſuch caſe, if the prebendary have a ſole diſtinct corps, it may be ſequeſtered; but where he is only a member of the body aggregate, and the inheritance is in the dean and chapter, there cannot be a ſequeſtration, and therefore they left the biſhop to do as he ought by law.

(*a*) 1 Cr. Pr. 345 (*b*) 3 Burn's E. L. tit. Sequeſtration. Tidd's Pr. 746.

[It is ſaid, that the writ of ſequeſtration muſt be renewed every term (*a*): but it ſeems, that if the writ be laid and executed, before the day of the return, the meſne profits may be taken under it, after the writ is returnable, otherwiſe not (*b*).]

(H) At what Time Execution may be ſued out; And herein of the Neceſſity of a *Scire Facias*.

2 Inſt. 471. 5 Co. 88. Cro. Eliz. 416. 6 Mod. 288.

AT common law, in real actions, where land was recovered, the demandant, after the year, might take out a *ſcire facias* to revive his judgment, becauſe the judgment being particular in the real action, *quoad* the lands with a certain deſcription, the law required, that the execution of that judgment ſhould be entered upon the roll, that it might be ſeen, whether execution was delivered of the ſame thing of which judgment was given; and therefore if there was no execution appearing on the roll, a *ſcire facias* iſſued to ſhew cauſe why execution ſhould not be.

2 Inſt. 469. Carth. 30, 31. Sid. 351.

But if the plaintiff, after he had obtained judgment in any perſonal action, had lain quiet, and had taken no proceſs of execution within the year, he was put to a new original upon his judgment, and no *ſcire facias* was iſſuable by law on the judgment, becauſe there was not a judgment for any particular thing in the perſonal action, with which the execution could be compared: therefore, after a reaſonable time, which was a year and a day, it was preſumed to be executed, and therefore the law allowed him no *ſcire facias* to ſhew cauſe why there ſhould not be execution; but if the party had ſlipped his time, he was put to his action on the judgment, and the defendant was obliged to ſhew how that debt, of which the judgment was an evidence, was diſcharged.

To remedy this, and make the forms of proceeding more uniform in both actions, the ſtatute of *Weſtm.* 2. 13 *E.* 1. *ſt.* 1. *c.* 45. gave

gave the *ſcire facias* to the plaintiff to revive the judgment, where he had omitted to ſue execution within the year after judgment was obtained. The words of the act are, *Quod ea quæ inveniuntur irrotulata coram eis qui record. habent, ſive ſervitia aut conſuetudines recognitæ, aut alia quæcunque irrotulata, ſi recens ſit cognitio, viz. infra annum, ſtatum habeat conquerens illius recognitionis, & ſi forte a majore tempore tranſactio facta fuerit aut illa recognitio, præcipiatur vic. quod ſcire faciat, &c.*

It hath been doubted, whether a *ſcire facias* lay to revive a judgment in ejectment after a year and a day, either by the common law, or by force of this ſtatute; for at common law this was looked upon as a perſonal action, and it was thought that the ſtatute extended only to ſuch perſonal actions in which debt or damages are recovered, and not to provide a remedy in this caſe, when at the time of making the act the poſſeſſion was not recovered in this action: but it ſeems now ſettled and confirmed by daily practice, that a *ſcire facias* lies on a judgment in ejectment, for the words of the act are, *Sive ſervitia ſive conſuetudines ſive alia quæcunque irrotulata*, which comprehend all judgments, and give the like remedy on them by *ſcire facias*, as the demandant had on a judgment in a real action at common law. Sid. 351. 2 Salk. 600. pl. 8. Ld. Raym. 669.

Here alſo it may be proper to diſtinguiſh between taking out execution on judgments and recognizances at common law, and on ſtatutes merchant and ſtaple; that on the firſt, *ſcire facias* after the year and day, is abſolutely neceſſary; but as to ſtatutes merchant, *&c.* the conuſee may at any time ſue execution on them, without the delay or charge of a *ſcire facias*. Co. Lit. 291. a. 2 Inſt. 469. F. N. B. 296. Bro. Recognizance, 17.

The reaſon, why the plaintiff is put to his *ſcire facias* after the year, is becauſe where he lies quiet ſo long after his judgment, it ſhall be preſumed he hath releaſed the execution, and therefore the defendant ſhall not be diſturbed without being called upon, and having an opportunity in court of pleading the releaſe, or ſhewing cauſe, if he can, why the execution ſhould not go. 2 Inſt. 470. and admitted to be the reaſon in all the caſes on this head.

Alſo, it is ſaid in *Salkeld*, that, if a judgment be above ten years ſtanding, the plaintiff cannot ſue a *ſcire facias* without motion in court; and if it be under ten, but above ſeven, he cannot have a *ſcire facias* without a motion at the ſide-bar; and a note is added, that if after ſuch motion, and judgment revived by *ſcire facias*, the defendant die before execution, the plaintiff muſt ſue a new *ſcire facias*, but may have it without motion, for the judgment was revived before. 2 Salk. 598. pl. 3. *per Cur.*

But though the general rule be, that the plaintiff cannot take out execution after the year and day without a *ſcire facias*, yet the rule muſt be underſtood with theſe reſtrictions.

That if the defendant brings a writ of error, and thereby hinders the plaintiff from taking his execution within the year, and the plaintiff in error is nonſuit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *ſcire facias*, becauſe the writ of error was a *ſuperſedeas* to the execution, and the plaintiff muſt acquieſce till he hears the judgment above; beſides, while the cauſe is depending on the writ of error, the cauſe Cro. Jac. 364. Yelv. 7. 15 H. 7. 16. b. Roll. Abr. 899. 4 Leon. 197. 5 Co. 88.

Carth. 236-7. 6 Mod. 288. cauſe is ſtill *ſub judice*, whether the plaintiff ſhall recover, or not, and the year for the execution ought to be accounted from the final judgment given.

6 Mod. 288. Roll. Rep. 104. So, if the plaintiff hath a judgment, with ſtay of execution for a year, he may, after the year, take out his execution without the *ſcire facias*, becauſe the delay is by conſent of parties, and in favour of the defendant; and the indulgence of the plaintiff ſhall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage, and at his inſtance.

Carth. 283-4. Seymour and Grenvill, & *vide* Roll. Rep. 104. 2 Show. 235. pl. 233. Comb. 346. Alſo, if the plaintiff enters on the roll of the judgment, an award of an *elegit* of the ſame term with the judgment, and continues it down with *vicecomes non miſit breve*, he may take out that writ at any time afterwards, without ſuing out any *ſcire facias*, though, upon debate of this matter, the judges at firſt inclined that the *elegit* ſhould be actually taken out; otherwiſe, ſuch an award as this might be entered at any time, paying only for the continuances, and the party thereby tricked out of the benefit which the law gives him of pleading any matter *poſt factum* upon the *ſcire facias*: but upon examination of ſeveral of the ancient practiſing clerks then in court, this appeared to have been the conſtant practice amongſt them for many years; and therefore the court, conſidering the inconveniency of opening a gap to deſtroy ſo many executions, for this irregularity, and becauſe the practice had prevailed ſo long, that it was become the law of the court, ordered that the execution ſhould ſtand good.

Salk. 322. pl. 9. 6 Mod. 288. S. C. Booth and Booth. * This rule of a previous *ſci. fa.* does not hold, where the defendant hath himſelf effected the delay; ſo far from it, that the defendant's rule "to ſhew cauſe why ſuch an execution ſhould not be ſet aſide," was diſcharged even with coſts. But if the defendant has been tied up by an injunction out of Chancery for a year, yet he cannot take out execution without a *ſcire facias*, becauſe the courts of law do not take notice of Chancery injunctions, as they do of writs of error: beſides, in that caſe, it would be no breach of the injunction to take out the execution within the year, and continue it down by *vic. non miſit breve*, which cannot be done in the caſe of a writ of error, becauſe that removes the record out of the court where the judgment was; and therefore there can be no proceedings below till it be affirmed, and returned to the inferior courts.

2 Bur. Rep. 660. ——If a *fieri facias* be ſued within the year, and *nulla bona* returned, and continued down ſeveral years, a *capias ad ſatisfaciendum* may iſſue without a *ſcire facias*. Str. 100. ——If plaintiff gets judgment in the petty-bag, (or any court,) and is ſtayed by injunction, after year and day he cannot ſue out execution without *ſcire facias*. 3 P. Will. 35. Barnes, 197. ——If execution is not returned by the ſheriff, or not filed, continuances thereon cannot be entered on the roll; and if they are, and thereupon a *ca. ſa.* iſſues after the year, without *ſcire facias*, defendant ſhall be diſcharged out of cuſtody, and plaintiff pay coſts. 2 Will. 82. Barnes, 213. ——The year ſhall be computed from the day of ſigning judgment to iſſuing the writ, not by the number of terms. Barnes, 197. Judgment, action on it, ſuperſeded for want of a declaration; *ca. ſa.* after a year from the judgment without *ſcire facias* ſhall be ſet aſide; for the *capias ad reſpondendum* will not warrant continuance on the roll. Barnes, 206. —— *Sci. fa.* muſt be in the ſame county where judgment or where execution is awarded. Barnes, 207.

(I) To what Time the Execution ſhall have relation, ſo as to avoid any Alienation by the Party: And herein of the Statute of Frauds.

AS to lands, they are bound from the time of the judgment, ſo that execution may be of theſe, though the party aliens *bonâ fide* before execution ſued out: ſo, of ſtatutes merchant, ſtaple, and recognizances, which alſo bind the lands from the time of entering into them. Co. Lit. 102. a. b. 8 Co. 171. Sir Gerrard Fleetwood's caſe. Roll. Rep. 77-8. Mod. 217. Chan. Ca. 268.

Therefore, if a man has judgment for debt, or is conuſee of a ſtatute; and the debtor, before execution ſued, aliens by fine, and five years paſs, yet the plaintiff may ſtill ſue out execution.

But here it is neceſſary to obſerve, that by the 29 *Car.* 2. *c.* 3. called the *Statute of Frauds*, reciting, that it had been found miſchievous, that judgments in the king's courts in *Weſtminſter* do many times relate to the firſt day of the term whereof they are entered, or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged or ſuffered and ſigned in the vacation time after the ſaid term, whereby purchaſers find themſelves aggrieved,

§ 14. It is enacted, "That any judge or officer of any of his "Majeſty's courts of *Weſtminſter*, that ſhall ſign any judgments, "ſhall, at the ſigning of the ſame, without fee for doing the "ſame, ſet down the day of the month and year of his ſo doing, "upon the paper-book, docket, or record which he ſhall ſign, "which day of the month and year ſhall alſo be entered upon the "margent of the roll of the record where the ſaid judgment ſhall "be entered." [This ſtatute, it hath been reſolved, is confined to purchaſers, and does not apply as between the parties to the ſuit.

Therefore, if the defendant die in the vacation, judgment may be ſtill entered after his death, as of the preceding term, when he was living; and it will be a good judgment, at common law, as of that term. though execution cannot be ſued out upon it againſt the repreſentative of the defendant until it is revived by *ſcire facias*. 1 Salk. 87. 3 Salk. 116. 2 Ld. Raym. 766. 7 Mod. 2. 93. S. C. 2 Salk. 401. 7 Mod. 39. S. C. 3 Salk. 159. 3 P. Wms. 309. 2 Str. 882. Ca. temp. Hardw. 158. S. C. 6 Term Rep. 368. But then the roll ought to be brought in and filed, before the eſſoign day of the ſubſequent term. 1 Salk. 87. 2 Ld. Raym. 850. 6 Mod. 191. And it is ſaid, that if judgment be ſigned in term time, and in the ſubſequent vacation, the defendant ſell lands, and before the eſſoign day of the next term the plaintiff enter his judgment, it ſhall affect the lands in the hands of the purchaſer. 6 Mod. 191. *Tamen qu.* if the judgment be not docketted at the time of the ſale. Tidd's Pr. 706.]

And § 15. it is enacted, "That ſuch judgments, as againſt "purchaſers *bonâ fide*, for valuable conſideration, of lands, tene-"ments, or hereditaments to be charged thereby, ſhall, in conſi-"deration of law, be judgments only from ſuch time as they "ſhall be ſo ſigned, and ſhall not relate to the firſt day of the "term whereof they are entered, or the day of the return of the "original, or filing the bail."

And § 18. it is enacted, "That the day of the month and "year of the enrolment of recognizances ſhall be ſet down in "the margent of the roll where the ſaid recognizances are en-

" rolled, and that no recognizance ſhall bind any lands, tene-
" ments, or hereditaments, in the hands of any purchaſer *bonâ*
" *fide*, and for valuable conſideration, but from the time of ſuch
" enrolment."

[Before this ſtatute, the judgment bound the lands, and the docket was nothing more than an index to find it readily. Gilb. C. P. 165. But now it is deemed neceſſary, that the judgment ſhould be docketted in order to bind the lands: and if it be not docketted, 4 Str. 639. Barnes, 261, 2. or if there be a falſe docket, which is as none, Gilb. C. P. 165. 1 Wilſ. 61. 2 Str. 1209. S. C. though a right judgment, the purchaſer or mortgagee will be ſafe; and in the latter caſe, the party muſt take his remedy againſt the attorney or officer for not docketting it truly. But *qu.* whether equity would not relieve againſt a purchaſer with notice, notwithſtanding the judgment be not docketted? See 7 Vin. Abr. 53. 2 Eq. Ca. Abr. 684. & 7 Vin. Abr. 54. If the judgment againſt a teſtator or inteſtate be not docketted, the debt is put on a level with ſimple contract debts, and the executor or adminiſtrator may, under the plea of *plenè adminiſtravit* to an action of debt upon ſuch a judgment, give in evidence the payment of bond and other ſpecialty debts. Hickey v. Hayter, 6 Term Rep. 384.]

Alſo, for the greater ſecurity of purchaſers, by the 4 & 5 *W. & M. c.* 20. it is enacted, " That the clerk of the eſſoins of the
" court of *C. B.*, the clerk of the doggets of the court of King's
" Bench, and the maſter of the office of Pleas in the court of
" Exchequer, ſhall make and put into an alphabetical dogget, by
" the defendants' names, a particular of all judgments by confeſ-
" ſion, *non ſum informatus*, or *nihil dicit*, entered in their ſeveral
" courts, *&c.* and that no judgment not doggetted, and entered
" in the books as aforeſaid, ſhall affect any lands or tenements as
" to purchaſers or mortgagees, or have any preference againſt
" heirs, executors, or adminiſtrators, in their adminiſtration of
" their anceſtors, teſtators, or inteſtates eſtates."

[To give effect to a judgment, as againſt purchaſers and mortgagees of lands in *Middleſex* and *Yorkſhire*, it is required, that it ſhould be *regiſtered*: for by 5 *Ann. c.* 18. § 4. and ſeveral ſubſequent ſtatutes, " No judgment, ſtatute, or recognizance, (other
" than ſuch as ſhall be entered into in the name and upon the
" proper account of his Majeſty,) ſhall affect or bind any manors,
" lands, tenements, or hereditaments, in thoſe counties, but only
" from the time that a memorandum of ſuch judgment, ſtatute,
" or recognizance, ſhall be entered at the regiſter-office, in ſuch
" manner as therein is directed."]

6 Ann. c. 35. § 19. 7 Ann. c. 20. § 18. 8 Geo. 2. c. 6. § 1 & 18.

Here alſo we muſt obſerve a difference as to judgments which affect the lands of an anceſtor, and thoſe which affect the heir; for as to the firſt, the plaintiff ſhall not have execution, but only of that land which the defendant had at the time of the judgment, becauſe the action was brought in reſpect of the perſon, and not in reſpect of the land.

Co. Lit. 102. a.

But if an action of debt be brought againſt the heir, and he alien, pending the writ; yet ſhall the land he had at the time of the (*a*) original purchaſed, be charged, for the action was brought againſt the heir in (*b*) reſpect of the land *.

Co. Lit. 102. b.

(*a*) That filing a bill in B. R. is as effectual for this purpoſe as an original writ. Carth. 245. (*b*) And therefore, if the anceſtor deviſed away the lands, creditors, whoſe ſecurities were inferior to judgments, had no remedy at common law, either againſt the heir or deviſee. Abr. Eq. 149. But now by the 3 & 4 W. & M. c. 14. it is enacted, that all wills concerning lands, or any rents, profits, term, or charge out of the ſame, whereof the deviſor ſhall be ſeiſed in fee-ſimple, in poſſeſſion, reverſion, or remainder, ſhall be deemed to be fraudulent and void againſt creditors upon bonds or other ſpecialties, their executors, adminiſtrators, &c. and ſuch creditors ſhall have their actions of debt againſt the heir at law and the deviſees jointly.—* Where execution ſhall go againſt the heir after an alienation of lands deſcended, *vide* 3 W. & M. c. 14. § 5, 6.

Hence

Hence it hath been adjudged, that if there are two creditors, *viz.* *A.* and *B.* of *J. S.*, whoſe heir is bound, and who has lands by deſcent, and *A.* files an original in *C. B.*, and hath judgment thereon, *Trinity* term 2 *Jac.* 2. by default, and thereupon a general *elegit* iſſues againſt all the lands of the heir, and a moiety thereof is delivered to *A.*, and *B.* on a bill filed in *B. R.* 1 & 2 *Jac.* 2. has a ſpecial judgment againſt the aſſets confeſſed by the heir, *Trinity* term 3 *Jac.* 2., though *B.*'s judgment be ſubſequent to *A.*'s, yet it appearing that his bill or original was filed before *A.*'s, the judgment ſhall have relation thereto, and therefore he muſt be firſt ſatisfied. Carth. 245. Gree and Oliver.

Alſo in the above caſe it ſeems, that though *A.*'s judgment had been on an original actually filed before *B*'s, that *B.* muſt have been preferred, becauſe his judgment was general againſt the heir, and the execution a general and common execution by *elegit*, and not againſt the aſſets only by way of extent; and therefore ſuch a general judgment will not operate by way of relation to the original, but binds only in common caſes from the time of the judgment given. Carth. 181. 246.

As to goods and chattels, the execution at common law had relation to the time of the awarding thereof, and therefore, if after the *teſte* of the writ of execution, the defendant had ſold the goods, though *bonâ fide*, and for valuable conſideration, yet were they ſtill liable to be taken in execution, into whoſe hands ſoever they came. 8 Co. 171. Cro. Eliz. 174. 440. 2 Vent. 218.

But as this created ſome inconveniency with reſpect to trade, in making thoſe goods ſtill ſubject to execution, though in the hands of a perſon who came by them for valuable conſideration, and without notice of any ſuch execution; and as there was a farther inconveniency in making a writ of execution taken out in vacation, to have relation to the laſt day of the precedent term; for remedy hereof, Mod. 188. Sid. 271.

By the 29 *Car.* 2. *c.* 3. § 16. it is enacted, "That no writ of "*fieri facias*, or other writ of execution, ſhall bind the property "of goods againſt whom ſuch writ of execution is ſued forth, "but from the time that ſuch writ ſhall be delivered to the ſheriff, "under-ſheriff, or coroners, to be executed; and, for the better "manifeſtation of the ſaid time, the ſheriff, under-ſheriff, and "coroners, their deputies and agents, ſhall, upon the receipt of "any ſuch writ (without fee for doing the ſame) indorſe upon "the back thereof the day of the month or year whereon he or "they received the ſame."

[But neither before this ſtatute, nor ſince, is the property of goods altered, but continues in the defendant, till the execution executed. The meaning of the words, *that no writ of execution ſhall bind the property but from the delivery of the writ to the ſheriff*, is, that after the writ is ſo delivered, if the defendant make an aſſignment of his goods, unleſs in market overt, the ſheriff may take them in execution. 2 Eq. Ca. Abr. 381.]

[This ſtatute protects only goods in the hands of *purchaſers* where the goods are ſold *bonâ fide*; for if the party die after the *teſte*, but before the delivery of the writ to the ſheriff, the goods are bound in the hands of his executors; for this is not a change of property by ſale, or for a valuable conſideration. Comb. 145.

So,

1 Ld. Raym. 252. But in ſuch caſe, the ſheriff ſhall not be made a treſpaſſer by relation for any ſubſequent diſpoſal of them; though he would be liable in trover. Smith v. Milles, 1 Term Rep. 475.

So, if a writ of execution be delivered to the ſheriff, and the defendant become bankrupt before it is executed, the execution is thereby ſuperſeded, and the goods are not bound by the delivery, for the property ceaſes to be in the bankrupt from the time of the act of bankruptcy committed.

Cro. Car. 459. 1 Sid. 29. 2 Ld. Raym. 1073. 1 Salk. 322. (a) Noy, 73. 2 Ld. Raym. 1073.

The ſheriff deriving his authority from the writ, it hath been holden, that if the plaintiff die after a *fieri facias* ſued out, it may be executed notwithſtanding; and his executor or adminiſtrator ſhall have the money. And if the plaintiff (a) has made no executor, or adminiſtration is not yet committed, the money muſt be brought into court, and there depoſited until, &c.]

(K) Of the King's Precedency in Executions.

Hob. 60. 2 Inſt. 19. 2 Roll. Abr. 472. 8 Co. 171. 2 Roll. Abr. 156-7.

IT hath been already obſerved, that the king, by his prerogative, may have execution of the body, lands, or goods of his debtor, at his election.

And here we muſt obſerve, that the king's execution relates as to land to the time of becoming in debt to the king; for as to debts that were of record, they always bound the lands and tenements; for all lands being held mediately or immediately from the king, when any debt was returned of any perſon, it laid the eſtate as liable to ſuch debt, as if it had been a reſervation on the firſt grant.

And as to debts not of record, they bind the lands from the time they are entered into; but this is by force of the ſtatute 33 *H.* 8. *c.* 39. by which it is enacted, "That if any ſuit be "commenced or taken, or any proceſs hereafter be awarded for "the king, for the recovery of any of the king's debts, that then the "ſame ſuit and proceſs ſhall be preferred before any perſon or "perſons; and that our ſaid ſovereign lord, his heirs and ſucceſſors, ſhall have firſt execution againſt any defendant or defendants, of and for the ſaid debts, before any other perſon or "perſons, ſo always, that the king's ſaid ſuit be taken and commenced, or proceſs awarded for the ſaid debt, at the ſuit of "our ſaid ſovereign lord the king, his heirs or ſucceſſors, before "judgment given for the ſaid other perſon or perſons."

[Rex v. Cotton, Parker 112. 2 Vez. 288. But the above ſtatute of 33 H. 8. extends to executions againſt perſonal property as well as againſt

As to the king's execution of goods, the ſame relates to the time of the awarding thereof, which is the *teſte* of the writ, as it was in the caſe of a common perſon at common law; for though by the 29 *Car.* 2. *c.* 3. "no execution ſhall bind the property of "the goods, but from the time of the delivery of the writ to the "ſheriff;" yet as this act does not extend to the king, an extent of a later *teſte* ſuperſedes an execution of the goods by a former writ; becauſe by the king's prerogative at common law, if there had been an execution at the ſubject's ſuit, and afterwards an extent, the execution was ſuperſeded till the extent was executed, becauſe

becauſe the publick ought to be preferred to the private property, and the rather, becauſe the king is ſuppoſed by publick buſineſs not to be able to take care of every private affair relating to his revenue, and therefore no time occurs to (or runs againſt) the king; and if he was to be prevented of his execution, by another perſon's coming in before him, laches muſt be imputed to him, which the law does not.

land, and reſtrains the prerogative within the limitation there preſcribed. Parker, 261, 2.]

If the king's debt be prior on record, it binds the lands of the debtor, into whoſe hands ſoever they come, becauſe, as has been obſerved, it is the nature of an original charge upon the land itſelf, and therefore muſt ſubject every body that claims under it; but if the lands were alienated in whole or in part, as by granting a jointure before the debt contracted, ſuch alienee claims prior to the charge, and in ſuch caſe the land is not ſubject.

But for this *vide* 2 Roll. Abr. 156-7. Moor, 126. 3 Leon. 239, 240. 4 Leon. 10.

[This ſtatute of 33 *H.* 8. it hath been reſolved, is not confined to bond debts only, but extends to all debts and executions at the ſuit of the king. But it is reſtrictive upon the old prerogative, and introductive of a new law, for *ita quod, ſo always that the king's ſuit*, &c. makes a condition precedent and a limitation. Hence, therefore, a judgment and execution, executed by *elegit*, ſhall be preferred to the extent of the king, iſſuing on a bond debt, bearing date before the ſubject's judgment, and aſſigned to the king before the ſubject's execution. And, in the caſe of an execution againſt perſonal property, if the king's extent be ſued out poſterior to a judgment recovered by the ſubject, and writ of execution thereon delivered to the ſheriff, though not executed, the king ſhall be poſtponed. Beſides, in this caſe, the property of the goods is changed by the ſubject's execution, and no longer remains in the king's debtor. It will indeed be otherwiſe, if an extent come after a diſtreſs, or before a proviſional aſſignment under a commiſſion of bankrupt, for in neither of thoſe caſes is the property of the goods diveſted out of the owner.]

7 Co. 18. b.

Attorney General v. Andrews, Hardr. 23.

Lechmere v. Thoroughgood, 3 Mod. 236. Comb. 123. Uppom v. Sumner, 2 Bl. Rep. 1251. 1294. Rorke v. Dayrell, 4 Term Rep. 402.

(L) Of the proper Officer to do Execution: And herein of the preceding and ſucceeding Sheriff.

THE ſheriff or officer, who has proper authority to begin an execution, is compellable to proceed in the ſame *.

Salk. 223. *vide* tit. Sheriff.

* As to his fees, ſee 23 H. 6. c. 9. 29 El. c. 4. 3 Geo. 1. c. 15. § 16, 17. 8 Geo. 1. c. 25. § 5. and 7 Geo. 3. c. 29.

Hence it hath been adjudged, that if a ſheriff on a *fieri facias* ſeizes goods in his hands to the value of the debt, and pays part of the debt, and is diſcharged, without having ſold the reſt of the goods, or having returned his writ, that notwithſtanding ſuch diſcharge, and without any writ of *venditioni exponas*, he may ſell the goods remaining in his hands, and ſuch ſale and execution ſhall be good by force of the writ of *fieri facias*.

Cro. Jac. 73. Ayre and Aden. Moor, 757. S. C. Roll. Abr. 893. S. C. but in Yelv. 44. the S. C. is reported, and that his authority ceaſed with his office; but *qu.* & *vide* 2 Sand. 47. Latch. 117.

and there held contrary to the reſolution in all the other books, that the ſale was void,

If

Cro. Eliz. 440. Boucher and Wiſeman.

If a *fieri facias* be delivered to an under-ſheriff, 9 *Nov.* 34 *Eliz.* on which he levies part of the debt; and on the ſame day a writ of diſcharge be delivered to him, dated 6 *Novem.* yet if it be not proved, that he had notice of this diſcharge prior to this commencing the execution, he ſtill remains under-ſheriff, and liable to the plaintiff's action for the money levied by him.

Salk. 323. (*a*) For which *vide* Theſ. Brev. 90. 34 H. 6. 36. Raſt. Ent. 164.

As the authority of the old ſheriff continues, ſo the law has provided a remedy to oblige him to proceed in the execution, which is by (*a*) *diſtringas nuper vicecomitem*, which is, either to diſtrain the old ſheriff to ſell and bring in the money, or to ſell and deliver the money to the new ſheriff to bring into court.

—That the *diſtringas*, which commands the new ſheriff to diſtrain the old one to ſell and bring in the money, is the moſt uſual. 6 Mod. 299.

(M) Of the Manner of compelling him to do Execution: And herein of the Party's Remedy againſt him for Neglect of his Duty.

Vide tit. Attachment and Sheriff.

IF the ſheriff refuſes to execute any judicial writ; this is a contempt to the court, for which an attachment will be granted.

Salk. 323.

So, if he executes the writ, and makes a falſe return, the party injured may have an action on the caſe againſt him.

7 Mod. 118. 6 Mod. 229. Salk. 323.

If a *fieri facias* be directed to the ſheriff, and he return, that he levied goods to ſuch a value, he muſt anſwer goods to that value; and in ſuch caſe, if he return, that they remain in his hands for want of buyers, then a *venditioni exponas* ſhall be awarded; upon which, if he refuſe to ſell the goods, a *diſtringas* iſſues to the coroner.

For this *vide* Cro. Jac. 514. Godb. 276. 2 Roll. Rep. 57. Bridgm. 53. Sly and Finch. Cro. Jac. 566. Coryton and Thomas.

But if to a *fieri facias* the ſheriff return, that he ſeized goods to ſuch a value, and that they were reſcued out of his hands; in this caſe, he makes himſelf liable to an action of debt, or a *ſcire facias* may be brought againſt him by the plaintiff, for the ſheriff having levied the goods, he can have no remedy againſt the defendant: alſo, in this caſe, there can be no *venditioni exponas* to the ſheriff, becauſe by his own ſhewing it appears, that he has not the goods in his hands.

Cro. Car. 53. 2 Saund. 343.

(N) Of the Sheriff's Authority in doing Execution: And herein of breaking Doors, &c.

5 Co. 91. &c. Semaine's caſe. 3 Inſt. 162. Moor, 668. Yelv. 28. Cro. Eliz. 908. Dalt.

IT is laid down as a general rule in our books, that the ſheriff, in executing any judicial writ, cannot break open the door of a dwelling-houſe. This privilege, which the law allows to a man's habitation, ariſes from the great regard the law has to every man's ſafety and quiet, and therefore protects them from thoſe inconveniencies which muſt neceſſarily attend an unlimited power in

in the ſheriff and his officers in this reſpect; and hence it is, that every man's houſe is called his caſtle *. Sher. 350. * In Trin. T. 17 G. 3.

in the cauſe of Yates and others againſt Delamayne Eſq. the court ſet aſide an execution levied on defendant's goods, in his dwelling-houſe, becauſe the officer forcibly broke into the houſe to execute the writ.

But yet, in favour of executions, which are the life of the law, and eſpecially in caſes of great neceſſity, or where the ſafety of the king and commonwealth are concerned, this general caſe hath the following exceptions:

1. That whenever the proceſs is at the ſuit of the (*a*) king, the ſheriff, or his officer, may, after requeſt to have the door opened, and refuſal, break and enter the houſe to do execution, either on the party's goods, or take his body, as the caſe ſhall be. 5 Co 91. b. (*a*) That upon a *capias utlagatum*, though on meſne

See Post. Cr. L. 319.

proceſs, and at the ſuit of the ſubject, the ſheriff may break open any outward doors after demand and refuſal 2 Show. 87. pl 78.

2. So, in a writ of ſeiſin, or *habere facias poſſeſſionem* in ejectment, the ſheriff may juſtify breaking open the door, if he be denied entrance by the tenant; for the end of the writ being to give the party full and actual poſſeſſion, conſequently, the ſheriff muſt have all power neceſſary for this end: beſides, in this caſe, the law does not, after the judgment, look upon the houſe as belonging to the tenant, but to him who has recovered. 5 Co. 91.

3. Alſo, this privilege of a man's houſe relates only to ſuch executions as affect himſelf; and therefore if a *fieri facias* be directed to the ſheriff to levy the goods of *A.* and it happen that *A.*'s goods are in the houſe of *B.*, if, after requeſt made by the ſheriff to *B.* to deliver theſe goods, he refuſe, the ſheriff may well juſtify the breaking and entering his houſe. 5 Co. 93. a. Sid. 186.

4. Alſo, this privilege extends to a man's dwelling-houſe or out-houſe adjoining thereto, and therefore it hath been adjudged, that the ſheriff, on a *fieri facias*, may break open the door of a barn, ſtanding at a diſtance from the dwelling-houſe, without requeſting the owner to open the door, in the ſame manner as he may enter a cloſe, *&c.* Sid. 189. Penton and Browne. Keb. 698. S. C.

5. So, on a *fieri facias*, when the ſheriff or his officers are once in the houſe, they may break open any (*b*) chamber-door or trunks for the completing the execution. 2 Show. 87. pl. 78. agreed *per Cur.* Comp. 2. Palm. 54.

(*b*) Q. Whether this muſt not be after requeſt and refuſal?

6. So, if the ſheriff's bailiffs enter the houſe, the door being open, and the owner locks them in, the ſheriff may juſtify breaking open the door, for the enlarging and ſetting at liberty the bailiffs; for if in this caſe he were obliged to ſtay till he could procure a *homine replegiando*, it might be highly inconvenient: alſo, it ſeems, that, in this caſe, the locking in the bailiffs is ſuch a diſturbance to the execution, that the court will grant an attachment for it. Palm. 52. White and Whitſhire. Cro. Jac. 555. S. C. 2 Roll. Rep. 132. S. C.

7. That if the ſheriff, in executing a writ, breaks open a door where he has no authority for ſo doing by law, yet the execution 5 Co. 93. a.

is good, and the party has no other remedy but an action of treſpaſs againſt the ſheriff.

1 Ld. Raym. 725. [A ſeizure of part of the goods in a houſe by virtue of a *fieri facias*, in the name of the whole, is a good ſeizure of all.]

(O) Of the Offence of hindering or obſtructing an Execution.

THERE were anciently caſtles, fortreſſes, and liberties, where they reſiſted the ſheriff in executing the king's writs, which creating great inconvenience, the ſtatute of *Weſtm.* 2. *c.* 39. hindered the ſheriff from returning reſcuers to the king's writ of execution, the words of which ſtatute are, *Multoties etiam falſum dant reſponſum mandando, quod non potuerunt exequi præceptum regis propter reſiſtentiam poteſtatis alicuius magnatis, de quo caveat vic. de cætero, quia hujuſmodi reſponſa multum redundant in dedecus domini regis & coronæ ſuæ. Et quam cito ſub-ballivi ſui teſtificentur quod invenerunt hujuſmodi reſiſtentiam, ſtatim (omnibus omiſſis) aſſump. ſecum poſſe comitat. ſui eat in propria perſona ad faciend. execution. Et ſi inveniat*, &c.

2 Inſt. 450.

The judges conſtrued theſe words to extend only to executions, and not to writs on meſne proceſs, and that the ſheriff was not obliged to carry the *poſſe comitatus* where the man was bailable, for they did not preſume, that in ſuch caſes the king's writ would be diſobeyed,

2 Inſt. 454. The original of commitment for contempts ſeems to be derived from this ſtatute; for ſince the ſheriff was to commit thoſe who reſiſted the proceſs, the judges who awarded ſuch proceſs muſt have the ſame authority to vindicate it. Hence, if any one offers any contempt to his proceſs, either by word or deed, he is ſubject to impriſonment during pleaſure, *viz. a qua non deliberetur ſine ſpeciali præcepto domini regis;* ſo that, notwithſtanding the ſtatute of *magna charta*, that none are to be impriſoned *ſine judicio pariun vel per legem terræ*, this is one part of the law of the land to commit for contempts, and confirmed by this ſtatute.

Salk. 321. pl. 7. Kingſdale and Mann. 6 Mod. 27. S. C. But though the court will on affidavit grant an attachment againſt the party, whether he be the defendant or a ſtranger who diſturbs the execution; yet where the ſheriff delivered poſſeſſion by virtue of an *habere facias poſſeſſionem* in the morning, and ſome hours after the ſheriff was gone, and the party in poſſeſſion, the defendant came and turned him out again; the court held, that if the plaintiff had been turned out immediately after he was put into poſſeſſion, or while the ſheriff and his officers were there, an attachment might have been granted, for this had been a diſturbance to the execution, and a contempt, but being ſeveral hours after, they doubted: but it was agreed in this caſe, that the court might grant a new *habere facias poſſeſſionem*, if the firſt was not returned.

Cro. Car. 109. Mynn and Oughton, Alſo, though the court will grant an attachment, yet if *A.* be taken on a *capias ad ſatisfaciendum* at the ſuit of *B.*, and reſcued by

by *J. S.*, *B.* may bring an action on the caſe againſt *J. S.* for the reſcue, or the ſheriff may have ſuch action againſt the reſcuer, becauſe he is liable to *B.*, but his being liable does not prevent *B.* from bringing his action againſt which of them he pleaſes. *vide* tit. Actions on the caſe.

(P) Of the Party's Remedy when there hath been an irregular Execution, and how the ſame is to be ſet aſide.

[IF the writ of *fieri facias*, &c. be irregular, the defendant may move the court to ſet it aſide, and that the goods or money levied may be reſtored to him. A third perſon, whoſe goods are taken under it, may alſo move the court to have them reſtored: But if the right be not clear, the court will leave him to his action againſt the ſheriff; or they will ſometimes direct an iſſue for trying it, and retain the money in court, to abide the event of the trial.] Tidd's Pr. 748.

(*a*) If upon an *elegit* the ſheriff delivers all the party's lands, or a third part, or more than a moiety, the extent is void: but in this (*b*) caſe, it can only be made void by (*c*) writ of error or *audita querela* (*d*). (*a*) Sid. 91. (*b*) Carth. 453. (*c*) That an irregular execution may be avoided in evidence in ejectment brought for the lands. Lev. 160. (*d*) But the court, it ſeems, would now ſet it aſide on motion.

But if upon an *elegit* the ſheriff delivereth a moiety of an houſe without metes and bounds, ſuch return is ill, and ſhall be quaſhed for incertainty on (*e*) motion, without a writ of error or *audita querela*. Carth. 453. (*e*) May for this be quaſhed, though it be filed and entered upon record, becauſe it appears by the record to be void for incertainty, *per* Hale, Ch. Juſt.; but Wyld, Juſt. held, that it being entered upon the record, there was no avoiding it, but by writ of error. Vent. 259. & *vide* Vent. 274. 3 Keb. 522.

So, if a *fieri facias* be not warranted by the judgment upon which it is awarded, though the ſheriff ſhall be (*f*) excuſed, yet it is merely void as to the party. Vent. 259. (*f*) Upon a *fieri facias* to the under-ſheriff of the county of Bucks, who ſold the goods of a poor man for 22 *l.* 13 *s.* 4 *d.* the goods being well worth 80 *l.* it appeared to the court, that the ſheriff had prevailed with the jury to prize the goods at an under-value, perſuading them it would be better for the poor man; whereupon they appraiſed them *ut ſupra*, and he delivered them to the plaintiff for the ſaid ſum. The court held, that it was oppreſſion, and inquirable at the aſſizes by indictment, or puniſhable in the ſtar-chamber; and commanded that the under-theriff, being an attorney, ſhould be brought before them. Cro. Jac. 426. Sayer, Sheriff of Buckingham's caſe.

[If a *fieri facias* be teſted, or returnable, out of term, or, in an action by bill, if it be returnable on a general return-day, it is void, or at leaſt erroneous, and may be quaſhed or ſet aſide on motion, together with the proceedings that have been had under it. But a *fieri facias* may be amended (*g*), by adding or altering the teſte.] 2 Salk. 700. Davey v. Hollingſworth, Tr. 24 Geo. 3. B.R. Tidd's Pr. 727. (*g*) 1 Wilſ. 155. Say. Rep. 12.

Salk. 409. pl. 5. 3 Salk. 320. pl. 8. Ld. Raym. 632. 12 Mod. 320. 396. 5 Burr 2631. 2 Bl. Rep. 1104. Doug. 41.

It has been held, that in treſpaſs againſt the ſheriff, it is enough for his juſtification, to ſhew a writ. So it is in the caſe of his bailiff or officer, with this difference, that the ſheriff muſt ſhew the writ was returned, if returnable; but the bailiff need not, becauſe it is not in his power. But in treſpaſs againſt the plaintiff himſelf, or a mere ſtranger, they cannot juſtify themſelves, unleſs they ſhew there was a judgment as well as an execution, for the judgment may be reverſed, and it ought to be at their peril, if they take out execution afterwards. But it ſeems, that if one comes in aid of the officer, at his requeſt, he may juſtify as the officer may do: but ſuch requeſt or command of the officer is traverſable.

Lev. 95. Turner and Felgate. Raym. 73. S. C.

So, where a man had judgment and execution executed, and afterwards the judgment was vacated for being unduly obtained, and reſtitution awarded, and afterwards the defendant brought (*a*) treſpaſs againſt the plaintiff in the firſt action for the taking of the goods; it was adjudged, that it well lay againſt the party, for by the vacating of the judgment it is as if it never had been, and is not like a judgment reverſed by error. But in this caſe it was held, that no action would lie againſt the ſheriff (*b*), who had the king's writ to warrant what he did.

(*a*) Where an action will lie for taking out execution on a judgment which the plaintiff knows to be ſatisfied, *vide* Hob. 205. 266. [(*b*) But if the ſheriff or officer incautiouſly join in the ſame plea with the party, he forfeits his defence. 1 Str. 509.]

But for this *vide* tit. Error letter (H). and 3 Lev. 312.

If after a writ of error ſued out, and bail put in, the plaintiff takes out execution, the court will grant a *ſuperſedeas quia executio erronicè emanavit.*

(Q) To what the Party ſhall be reſtored when ſuch erroneous Execution is ſet aſide.

Roll. Abr. 778. 8 Co. 19. 143. Cro. Eliz. 278. Moor, 573. Leon. 96. 3 Leon. 89. Cro. Jac. 246. Godb. 27. Goulſ. 103.

IF upon his judgment the plaintiff takes out a *fieri facias*, and thereupon the ſheriff ſells a term for years to a ſtranger, and the judgment is afterwards reverſed, the defendant ſhall only be reſtored to the money for which the term was ſold, and not the term itſelf; for by the writ the ſheriff had authority to ſell; and if the ſale may be avoided afterwards, few would be willing to purchaſe under executions; which would render writs of execution of no effect.

Roll. Abr. 778. Cro. Jac. 246. Yelv. 179. Brownl. 107, 108. (*c*) That it would be otherwiſe if ſold to a ſtranger, *vide* Yelv. 108. Brownl. 107.

But if the plaintiff takes out an *elegit* on his judgment, and the ſheriff, upon this writ, delivers a leaſe for years, of the defendant's, to the value of 50 *l.* to the plaintiff *per rationabile pretium & extentum*, to have as his own term, in full ſatisfaction of 50 *l.* part of the ſum recovered, and after the defendant reverſes the judgment, he ſhall be reſtored to the ſame term, and not to the value; for though the ſheriff might have ſold the term on this writ, yet here is no ſale to (*c*) a ſtranger, but a delivery of the term to the party that recovered by way of extent, without any ſale, and therefore the owner ſhall be reſtored.

And

And for this reaſon, if perſonal goods were on this writ delivered to the party *per rationabile pretium & extentum*, upon the reverſal of the judgment he ſhould be reſtored to the goods themſelves. Roll. Abr. 778.

So, if the goods of an outlawed man are ſold by the ſheriff on a *capias utlagatum*, and after the outlawry is reverſed by writ of error, he ſhall be reſtored to the goods themſelves, becauſe the ſheriff was not compellable to ſell theſe goods, but only to keep them to the uſe of the king. 5 Co. 90. Roll. Abr. 778. Cro. Eliz. 278.

So, if upon a *fieri facias* on a judgment againſt *B.* the ſheriff takes the goods of *B.* into his hands, but before any ſale of them, *B.* delivers to the ſheriff a *ſuperſedeas* on a writ of error, *B.* ſhall have the goods again, for by this ſeizure no property is altered. 2 Roll. Abr. 491. Sare and Shelton; but for this *vide* Roll. Abr. 492. Cro. Eliz. 597. Moor, 542. Style, 159. Vent. 255. Comb 389.

END OF THE SECOND VOLUME.